STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Dimas Reyes,
Petitioner,

vs.

No. 14 WC 29028

18IWCC0596

James O'Brien & Company,
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, notice, causal connection, medical expenses, benefit rates, temporary disability and permanent partial disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Petitioner, a 34-year-old landscaping laborer, testified he sustained a low back injury while moving a 300-lb. tree on June 17, 2014. He was diagnosed with a lumbar sprain by his initial treaters. Petitioner underwent 9 to 12 months of conservative care, physical therapy and chiropractic treatment. Pain management doctor, Dr. Sharma, administered two lumbar injections, on October 7, 2014 and on February 10, 2015. After each, Dr. Sharma reported improvement in Petitioner's condition of 75% and 80%, respectively. Petitioner, however, testified the injections made his condition worse. He admitted that he has not looked for work.

Petitioner suffered from a pre-existing degenerative spine condition. More than 1½ years before his accident he was diagnosed with chronic low back pain and lumbago. In October 2012, he was recommended to undergo physical therapy and a lumbar MRI. His December 19, 2012 MRI revealed a 3 mm bulge at L4-L5; a 2 mm bulge at L5-S1; diffuse lumbar spondylosis, multi-level lumbar degenerative disc disease, arthropathy, and foraminal stenosis. As noted by the Arbitrator, however, Petitioner was able to work without restrictions until his current accident on June 17, 2014.

On September 22, 2015 Petitioner underwent an FCE at the recommendation of Dr. Barnabas, whose records were not offered into evidence. That FCE found Petitioner able to work only at a sedentary level. On November 3, 2015, Petitioner saw Dr. Vargas, also upon referral by Dr. Barnabas. Dr. Vargas reported Petitioner would be a candidate for a lumbar fusion, though only after a discogram and post-discogram CT – tests he considered vital in obtaining valid information prior to deciding whether surgery is appropriate. Petitioner never underwent those tests and refused to consider the suggested surgery.

While the Commission finds Petitioner did prove he sustained a work accident on June 17, 2014 and did give timely notice, it finds Petitioner's credibility severely lacking with regard to his medical care and his condition of ill-being.

Petitioner testified that prior to his June 17, 2014 claim, he never had problems with nor sought treatment for his low back at Westlake Hospital. That testimony is contradicted hospital records showing Petitioner received emergency room treatment there for low back pain on May 1, 2010 and October 8, 2012, the latter date on which Petitioner was diagnosed with chronic low back pain.

Petitioner denied undergoing a lumbar MRI at Lincoln Imaging on December 19, 2012; that testimony is contradicted by records from Lincoln Imaging showing that he did. Petitioner denied receiving treatment at Young Family Health Associates; their records show Petitioner received a comprehensive physical exam there on March 5, 2016.

Petitioner testified that neither of the lumbar injections which Dr. Sharma provided improved his condition, and actually made it worse. As noted above, Dr. Sharma documented Petitioner's reports of 75% and 80% relief of pain weeks after each injection.

Petitioner claimed his legs became numb after his injections. That testimony is contradicted by both Dr. Ambrosino's and Dr. Sharma's records, showing that after his October 7, 2014 lumbar injection, Petitioner denied leg pain and radicular bilateral leg pain and numbness. Petitioner testified that since the accident, his back pain level has remained between 7/10 and 9/10. That was contradicted by Dr. Ambrosino's records showing Petitioner reported his pain to be 2/10 or 3/10 as early as October 19, 2014, just 4 months after his accident.

Petitioner's history to Dr. Vargas on November 3, 2015 was also inaccurate. Petitioner told Dr. Vargas his leg pain continued to worsen in frequency and intensity. However, no radiating

leg pain was documented until August 6, 2014, seven weeks after his accident. That symptom was short-lived: it resolved by August 20, 2014, according to Dr. Ambrosino's records. On that date and at subsequent office visits to Dr. Ambrosino, Petitioner reported he no longer had leg pain.

Dr. Vargas diagnosed Petitioner with two herniated discs, as did the reviewing radiologist. While Dr. Vargas opined that Petitioner is a candidate for a fusion, his opinions were provided without his review of Dr. Sharma's records. Dr. Sharma's records showed significant improvement in Petitioner's condition following his lumbar injections, contrary to the history Petitioner provided to Dr. Vargas. Dr. Vargas also qualified his recommendation for surgery by stating Petitioner should first undergo a provocative lumbar discogram, which Petitioner never did.

At Dr. Graf's July 16, 2015 Section 12 examination, Petitioner self-rated himself as "severely disabled" despite his admission that he was taking no prescription pain medications. Dr. Graf read Petitioner's August 7, 2014 MRI as showing no herniations or nerve root compression. Dr. Graf reported that MRI showed only mild disc desiccation and degeneration at L4-L5 and L5-S1, with a small left-sided disc bulge. Dr. Graf found Petitioner's neurologic physical exam to be normal, and he found Petitioner demonstrated, "multiple inconsistencies and multiple non-organic pain signs." Dr. Graf did not believe that Petitioner required surgery or any other treatment.

Dr. Graf was not the only doctor who did not diagnose Petitioner with *herniated* discs. Petitioner's pain management physician, Dr. Sharma, reported that Petitioner had only a single disc *protrusion* at L4-L5. Dr. Sharma also noted on September 23, 2014 that Petitioner was taking no medications. Dr. Sharma's diagnosis was low back pain, degeneration of lumbar disc, lumbar osteoarthritis and lumbar strain.

The Commission does not find Petitioner's September 22, 2015 FCE report to be persuasive. Neither that report nor the cover letter accompanying it were written on Total Rehab company stationary.[1] The signature on the cover letter is illegible and contains no professional suffixes, such as a physical therapist would include after their signed name. The FCE report itself did not identify the name of the person who administered the FCE test to Petitioner or who authored the report.

The Commission finds the most corroborating evidence of Petitioner's current condition to be his March 5, 2016 comprehensive physical exam by Dr. Patricio at Young Family Health. Then, he was asked if he had any pain that bothered him in his daily life; Petitioner answered, "No." That exam took place four months after Dr. Vargas recommended surgery. At arbitration, Petitioner denied going to Young Family Health on March 5, 2016.

For the above reasons, the Commission finds the opinions of Dr. Graf to be more credible than those of Dr. Vargas. Dr. Graf's opinion that Petitioner did not suffer disc herniations is supported by Dr. Sharma. The Commission finds Petitioner suffered only a lumbar strain and temporary exacerbation of his pre-existing degenerative condition which returned to its pre-accident baseline on November 17, 2014. Although Dr. Graf opined Petitioner's injury required

[1] The cover letter begins, "*Our company* performed a functional capacity evaluation with Dimas Reyes," but the name of the "company" is not included anywhere within the cover letter or FCE report.

only 3 months of treatment, records from Alevio Physical Therapy show Petitioner's condition took a little longer than that to recover. November 17, 2014 was the last date Petitioner saw Dr. Ambrosino, who documented Petitioner report of having no leg pain and feeling, "overall improved with less tension notable in the back."

In finding Petitioner attained MMI for his injuries on November 17, 2014, the Commission modifies the Arbitrator's award of medical expenses. The Arbitrator found all the medical bills offered by Petitioner to be reasonable and necessary. However, Petitioner offered only bills without supporting medical records of treatment from Herron Medical Center, and from Alevio Physical Therapy and Chiropractic for these dates: 8/5/14; 9/3, 17, 19, 23, 24, 26, 30/14; and 10/1, 3 ,6, 10, 17, 20, 29 and 31/14. The Commission modifies the award of medical expenses and finds Respondent shall pay Petitioner only those reasonable and necessary bills incurred through November 17, 2014, but only those bills for which corresponding medical records were offered into evidence.

The Arbitrator found Petitioner's average weekly wage (AWW) to be $597.73, relying upon Petitioner's testimony that he earned $14.00 per hour, and "time and a half" for overtime hours. The Arbitrator found Petitioner's overtime hours were mandatory, as he was required to work until each day's job was finished. The Arbitrator did not explain how he calculated Petitioner's AWW, but it seems clear he accepted the $597.73 figure which Petitioner claimed on the Request for Hearing sheet.

The sole evidence of Petitioner's prior 52-week earnings and the amount of overtime hours he worked during that period was his testimony that, "We used to work from 40 to 50 hours sometimes." Petitioner offered no paystubs or other documentation to support his claimed AWW. Petitioner provided no explanation of how he calculated his AWW to be $597.73.

The Commission finds Petitioner's evidence insufficient to establish an AWW of $597.73. Without proof of the number of overtime hours worked, Petitioner's overtime earnings cannot be included in his AWW calculation, even though they may have been mandatory. Petitioner's testimony is sufficient proof that he worked at least 40 hours every week, as no contrary evidence was offered. However, without evidence of the number of overtime hours worked, it would be speculative for the Commission to include any overtime earnings. Accordingly, the Commission finds Petitioner's average weekly wage to be $560.00, calculated by multiplying his $14.00 hourly base pay rate by a 40-hour week.

The Commission modifies the award of temporary total disability benefits, finding Petitioner proved he was entitled to 17-1/7 weeks of TTD, from July 21, 2014 through November 17, 2014 when he achieved MMI, pursuant to §8(b) of the Act. Contrary to the Arbitrator's finding that Dr. Sharma and Dr. Vargas continued Petitioner's off work status through November 3, 2015, the Commission notes Petitioner never returned to Dr. Sharma after February 27, 2015, despite being instructed to return. Dr. Sharma's records also did not include any off-work authorizations.

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Thus, Dr. Sharma did not continue Petitioner's off work status to November 3, 2015. Nor did Dr. Vargas, whom Petitioner did not see until November 3, 2015.

The Arbitrator awarded Petitioner 125 weeks of permanent partial disability, representing 25% loss of use of person-as-a-whole, for a loss of occupation, because Petitioner can no longer engage in the same duties/activities as a laborer. The Commission views the evidence differently than the Arbitrator and modifies this award. In determining the level of Petitioner's permanent partial disability (PPD), the Commission assigns the following weights to the five factors enumerated in §8.1b of the Act:

(i) Disability impairment rating: *moderate weight,* based upon Dr. Graf's 3% AMA Impairment Rating;
(ii) Employee's occupation (as a laborer): *moderate weight;*
(iii) Employee's age (of 32): *moderate weight;*
(iv) Employee's future earning capacity: *no weight,* because Petitioner did not engage in job searches; and
(v) Evidence of disability corroborated by the treating records: *moderate weight,* because many of Petitioner's treating medical records did not corroborate his claimed disability and condition.

The Commission finds Petitioner entitled to 37.5 weeks of PPD at a rate of $336.00 per week, representing 7.5% loss of person-as-a-whole pursuant to §8(d)2 of the Act, for a lumbar strain and temporary exacerbation of a pre-existing degenerative condition.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 25, 2017, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Petitioner's average weekly wage is modified to $560.00.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of medical expenses to Petitioner is modified as stated hereinabove.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of temporary total disability benefits is modified, and Respondent shall pay Petitioner temporary total disability benefits of $373.33/week for 17-1/7 weeks, commencing on July 21, 2014 through November 17, 2014, as provided by §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $336.00 per week for a period of 37.5 weeks, as provided in §8(d)2 of the Act, because the injury sustained caused a 7.5% percent disability of person-as-a-whole.

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

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

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 4 - 2018

o-08/29/18
jdl/mcp
68

Joshua D. Luskin

Charles J. DeVriendt

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

REYES, DEMAS
Employee/Petitioner

Case# **14WC029028**

JAMES O'BRIEN & COMPANY
Employer/Respondent

18IWCC0596

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

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

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

1067 ANKIN LAW OFFICE LLC
JILL WAGNER
10 N DEARBORN ST SUITE 500
CHICAGO, IL 60602

5265 WOLF LAW LTD
DANIEL R SARTHER
25 E WASHINGTON ST SUITE 801
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

Dimas Reyes
Employee/Petitioner

v.

James O'Brien & Company
Employer/Respondent

Case # 14 WC 29028

Consolidated cases: N/A

18IWCC0596

An *Application for Adjustment 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 **March 9, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **June 17, 2014** , Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $ **6,393.48** ; the average weekly wage was $ **597.73** .

On the date of accident, Petitioner was **34** years of age, ***married*** with **1** dependent children.

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

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

Respondent shall be given a credit of $ **14,644.65** for TTD, $ **0.00** for TPD, $ **0.00** for maintenance, and $ **23,259.32** for other benefits, for a total credit of $ **37,903.97** .

Respondent is entitled to a credit of $ **37,903.97** under Section 8(j) of the Act.

ORDER

Medical benefits

Respondent shall pay reasonable and necessary medical services of $ 18,264.50 , as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $ 5,991.00 to Medorizon / Herron Medical Center , $ 6,800.00 to Medorizon / Alivio Physical Therapy , $ 2,293.50 to Delaware Place MRI , $1,260.00 to Pain & Spine Institute, and $1,920.00 to Total Rehab P.C. as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay reasonable and necessary medical services of $ 18,264.50 , as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $ 23,259.32 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.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $ 398.49 /week for 67 1/7 weeks, commencing July 21, 2014 through November 3, 2015 , as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from July 21, 2014 through November 3, 2015 , and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $ 14,644.65 for temporary total disability benefits that have been paid.

Permanent Partial Disability with 8.1b language (For injuries after 9/1/11)

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that the record contains an impairment rating of 3 % of the Person as a Whole as determined by Dr. Carl Graf , pursuant to the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment. (Respondent Exhibit #1). The Arbitrator notes that this level of impairment does not necessarily equate to permanent partial disability under the Workers' Compensation Act, but instead is a factor to be considered in making such a disability evaluation. The doctor noted he sustained a sprain with continued complaints of axial and/or non-verifibale radicular complaints . Because of the Petitioner's consistent radicular complaints and objective findings of herniated discs at L4-5 and L5-S1 , the Arbitrator therefore gives *lesser* weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a laborer at the time of the accident and that he *is not* able to return to work in his prior capacity as a result of said injury. The Arbitrator notes that the occupation of laborer is considered a heavy physical demand level . Because of the Petitioner's inability to perform at the heavy physical demand level , the Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 32 years old at the time of the accident. Because of the Petitioner's young age , the Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that the Petitioner did not return to work following this injury and did not engage in a job search . Because of the Petitioner's refusal to engage in job searches , the Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the Petitioner was given permanent sedentary work restrictions . Because of the Petitioner's documented permanent work restrictions and objective findings of L4-5 and L5-S1 herniated discs , the Arbitrator therefore gives *greater* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 25% loss of use of the Person as a Whole pursuant to § 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

04-25-17
Date

APR 25 2017

STATEMENT OF FACTS

The Petitioner, Dimas Reyes (hereinafter referred to as the "Petitioner"), is a 34 year old man who worked for Respondent, James O'Brien & Company (hereinafter referred to as the "Respondent"), as a laborer. Transcript of Arbitration, hereinafter referred to as "R." at 7 and 9. His duties included landscaping at commercial properties working 40-50 hours per week earning $14.00 per hour. R. at 9. He testified that he would arrive at work every morning and the crew leader would give them the assignment for the day and they would all ride together in the company truck to the job site. R. at 10. Once the job was completed they would all take the truck back to the office together and go home for the day. R. at 11. If the job took over eight hours on that day, it was required that they stay and complete the job. R. at 11-12.

On June 17, 2014, the Petitioner testified that he was assigned to move a 300 pound tree from the front of the house to the back of the house with four other co-workers when he hurt his back. R. at 13-14. He testified that he initially did not think it was a big deal, but the next day his pain became severe. R. at 15. He immediately told his supervisor, Jason, who told him to take the day off and go to the hospital. R. at 15-16.

On June 20, 2014, the Petitioner presented to Loyola University Gottlieb Memorial emergency room with back pain. Pet. Ex. #2. He was diagnosed with a lumbar strain, given light duty work restrictions of no lifting, bending, twisting, or prolonged sitting or standing for one week, and referred to an orthopedic doctor and to get a MRI of the lumbar spine. Pet. Ex. #2. He then presented to his primary care physician, Dr. Miguel Burgos, at the Santa Maria Medical Center on July 21, 2014. Pet. Ex. #3. Dr. Burgos diagnosed him with a lumbar strain, gave him pain medications, and continued his light duty work restrictions. Pet. Ex. #3. Dr. Burgos ordered a MRI on July 31, 2014. Pet. Ex. #3.

The Petitioner testified that the Respondent was able to accommodate his light duty work restrictions and allowed him to drive the truck and take products to the job sites. R. at 17. He continued working in the light duty position until he was terminated on July 21, 2014. R. at 18.

The Petitioner sought a second opinion with Dr. Nunzio Ambrosino at the Herron Medical Center on August 5, 2014 for continued back pain and pain into both the right and left legs. Pet. Ex. #4. Dr. Ambrosino diagnosed him with a thoracic sprain, lumbar sprain, thoracic or lumbar neuritis, and ordered a MRI of the lumbar spine and took him off of work. Pet. Ex. #4. An MRI of the lumbar spine completed on August 7, 2014 revealed a 3-4 mm left sided disc herniation at L4-5 indenting the left lateral aspect of the thecal sac with mild left sided spinal stenosis and narrowing of the left lateral recess and a 3-4 mm posterior broad based central disc herniation indenting the thecal sac at L5-S1. Pet. Ex. #8. Dr. Ambrosino reviewed the MRI and confirmed it showed a L4-5 herniation with stenosis and neuroforaminal narrowing and a L5-S1 disc herniation with neural foraminal narrowing. Pet. Ex. #4. Dr. Ambrosino ordered physical therapy and continued him off of work. Pet. Ex. #4. The Petitioner underwent a course of physical therapy at Alivio Physical Therapy from August 7, 2014 through March 6, 2015. Pet. Ex. #4. The Petitioner continued to follow up with Dr. Ambrosino who eventually referred him to a pain management consult with Dr. Samir Sharma on September 8, 2014. Pet. Ex. #4.

The Petitioner presented to the Pain & Spine Institute for a consult with Dr. Sharma on September 23, 2014. Pet. Ex. #5. Dr. Sharma diagnosed the Petitioner with work related degeneration of his lumbar disc, lumbar osteoarthritis, and a lumbar strain and recommended he continue therapy and undergo injections. Pet. Ex. #5. The Petitioner underwent lumbar injections on October 7, 2014 and February 10, 2015. Pet. Ex. #6. He testified that neither injection helped his pain. R. at 21. The Petitioner continued to see Dr. Sharma through February

27, 2015 where he continued his off work restrictions and ordered more physical therapy. Pet. Ex. #5.

The Petitioner presented to an Independent Medical Examination with Dr. Carl Graf at the Illinois Spine Institute on July 16, 2015 at the request of the Respondent. Resp. Ex. #1. Dr. Graf diagnosed him with a work related lumbar strain with unsubstantiated reports of pain as of the date of his examination. Resp. Ex. #1. Dr. Graf opined that his treatment for the first three months was reasonable and necessary, but disagreed with treatment after that time. Resp. Ex. #1. He found him to be at maximum medical improvement and capable of working full duty. Resp. Ex. #1. Lastly, he gave him an impairment rating of 3% loss of use of the person as a whole. Resp. Ex. #1.

On September 9, 2015 the Petitioner presented at Herron Medical Center and saw Dr. Ravi Barnabus who ordered a Functional Capacity Examination, which he completed at Total Rehab on September 22, 2015. Pet. Ex. #9. The FCE was found to be valid and put him at the sedentary physical demand level. Pet. Ex. #9. Dr. Barnabus then referred the Petitioner to Dr. Axel Vargas for a spine surgery consultation. Pet. Ex. #4. The Petitioner presented to Dr. Vargas on October 21, 2015 at the River North Pain Management Consultants. Pet. Ex. #8. Dr. Vargas indicated that he still had back pain and "electrical like shooting pain" into both legs and diagnosed him with work related intractable chronic lower back pain syndrome, lumbar discogenic radiculopathy, intractable lumbar discogenic pain syndrome, lumbar facet pain syndrome, and herniated discs at L4-5 and L5-S1. Pet. Ex. #8. Dr. Vargas noted that he had failed conservative care and was a good candidate for a surgical decompression and possible fusion. Pet. Ex. #8. The Petitioner last saw Dr. Vargas on November 3, 2015 where he continued to recommend surgery and continued his off work restrictions. Pet. Ex. #8. He

testified that he never had the recommended surgery and did not plan to because he was afraid of the surgery. R. at 24-25.

On cross examination, the Respondent introduced prior medical records from Westlake Hospital. Resp. Ex. #2. The records show he presented to the hospital with back pain on May 1, 2010 after he fell backwards lifting a box. Resp. Ex. #2. He was diagnosed with a lumbar strain, given ibuprofen, and discharged the same day with no recommendations for follow up care. Resp. Ex. #2. Two years later, on October 8, 2012, the Petitioner presented to Westlake Hospital for back pain. Resp. Ex. #2 p. 20. At that visit he was diagnosed with lumbago and recommended to follow up with his primary care physician for physical therapy and a possible MRI. Resp. Ex. #2. The Petitioner had a MRI of the lumbar spine on December 19, 2012 at the MRI Lincoln Imaging Center. Resp. Ex. #3. The MRI showed a shallow disc bulge at L3-4, a diffuse generalized disc bulge up to 3 mm and stenosis at L4-5, and a 2 mm disc bulge and stenosis at L5-S1. Resp. Ex. #3. The remaining medical records were for right ankle and left wrist and shoulder pains. Resp. Ex. #2. The Respondent also introduced records from Young Family Health Associates, which included his general physical examinations and an x-ray of the back from October 12, 2012 which showed possible L5 spondylolysis. Resp. Ex. #4.

The Petitioner testified that before his injury on June 17, 2014, he was not experiencing pain in his back and could work his job with the Respondent at the full duty level. R. at 43. As of the date of trial, he still has back pain that causes cramps and numbness in his legs. R. at 21 and 26. He testified that he cannot walk fast or do the things he used to enjoy, like play soccer like he could before his injury. R. at 26. He testified that he only received one check for temporary total disability benefits and that his medical bills have not been paid. R. at 25-26.

CONCLUSIONS OF LAW

C. WITH REGARD TO ITEM (C), WHETHER AN ACCIDENT OCCURRED THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Arbitrator finds that the accident arose out of and in the course and scope of the Petitioner's employment with the Respondent. In order to obtain compensation under the Act, a claimant must show by a preponderance of the evidence that he has suffered a disabling injury arising out of and in the course of his employment. Both elements must be present at the time of the claimant's injury in order to justify compensation. *IL Bell Telephone Co. v. Indust. Comm'n.*, 131 Ill.2d 478, 483 (1989). Injuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing his duties, and while a claimant is at work, are generally deemed to have been received "in the course" of the employment. *Caterpillar Tractor Co. v. Indust. Comm'n.*, 129 Ill.2d 52, 57 (1989). The "arising out of" component refers to the origin of cause of the claimant's injury and requires that the risk be connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. *Id.* at 58.

Here, both elements have been met. The Petitioner works as a laborer for the Respondent completing landscaping jobs at commercial properties. R. at 9. On June 17, 2014, the Petitioner was assigned to move a 300 pound tree from the front of a house to the back of a house at a job site with four other co-workers. R. at 13-15. While doing so, he felt a pop in his back. R. at 13. He told his supervisor, Jason, the following day and sought immediate care at Loyola University Gottlieb emergency room. R. at 15-16.

All of the medical record histories state the same mechanism of history and corroborate the Petitioner's testimony regarding his injury. The history at Loyola University Gottlieb Hospital

states he hurt his back after he was "lifting a heavy tree Tuesday and heard a pop had pain more on Wednesday after waking up." Pet. Ex. #2. Shortly thereafter he presented to his primary care physician, Dr. Burgos at Santa Maria Medical Center who gave a history of back pain due to an injury at work after "lifting very heavy trees." Pet. Ex. #3. He sought a second opinion with Dr. Nunzio Ambrosino at Herron Medical Center who said, "The patient is a 32 year old male who was injured at work on June 17, 2014. The patient describes that he was in the process of carrying small trees at his job site when he felt a snap in his back occur with immediate pain developing in the low back." Pet. Ex. #4. Dr. Ambrosino eventually referred the Petitioner to a pain management doctor, Dr. Samir Sharma at the Pain and Spine Institute. Pet. Ex. #4. Dr. Sharma listed an injury "dated June 17, 2014 lifting 300 pound tree stump with 4 other workers; this occurred at work." Pet. Ex. #5. The Petitioner was later referred to Dr. Axel Vargas for a spine surgery consultation and he stated the Petitioner "was in his usual state of health until 6/17/14 when, while at work, he sustained a work related injury." Pet. Ex. #8. Lastly, the Respondent's Independent Medical Examiner, Dr. Carl Garf, stated, "Mr. Reyes states the date of injury was on June 17, 2014. He states that he was moving three trees into position. He describes how there is a dolly that was being used and he was holding the dolly up. He states 'I heard something crack or snap in my back.'" Resp. Ex. #1.

These consistent histories coupled with the fact that the Respondent produced no evidence to refute the fact that this injury took place prove that the Petitioner sustained an accident on June 17, 2014. As such, since his injury occurred at a job site for the Respondent while he was performing his work duties, the injury occurred in the course of his employment.

As to the second element, the lifting of heavy trees created a risk incidental to his employment. It is undisputed that the injury was a direct result of moving a 300 pound tree and

the Petitioner was required to do it as part of his job with the Respondent. While he did have back treatment years prior to this injury, the Petitioner testified that while working for the Respondent, he was in good health and was working full duty until this injury occurred. R. at 43-44. The evidence also proves that this injury exacerbated any prior minor injuries and it was only after he had to move the trees that he required ongoing treatment and was diagnosed with herniated discs. As such, the Petitioner has shown by a preponderance of the evidence that his injury arose out of and occurred in the course and scope of his employment.

F. WITH REGARD TO ITEM (F), WHETHER THE PETITIONER'S CURRENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE WORK ACCIDENT, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Arbitrator finds that the Petitioner's current condition of ill-being is causally related to his work accident. A causal connection between work duties and a condition of ill-being may be established by a chain of events including petitioner's ability to perform the duties before the date of the accident, and inability to perform the same duties following that date. *Pulliam Masonry v. Industrial Comm'n.*, 77 Ill.2d 469, 471 (1979).

The Petitioner injured his back after moving a 300 pound tree at work on June 17, 2014. R. at 13-15. He reported the injury to his supervisor the following day and got treatment at Loyola Gottlieb Hospital shortly thereafter on June 20, 2014. Pet. Ex. #1. The history at Loyola Gottlieb Hospital indicates that he had pain after "lifting a heavy tree Tuesday and heard a pop had pain more on Wednesday after waking up." Pet. Ex. #1. He was diagnosed with a lumbar strain and told to follow up with an orthopedic doctor. Pet. Ex. #1. He saw his primary care physician, Dr. Burgos, at Santa Maria Medical Center on July 21, 2014 with a history which also indicated he hurt his back lifting heavy trees. Pet. Ex. #3. Dr. Burgos diagnosed him with a work related lumbar sprain. Pet. Ex. #3.

The Petitioner sought a second opinion with Dr. Nunzio Ambrosino on August 5, 2014 whose history stated, "Petitioner was injured at work 6/17/14 while carrying small trees at his job site and felt a snap in his back." Pet. Ex. #4. The Petitioner had back and bilateral leg complaints and Dr. Ambrosino diagnosed him with a thoracic sprain, lumbar sprain, and lumbar neuritis and ordered an MRI of the lower back. The MRI performed on August 7, 2014 showed a 3-4 mm left sided disc herniation at L4-5 indenting the thecal sac with stenosis and narrowing of the neural foramina and a 3-4 mm posterior broad based central disc herniation at L5-S1 indenting the thecal sac. Pet. Ex. #8. Dr. Ambrosino reviewed the MRI and agreed that it showed herniated discs at L4-5 and L5-S1. Pet. Ex. #4.

Dr. Ambrosino eventually referred the Petitioner to Dr. Samir Sharma for a pain management consultation. Pet. Ex. #4. Dr. Sharma saw the Petitioner on September 23, 2014 and noted a history of the Petitioner lifting a 300 pound tree stump with four other workers and opined that his pain complaints were related to the work injury. Pet. Ex. #5. He recommended and performed two injections, which the Petitioner testified did not help his pain. R. at 21. When the injections and conservative care did not relieve his pain, the Petitioner was referred to Dr. Axel Vargas for a spinal surgery consultation. Pet. Ex. #4. Dr. Vargas indicated that he had low back and shooting leg pain and confirmed the diagnosis of herniated discs at L4-5 and L5-S1, which he causally related to the work injury of June 17, 2014. Pet. Ex. #8. Dr. Vargas recommended surgery in the form of a decompression and possible fusion. Pet. Ex. #8. The surgery was not authorized and the Petitioner underwent a Functional Capacity Examination which placed him at the sedentary physical demand level. Pet. Ex. #9.

The Petitioner presented to Dr. Carl Graf for an Independent Medical Examination on July 16, 2015. Resp. Ex. #1. The Petitioner gave the same history of injury of hurting his back

after moving trees at work. Resp. Ex. #1. Dr. Graf diagnosed the Petitioner with a lumbar strain and found him to be a maximum medical improvement and could return to full duty work. Resp. Ex. #1. He opined that three months of conservative treatment was reasonable and necessary but found any treatment after that time frame unnecessary and unrelated. Resp. Ex. #1. He also gave an impairment rating of 3% loss of use of the person as a whole. Resp. Ex. #1.

The Respondent also introduced the Petitioner's prior medical records. These records show that the Petitioner presented to Westlake Hospital for back pain on two prior occasions. Resp. Ex. #2. The first visit was on May 1, 2010 after the Petitioner fell backwards while carrying a box and injured his back. Resp. Ex. #2. He was diagnosed with a lumbar strain, given pain medications, and discharged home. Resp. Ex. #2. He never followed up with the doctor and there were no further visits in relation to that injury. Resp. Ex. #2. Two years later, on October 8, 2012, the Petitioner presented to Westlake Hospital again for back pain. Resp. Ex. #2. He was diagnosed with lumbago and recommended to follow up with his primary care physician for physical therapy and a possible MRI. Resp. Ex. #2. He had a MRI of the lumbar spine on December 19, 2012 at the MRI Lincoln Imaging Center. Resp. Ex. #3. The MRI showed a shallow disc bulge at L3-4, a diffuse generalized disc bulge up to 3 mm at L4-5 and stenosis, and a 2 mm disc bulge and stenosis at L5-S1. Resp. Ex. #3.

These prior instances of back pain should be given little weight. The evidence proves that the injuries sustained from the June 17, 2014 accident are separate and distinct from the prior injuries. When comparing the MRIs, there is a clear exacerbation from the prior injury in 2014. In 2012 he was diagnosed with mild disc bulges whereas in 2014 he was diagnosed with herniations. Pet. Ex. #8. Specifically, at the L5-S1 level he was previously diagnosed with a 2 mm disc bulge whereas in 2014 the MRI shows a 3-4 mm herniation. Pet. Ex. #8. Further, at the

L4-5 level, he was previously diagnosed with a 3 mm disc bulge whereas in 2014 the MRI shows a 3-4 mm herniation. Pet. Ex. #8. The prior injuries did not require continued care and he was discharged home with no follow ups. Resp. Ex. #2. These injuries did not have a permanent effect on the Petitioner as is evidenced by his testimony that before his injury on June 17, 2014 he was in good health and able to work full duty with the Respondent. R. at 43.

Taking the record as a whole, the Petitioner has proven that his current condition of ill-being is causally related to his work injury. The Petitioner immediately notified the Respondent of his work injury and sought treatment right away. All of the medical record histories indicate a work related injury of lifting a tree at work on June 17, 2014. Further, all doctors give the same history of injury and causally relate his diagnoses to his work injury, including the Respondent's Independent Medical Examiner, Dr. Graf. The Petitioner has proven causation by the fact that he was working full duty as of June 17, 2014, sustained an undisputed work accident that exacerbated his prior injuries from bulges to larger herniations, and his injuries left him unable to work following that injury. Thus, the Petitioner has proven that the Petitioner's current condition of ill-being is causally related to his June 17, 2014 work injury.

G. WITH REGARD TO ITEM (G), WHAT WERE PETITIONER'S EARNINGS, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS AND FACTS AND CONCLUSIONS OF LAW:

The Arbitrator finds that the Petitioner's overtime hours were mandatory and required and should be considered in computing his average weekly wage. The hours which an employee works in excess of his regular weekly hours of employment are not considered overtime within the meaning of §10 and are to be included in an average weekly wage calculation if the hours worked are consistent or if the employee is required to work the excess hours as a condition of

his employment. *Airborne Express v. Workers' Comp. Comm'n*, 372 Ill. App. 3d 549, 554, 865 N.E.2d 979, 310 Ill. Dec. 259 (2007).

The Petitioner testified that he worked for the Respondent as a laborer 40-50 hours per week earning $14.00 per hour. R. at 9. He testified that every morning the workers were given their assignments for that day from the crew leader and would all travel together to the job site in the same company vehicle. R. at 10. After the job was completed for the day, everyone would travel back to the office together in the same company vehicle. R. at 11. The Petitioner testified that the job assigned for that day had to be completed that day and that any overtime necessary to finish the job was mandatory. R. at 11-12. Further, since all the workers traveled together in the company vehicle, they had no choice but to stay until the job was completed so that they could have a ride back to the office. R. at 11-12. When he worked overtime, he earned time and a half. R. at 12. The Respondent produced no evidence to refute the fact that the overtime was required. As such, the Petitioner's overtime hours were required and his average weekly wage was $597.73.

J. WITH REGARD TO ITEM (J), WERE THE MEDICAL SERVICES PROVIDED TO THE PETITIONER REASONABLE AND NECESSARY AND HAS THE RESPONDENT PAID ALL APPROPRIATE CHARGES, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Arbitrator finds that the medical services provided to the Petitioner have been reasonable and necessary. Due to the Petitioner's work related injury, he has required treatment in the form of doctor's visits, injections, diagnostic testing, medication, physical therapy, and a Functional Capacity Examination.

After his work injury on June 17, 2014, the Petitioner sought emergency care at Loyola University Gottlieb Memorial Hospital. Pet. Ex. #2. Shortly thereafter, he sought treatment at

Santa Maria Medical Center where he was diagnosed with a lumbar strain and given pain medications and an order for a lumbar MRI. Pet. Ex. #3.

On August 5, 2014, the Petitioner presented at Herron Medical Center with Dr. Nunzio Ambrosino for a second opinion. Pet. Ex. #4. Dr. Ambrosino diagnosed the Petitioner with thoracic and lumbar sprains and ordered physical therapy and an MRI of the lumbar spine. Pet. Ex. #4. The Petitioner completed the MRI at Delaware Place MRI on August 7, 2014 and it revealed a 3-4 mm left sided disc herniation at L4-5 and a 3-4 mm posterior broad based central disc herniation at L5-S1. Pet. Ex. #8. The Petitioner completed a course of physical therapy at Alivio Physical Therapy from August 7, 2014 through March 6, 2015. Pet. Ex. #4. Eventually Dr. Ambrosino referred the Petitioner to Dr. Samir Sharma for a pain management consultation. Pet. Ex. #4.

The Petitioner presented to Dr. Sharma at the Pain & Spine Institute on September 23, 2014 where he diagnosed him with work related lumbar disc degeneration, lumbar osteoarthritis, and a lumbar strain. Pet. Ex. #5. As such, he recommended injections and continued physical therapy. Pet. Ex. #5. The Petitioner underwent the injections on October 7, 2014 and February 10, 2015, but testified that neither of these injections helped his pain. R. at 21. Due to his continued pain complaints, the Petitioner was referred to Dr. Axel Vargas for a spine surgery consultation. Pet. Ex. #4. The Petitioner presented to Dr. Vargas on October 21, 2015 who diagnosed him with work related herniated discs at L4-5 and L5-1 and recommended a decompression and possible fusion. Pet. Ex. #8. The Petitioner never underwent the recommended surgery but did complete a Functional Capacity Examination on September 22, 2015 at Total Rehab, P.C. Pet. Ex. #9. The FCE was found to be valid and placed him at the sedentary physical demand level. Pet. Ex. #9.

The Petitioner underwent an Independent Medical Examination with Dr. Carl Graf on July 16, 2015. Resp. Ex. #1. Dr. Graf diagnosed the Petitioner with a lumbar sprain and indicated that his current complaints were unsubstantiated complaints of pain. Resp. Ex. #1. He opined that the initial three months of treatment were reasonable but that he was at maximum medical improvement and could return to work full duty. Resp. Ex. #1. He also gave an impairment rating of 3% loss of use of the person as a whole, which he related in part to non-radicular pain. Resp. Ex. #1.

The opinions of the Petitioner's treating physicians, Dr. Burgos, Dr. Ambrosino, Dr. Sharma, and Dr. Vargas should be given more weight based on their consistent opinions. Dr. Graf relates the Petitioner's pain to unsubstantiated complaints but completely ignores the objective evidence. Resp. Ex. #1. He does not consider the lumbar MRI in coming to his diagnosis or the fact that he had been complaining of intermittent leg pain throughout his treatment. Every other doctor agreed that he sustained herniated discs from this injury and required more than three months of treatment. Dr. Burgos, Dr. Ambrosino, Dr. Sharma, and Dr. Vargas all considered the Petitioner's objective evidence, his subjective complaints, and all agreed on a course of treatment. The records indicate that his pain did improve over time, further proving the treatment he received was the best course of care. As such, their opinions should be given more weight and their treatment should be found to be reasonable and necessary.

Accordingly, the preponderance of credible evidence establishes that the Petitioner sustained L4-5 and L5-S1 disc herniations, failed conservative medical care, and now has permanent work restrictions. The Arbitrator therefore finds that the Petitioner's medical care has been reasonable and necessary. The Arbitrator finds that the Respondent has not paid all

appropriate charges. The Petitioner testified that his medical bills have not been paid as of the date of trial. R. at 25-26. At trial, the Petitioner produced an itemization of all medical bills that the Respondent has refused to pay. Pet. Ex. #1. Since the treatment he received is deemed reasonable and necessary, the Arbitrator hereby awards the Petitioner the medical bills contained in Petitioner's Exhibit #1.

K. WITH REGARD TO ITEM (K), ARE TTD BENEFITS OWED TO PETITIONER, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Arbitrator finds that the Petitioner is entitled to TTD benefits from July 21, 2014 through November 3, 2015, a period of 67 1/7 weeks. The Petitioner has shown by a preponderance of credible evidence that his current condition of ill-being is causally related to his work injury. The Petitioner was initially placed on light duty work restrictions by Loyola University Gottlieb Memorial Hospital and Dr. Burgos at Santa Maria Medical Center, which the Respondent could accommodate. R. at 14. The Petitioner worked in a light duty position until he was terminated on July 21, 2014. R. at 18. Shortly thereafter, he was taken off of work from Dr. Ambrosino on August 5, 2014 and continued off of work by Dr. Sharma and Dr. Vargas through November 3, 2015. Pet. Ex. #3. The Petitioner testified that he received one temporary total disability check from the Respondent but did not receive any further temporary total disability benefits after that date. R. at 25.

The Petitioner's medical records establish that he has been either on a light duty work status or has been off of work since the date of injury through his release date of November 3, 2015. Therefore, the Petitioner is entitled to TTD benefits for the time period ranging from July 21, 2014 through November 3, 2015.

L. WITH REGARD TO ITEM (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

In situations where the Petitioner is unable to perform the customary duties of his pre-accident employment after his injury but does not sustain a loss in earning capacity, an award under Section §8(d)(2) is proper. *Gallianetti v. Indust. Comm'n*, 315 Ill. App. 3d 721, 724 (2000).

The Arbitrator finds that based on the Petitioner's credible testimony and medical records, he is unable to return to his position for the Respondent since he can no longer engage in the same duties/activities as a laborer. The Petitioner sustained a severe back injury as a result of the work injury on June 17, 2014. This injury required extensive medical treatment of physical therapy, diagnostic testing, injections, and pain management. In sum, the Petitioner underwent months of physical therapy, doctor's visits, two epidural injections, and was recommended for surgery. Following this treatment, he was released with permanent sedentary work restrictions per the FCE completed at Total Rehab, P.C placing him below the physical demand requirements of a laborer. Pet. Ex. #9. From a physical perspective, the Petitioner testified that he has pain every day as a result of the work injury. R. at 39. He testified that he has cramping in his legs and can no longer enjoy physical activities like running or playing soccer that he could before his injury. R. at 21 and 26. Accordingly, the Petitioner has lost his occupation because he is now unable to perform the customary duties of his pre-accident employment. As such, an award of 25% loss to the Person as a Whole under Section 8(d)(2) is proper.

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 Up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Nathan Tucker,

Petitioner,

vs.

NO: 17 WC 12560

State of IL, Centralia Correctional Center,

18IWCC0597

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) / §8(a) having been filed by Respondent herein and notice given to all parties, the Commission after considering the issue of accident, and being advised of the facts and law, reverses the Decision of the Arbitrator for the reasons stated below.

Findings of Fact

In the interest of efficiency, the Commission only addresses the facts relevant to the question of accident in this Decision; however, the Commission has carefully reviewed the entire record. Petitioner has worked as a correctional officer at the Centralia Correctional Center for almost nine years. (Tr. at 10). On March 29, 2017, he was playing pickleball in the employee and inmate gym and twisted his right knee when he tried to hit a ball. *Id.* at 11. Petitioner testified that he heard a snap that sounded like celery and fell to the ground. *Id.*

Pickleball is set up like a tennis court and uses a mixture of ping pong, tennis, and volleyball rules. *Id.* at 13. Petitioner testified that the Centralia team is well known, and a few correctional officers even compete in out-of-state tournaments. *Id.* He testified that Respondent permits his participation in pickleball during his lunch break. *Id.* at 14. Other employees participate, including Major Ted McAbee, Respondent's witness. *Id.* Petitioner testified that Respondent provides the net and gym and the employees bring their own paddles and balls. *Id.* at 14-15. Petitioner testified that staying in shape benefits his employer. *Id.* at 15-16.

Respondent prohibits correctional officers from leaving the premises during their shift because the officers must be available to respond to any emergencies. *Id.* at 11-12. Respondent allows correctional officers to use the inmate gym during their lunch break. *Id.* at 12. Petitioner testified that officers and management use the same gym and equipment. *Id.* Petitioner testified

that he plays pickleball "to have cardio, stay in shape, stay fit to do [his] job, be able to respond quicker and stay healthier." *Id.* at 12-13.

On cross-examination, Petitioner testified that he brings his own ball and paddle and the gym has lockers where the employees keep their equipment. *Id.* at 21-22. Petitioner admitted he also plays pickleball outside of the correctional center. *Id.* at 22. Petitioner testified that on the date of accident he was not assigned to the gym, but he occasionally did receive an assignment to monitor the gym. *Id.* Petitioner is unaware of any memorandum or mandate requiring correctional officers to play pickleball or perform other physical activities during their lunch break. *Id.* at 23. Petitioner does not receive any bonus or other incentive from Respondent to exercise during his lunch break. *Id.* Petitioner does not have to report his breaktime activities to anyone. *Id.* He works 37.5 hours a week with an unpaid 30-minute lunch each day. *Id.* Petitioner testified that he underwent a physical exam prior to his employment with Respondent but Respondent has not required any subsequent physical examinations. *Id.* at 24-25.

Major Ted McAbee testified on Respondent's behalf during the hearing. He has worked for Respondent for 26.5 years. *Id.* at 29. McAbee testified that Respondent prohibits correctional officers from leaving the facility during their shift. *Id.* He testified that if there is an emergency he needs to be able to contact staff and address the situation. *Id.* He testified that he needs to know where the staff is in the event there is a hostage situation. *Id.* McAbee testified that there are five areas where employees go during their lunch break. *Id.* at 30. He testified that employees can spend their break in the following places: 1) the employee dining room; 2) the roll call room; 3) the inmate gym; 4) the officers' gym; and 5) the smoking area outside. *Id.* McAbee testified that he also plays pickleball.

McAbee has supervised Petitioner since Petitioner began working at the facility. *Id.* at 31. He testified that Petitioner is a good employee and he believes Petitioner reported the work accident directly to him. *Id.* McAbee testified, "You're allowed to go in the gym. We don't put any onus on them being physically fit. We don't ask them to do anything other than go [to] one of these five places during the dinner break, so we're not stopping them from [playing pickleball], I guess." *Id.* at 33-34. McAbee agreed that Petitioner would not get into trouble by going to the inmate gym and that a common activity of correctional officers is to go to the gym and play sports. *Id.* at 34.

McAbee testified that correctional officers receive pay for 7.5 hours each day and their lunch break is unpaid. *Id.* at 35. He testified that as long as the correctional officers do not leave the facility during their lunch break, Respondent permits them to use the time any way they wish. *Id.* He testified that there is no physical fitness requirement for correctional officers and that the facility even eliminated the initial physical during the hiring process in the past year. *Id.* at 36. When questioned about the physical shape of the facility's correctional officers, McAbee stated, "We've got a little bit of everything. We've got some guys that are as fit as you would like to see. We've got some other people who can, basically, barely walk..." *Id.* at 36-37. He testified that there is no requirement for correctional officers to be in a certain physical shape or participate in certain activities. *Id.* at 37.

McAbee testified that Respondent initially purchased the pickleball equipment in 2000 or

2001. *Id.* at 38. McAbee testified that Respondent "purchases the stuff for the inmates. The inmates are allowed to play, also. It's their gym, and as the equipment was originally purchased for them, they're still allowed to play. So the Leisure Time Services Department provides paddles and balls for the inmates. We bring our own in." *Id.* at 39. He further testified that initially Respondent allowed officers to use the paddles and balls the department purchased; however, that became cost prohibitive due to the expense of the balls. *Id.* Now correctional officers must bring their own balls and paddles. *Id.* He testified that officers can use anything in the inmate gym including the weights, basketballs, etc. *Id.* at 40. The Inmate Benefit Fund uses the money spent by the inmates in the commissary to provide equipment for the inmate gym and other things for the inmates. *Id.* McAbee testified that employees do not contribute to that fund and the equipment purchased by the fund is intended for the inmates' use. *Id.* at 40-41.

Conclusions of Law

Petitioner bears the burden of proving each element of his case by a preponderance of the evidence. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). He must show by a preponderance of the evidence that he suffered a disabling injury which arose out of and in the course of his employment. *Id.* The phrase "in the course of employment" refers to the time, place and circumstances surrounding the injury. *Id.* To satisfy the "arising out of" prong, Petitioner must show that the injury "had its origin in some risk connected with, or incidental to, the employment." *Id.* After carefully considering all the evidence and relevant law, the Commission finds Petitioner did not meet his burden of proving his injury arose out of and in the course of his employment.

The Arbitrator determined Petitioner proved he suffered an injury arising out of and in the course of his employment pursuant to the personal comfort doctrine. In reaching this conclusion, the Arbitrator relied on *Eagle Disc. Supermkt. v. Indus. Comm'n*, 82 Ill. 2d 331 (1980). The claimant in *Eagle Disc.* broke his ankle while playing Frisbee in the store parking lot during his lunch break. The Court rendered this decision before the September 15, 1980, amendment to §11 of the Act became effective. Prior to the effective date of the amended §11, courts determined the compensability of cases involving injuries relating to recreational activities using an analysis very different from the post-amendment cases. As such, the *Eagle Disc.* Court applied the personal comfort doctrine and affirmed the Commission's conclusion that the petitioner sustained an accident arising out of and in the course of his employment.

In the current case, the Arbitrator focused on issues such as the alleged benefits to Respondent if Petitioner stays in shape, the fact that Respondent prohibits its employees from leaving the premises during their unpaid break, and whether Respondent acquiesced to employees playing pickleball during their break. The Arbitrator noted that Respondent supplies some of the pickleball equipment—the gym and the net—and in the past allowed employees to use the paddles and balls purchased by Respondent. These factors are essential to the *Eagle Disc.* personal comfort analysis, not an analysis pursuant to §11.

Section 11 states in relevant part,

> "Accidental injuries incurred while participating in voluntary recreational programs including but not limited to athletic events,

> parties and picnics do not arise out of and in the course of the employment even though the employer pays some or all of the cost thereof. This exclusion shall not apply in the event that the injured employee was ordered or assigned by his employer to participate in the program."

820 ILCS 305/11. Illinois courts have found that §11 also "excludes from compensation injuries which occur during various leisure activities in which employees participate with the employer's blessing." *Kozak v. Indus. Comm'n*, 219 Ill. App. 3d 629, 632 (1991). In *Kozak*, the Court stated that §11 "applies if an employee is injured while participating in a voluntary recreational activity regardless of the purpose of the activity." *Id.* The Court further stated, "except to the extent that an employee is ordered or assigned by the employer to participate in the program, injuries occurring during the course of recreational events are simply not compensable irrespective of whether it may be said they arise out of and in the course of employment." *Id.* at 633.

Post-amendment, Illinois courts primarily focus on whether the employee's participation was voluntary, regardless of the employer's knowledge of or benefit from the activity. Courts also consider whether the activity qualifies as recreation in the context of the employee's job duties. For example, in *Elmhurst Park Dist. v. Ill. Workers' Comp. Comm'n*, the primary question was whether the claimant's injury during a wallyball game qualified as recreational activity. 395 Ill. App. 3d 404 (2009). The Court noted that "recreation" is inherent in certain professions such as professional athletes or the claimant's profession as a fitness supervisor. *Id.* at 409. One could consider almost any activity in which the claimant participated while at work, recreation. After examining the claimant's job description as well as the circumstances under which he agreed to play wallyball, the Court concluded the claimant was not engaged in a recreational activity; thus, the claimant suffered a compensable work accident.

Similarly, in *Calumet Sch. Dist. #132 v. Ill. Workers' Comp. Comm'n*, a teacher sustained an injury while participating in an after-school student/teacher basketball game. 2016 IL App (1st) 153034WC. The Court determined that while there are circumstances in which participation in a basketball game would constitute a "recreational activity," that was not the case given the circumstances surrounding the claimant's participation in the game. *Id.* at ¶ 35. The Court focused on the evidence that the claimant was not a basketball player and did not want to participate in the game. *Id.* Playing basketball was not part of the claimant's job duties. The claimant only participated after the principal continued to pressure him to participate. *Id.* The claimant also participated in the game because he feared his continued refusal would negatively affect his job. After analyzing the facts, the Court concluded the claimant was not engaged in a "voluntary recreational program" under §11 of the Act. *Id.*

The Commission finds recreation is not inherent to the position of a correctional officer. Thus, Petitioner was engaged in a recreational activity when he played pickleball on the date of accident. As pickleball is undeniably recreational and recreation is not intrinsic to Petitioner's position as a correctional officer, Petitioner bears the burden of proving his participation in the pickleball game was not voluntary. Petitioner did not meet this burden. Respondent's acquiescence to Petitioner playing pickleball during his break does not make §11 inapplicable. Likewise, the fact that Respondent provides some of the necessary pickleball equipment does not

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render the voluntary recreation exclusion inapplicable. There is no evidence that Respondent exerted any pressure on Petitioner to play pickleball during his break. The possibility that Respondent may benefit from its employees staying in some semblance of shape also does not render the voluntary recreational activity exclusion inapplicable. Thus, Petitioner's right knee injury during a pickleball game is not compensable.

Finally, the Commission must address Petitioner's citation of an appellate order issued pursuant to Supreme Court Rule 23(b) to support his argument that §11 is inapplicable because that section only applies to recreational "programs." Petitioner's citation to *Taylorville Fire Dep't v. Ill. Workers' Comp. Comm'n*, 2014 IL App (5th) 140010WC-U, is a blatant violation of Supreme Court Rule 23(e) which states in relevant part, "An order entered under subpart (b) or (c) of this rule is not precedential and may not be cited by any party except to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case." However, even if *Taylorville Fire Dep't* were a published opinion, it in no way supports Petitioner's assertion. In fact, the Commission has found no cases that interpret the language of §11 to only apply to recreational "programs" only, instead of recreational activities. The Appellate Court certainly has not interpreted the phrase "recreational programs" in such a narrow manner. While the Act does not explicitly define the phrase "voluntary recreational programs," §11 lists some examples "including but not limited to athletic events, parties and picnics." 820 ILCS 305/11. Petitioner has not submitted any evidence that disputes the Commission's determination that pickleball is an athletic event.

For the foregoing reasons, the Commission denies benefits to Petitioner because he did not suffer an injury arising out of and in the course of his employment.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated August 10, 2017, is reversed in its entirety and all benefits are denied.

DATED: OCT 5 – 2018
o: 8/7/2018
TJT/jds
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Michael J. Brennan

Kevin W. Lamborn

DISSENT

I respectfully dissent from the opinion of the majority and would affirm and adopt the Arbitrator's Decision. I believe Petitioner met his burden of proving by a preponderance of the evidence that he suffered an accident arising out of and in the course of his employment.

Petitioner has worked as a correctional officer at Centralia Correctional Center for nine years. During that time, he has routinely played pickleball with other employees and supervisors during his lunch break. Respondent prohibits its employees from leaving the premises during

lunch. While Respondent does not control how Petitioner spends his break, the facility does restrict its employees to the following five areas during their break: 1) the employee dining room; 2) the roll call room; 3) the inmate gym; 4) the officers' gym; and 5) the designated smoking area outside the facility.

There is no question that Respondent knew that many of its employees chose to spend their break playing sports in the inmate gym. Major Ted McAbee, who has worked for Respondent for 26.5 years and is a high-ranking supervisor, testified that "...a common activity of correctional officers is to go to the gym and play sports." (Tr. at 34). Respondent also knew that many of its employees played pickleball during their break. Petitioner testified that the Centralia Correctional Center team is well-known, and a few officers even compete in out-of-state tournaments. Major McAbee, Petitioner's supervisor, also has played pickleball during his break with other officers during his break. Petitioner testified that in his nine years of employment with Respondent, no one ever reprimanded him or told him he could not play pickleball during his break. Respondent's acquiescence is also evident in the fact that in the past, Respondent used to provide all the equipment for the officers to play pickleball. Respondent purchased the pickleball equipment in 2000 or 2001 for the inmates to use during their leisure time. Major McAbee testified that Respondent initially allowed its employees to use the paddles and balls it purchased for the inmates; however, that quickly became cost prohibitive and officers now must bring their own balls and paddles. Respondent still allows the officers to use the net purchased by Respondent and the inmate gym for their pickleball games.

After considering the totality of the evidence, I believe Petitioner proved his right knee injury is the result of a compensable work accident. While Respondent does not mandate its employees play pickleball or engage in any other physical activity during lunch, the evidence shows Respondent supports its workers' participation in physical activities such as pickleball. Respondent exercises a level of control over its employees during lunch because it restricts its employees to only five locations during their break. Respondent clearly benefits from its employees staying healthy and in shape because being a correctional officer is a physically demanding job. In fact, Petitioner testified that he plays pickleball "to have cardio, stay in shape, stay fit to do [his] job, be able to respond quicker and stay healthier." *Id.* at 12-13.

Based on the evidence that Respondent exercised a level of control over Petitioner during his unpaid lunch, Respondent's longstanding tacit approval of its employees playing pickleball in the inmate gym during the lunch break, and the benefit Respondent derives from its employees staying fit, I believe Petitioner's injury did not occur during a voluntary recreational activity or program. Thus, the majority erroneously analyzed this case under §11 of the Act. The Arbitrator correctly analyzed the facts of this case under the personal comfort doctrine pursuant to *Eagle Disc. Supermkt. v. Indus. Comm'n*, 82 Ill. 2d 331, 412 N.E.2d 492 (1980).

For the forgoing reasons, I would affirm and adopt the Arbitrator's Decision in its entirety.

Thomas J. Tyrrell

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

TUCKER, NATHAN
Employee/Petitioner

Case# **17WC012560**

STATE OF IL CENTRALIA CORR CENTER
Employer/Respondent

18IWCC0597

On 8/10/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.14% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

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

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

1350 CENTRAL MANAGEMENT SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

AUG 10 2017

RONALD A. RISCICA, ACTING SECRETARY
Illinois Workers' Compensation Commission

18IWCC0597

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

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

NATHAN TUCKER
Employee/Petitioner

v.

STATE OF ILLINOIS / CENTRALIA CORR. CENTER
Employer/Respondent

Case # 17 WC 12560

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Cellini**, Arbitrator of the Commission, in the city of **Collinsville**, on **July 18, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **March 29, 2017**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$63,660.00**; the average weekly wage was **$1,224.23**.

On the date of accident, Petitioner was **33** years of age, *married* with **0** dependent children.

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

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

Respondent is entitled to a credit for any medical expenses paid prior to hearing, if any, under Section 8(j) of the Act.

ORDER

The Arbitrator finds that the Petitioner sustained accidental injuries arising out of and in the course of his employment on March 29, 2017. Additionally, the Arbitrator finds that the Petitioner's right knee condition is causally related to the March 29, 2017 accident.

Respondent shall pay Petitioner temporary total disability benefits of **$816.15 per week** for **8-2/7 weeks**, commencing **April 20, 2017 through June 16, 2017**, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary **medical expenses contained in Petitioner's Exhibit 1**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of for medical expenses it paid prior to hearing, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

The Arbitrator makes no specific award of prospective medical treatment.

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

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

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

Signature of Arbitrator

August 2, 2017
Date

STATEMENT OF FACTS

Petitioner has worked as a Correctional Officer (CO) at Centralia Correctional Center for approximately 9 years. On 3/29/17, he testified that he was playing a game of "pickleball" in the inmate gym, which he described as a combination of tennis, ping pong and volleyball with the use of a court, paddles, a ball and a net. While retrieving a ball, he testified that he twisted his right knee and heard a snap "like celery", and he fell to the ground. He reported the injury to his Major and went to the facility health care.

Px8 and Rx1 through Rx4 contain internal Respondent injury report memoranda, and they are all consistent with Petitioner's testimony regarding the 3/29/17 incident. There were also multiple witness statements indicating the Petitioner hurt his knee or leg while playing pickleball and indicated that something popped. (Px8; Rx1; Rx2: Rx3: Rx4).

The Petitioner testified that, as a CO, he is not allowed to leave the premises while on shift in case there are emergencies. COs are allowed to use the inmate gym facilities, and he testified the facilities are also utilized by management staff. This includes weight lifting. Petitioner testified that he plays pickleball to help him stay in shape, which helps him to perform his job, and thus that it also benefits the Respondent. He testified that the pickleball team from Centralia is well known and that some of the Respondent's COs compete outside the state in tournaments.

The Petitioner testified that the Respondent permits him and other COs to participate in pickleball on the premises, as well as other staff members, and that his supervisor, Major McAbee, who was present for the hearing, participates as well and is one of the better pickleball players.

Petitioner testified that the gymnasium with the pickleball court, as well as the net, are property of the facility, while the COs bring their own paddles and balls.

On 3/29/17, Dr. Beaty noted Petitioner injured his right knee that morning playing pickleball and felt a pop. Petitioner reported two prior right knee surgeries. Given it was a recurrent injury, he held Petitioner off work pending evaluation with Dr. Bassman. (Px3).

Petitioner initially saw Dr. Mall on 3/31/17, reporting that he felt a pop in his knee playing pickleball at work when he turned and his knee gave out. He also had swelling. Petitioner reported a prior right ACL reconstruction surgery with Dr. Bassman in 2010. He also reported that "he may have tweaked the knee last year", but he saw Dr. Bassman and the doctor "felt that his knee was fine." With this injury, the Petitioner reported feeling something substantially different with immediate symptoms and greater instability. The MRI report from films obtained on this date indicates ACL reconstruction changes with a partially torn graft at the

midpoint, likely elongation and graft laxity, resulting in posterior bowing of the PCL. Additionally, there was a partially resected medial meniscus without evidence for a definite recurrent tear, a posterior horn lateral meniscus tear with possible centrally displaced parrot beak fragment, and grade IV chondromalacia at the lateral tibial plateau and grade III at the lateral condylar, both at weightbearing locations. Dr. Mall described the films as reflecting a bone bruise on the lateral femoral condyle, lateral tibial plateau consistent with an ACL tear with disruption of the prior graft and joint effusion. He recommended ACL reconstruction surgery, noting that the mechanism of injury could have caused the ACL tear, noting the bone bruise was indicative of same and that Petitioner had immediate symptoms. However, he wanted Petitioner to participate in physical therapy to increase range of motion and to reduce swelling in preparation for surgery. Dr. Mall also instituted light duty restrictions. (Px4 & 5).

Surgery was performed on 4/20/17, involving arthroscopic ACL reconstruction revision, chondroplasty of the lateral femoral condyle, and partial lateral meniscectomy of about 5% to 10% of the meniscus. The post-surgical diagnoses were right ACL and lateral meniscus tears, chondral defects of the lateral femoral condyle and retained suture from the prior ACL repair. Petitioner was held off work at this time, and he then underwent physical therapy. The last note in evidence from 6/13/17 indicated Petitioner felt ready to try to return to work, that his range and strength were slowly improving, but that he remained challenged with the exercise program and fatigued with ongoing quad weakness. (Px6 & 7).

On 6/29/17, Dr. Mall noted Petitioner was doing well and progressing with therapy. Therapy and light duty restrictions were continued. (Px4).

The Petitioner testified that he was held off work from 4/20 to 6/16/17 and received no workers compensation benefits. He also testified that he did not receive any non-occupational disability benefits and used his personal days and sick time while off work for the surgery, and so continued to receive his full wages.

The Petitioner testified that the surgery helped his condition, and at the time of hearing he remained in physical therapy and would so remain for another month or two. He was currently working light duty in the mailroom and had not yet been released to return to full duty.

Petitioner testified that he had undergone a prior right knee surgery in 2010. He also testified that he had an incident about two years ago where he had right knee swelling. He believed he was in the gym when it occurred, but wasn't sure what caused it to swell. He did see the doctor when this occurred, indicating he was told there was nothing wrong and that he should rest it. He couldn't recall if he missed any time from work due to the swelling incident. Otherwise, he testified to no ongoing knee problems since 2010 through 3/28/17.

On cross examination, Petitioner testified that the gym where pickleball is played is the inmate gym, not an employee gym, and that it is provided for inmate use. He also reiterated that Respondent employees bring the paddle and ball equipment, but store them in lockers on the premises. He agreed that the Respondent does not require COs to participate in pickleball.

Petitioner testified that he has played pickleball outside of the Respondent's premises. He has been assigned at times to be the gym officer, but could not recall if he had been so assigned on 3/29/17.

COs do not receive any bonus or incentive to work out or perform physical fitness activities on their breaks, and Petitioner testified he is not required to report any such activities to the Respondent. COs have designated areas they can go to while on break, but otherwise to Petitioner's knowledge the Respondent doesn't track where COs are while on breaks. The Petitioner has not had to take any physical exams for Respondent since he was hired.

Petitioner could not recall when he last saw a doctor for his right knee prior to 3/29/17, but acknowledged he may have had check ups with Dr. Bassman, who he testified performed two prior surgeries for him.

The Petitioner called Major Ted McAbee to testify at the hearing. A 26 plus year employee at Centralia, Major McAbee acknowledged that a CO is not allowed to leave the prison facility during a shift, as they need to be available for an emergency, and he needs to know where his staff is at any given time. Major McAbee testified that COs can go to five different areas at Centralia while on lunch break: the employee dining room, the roll call room, the inmate gym, the officer's gym and an outdoor smoking area. The Major also acknowledged that he himself plays pickleball, including at the Respondent prison facility, and that he is pretty good at it.

Major McAbee has supervised the Petitioner since Petitioner began working for the Respondent, and indicated he is a good employee. To his recall, the Petitioner reported the 3/29/17 pickleball incident to him, including that it occurred on the facility premises. His description of the pickleball game was consistent with the Petitioner's, including a court similar to tennis but smaller.

Major McAbee testified that the Respondent has no prohibition against COs using the inmate gym, also known as the multi-purpose facility, to play pickleball. He agreed a CO would not be stopped from playing pickleball, and would not get in any trouble for doing so or for working out at the gym. He testified that while COs are allowed to use the gym, there is no onus on these employees to be physically fit, noting the fitness of COs ranges from being very fit to those who can barely ambulate. However, it is a common activity for COs to use the facility to exercise in various ways.

Upon Respondent's counsel's questioning, Major McAbee testified that employees are not paid for their time during lunch breaks, which the Petitioner also acknowledged. COs are not tracked with regard to their location during breaks other than that they are in one of the five noted areas.

Major McAbee and the Petitioner agreed that Petitioner had to take an initial physical exam before being hired, but that no further physical examinations are required, and that recently even the initial physical exam requirement has been rescinded.

In 2000 and 2001, the prison obtained and provided equipment for pickleball, but the COs didn't like the paddles that were there and so brought their own, as well as their own balls when the cost of the balls became prohibitive for the Respondent. Inmates also are allowed to play pickleball, and the equipment was originally provided for them. He agreed that COs are allowed to use anything else in the gym area, including weights, basketballs, etc. The funds for inmate gym equipment come from a percentage of revenue from the inmate commissary, which is kept in the inmate benefit fund.

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

This case involves the interaction of Section 11 of the Act, and the "personal comfort doctrine." To obtain compensation under the Act, an injury must "arise out of" and "in the course of" employment. 820 ILCS

305/1(d). "The phrase "arising out of the employment" refers to the requisite causal connection between the employment and the injury; that is, the injury must have had its origins in some risk incidental to the employment. The phrase 'in the course of employment' refers to the time, place and circumstances of the injury." *Eagle Discount Supermarket v. Indus. Comm'n*, 82 Ill. 2d 331, 338, 412 N.E.2d 492, 496 (1980). With regard to injuries sustained during activities performed during a claimant's lunch period, Illinois courts have held that the "personal comfort doctrine" may apply. Acts of "personal comfort," including engaging in sports activities, may be "incidental to employment" and satisfy the "arising out of" requirement. So long as an employee does not engage in the sports activities in an unexpected manner and expose him or herself to an unreasonable risk, the resultant injury will be deemed to have occurred within the course of employment. Notwithstanding the latter, the employer may still be held liable where it has knowledge of or has acquiesced to the practice or custom. *Id.* at 496-497.

However, subsequent to the decision in *Eagle Discount Supermarket*, the Illinois legislature enacted a specific portion of Section 11 of the Act, which states as follows:

> "Accidental injuries incurred while participating in voluntary recreational programs including but not limited to athletic events, parties and picnics do not arise out of and in the course of employment even though the employer pays some or all of the cost thereof. This exclusion shall not apply in the event that the injured employee was ordered or assigned by his employer to participate in the program." 820 ILCS 305/11.

While Section 11 of the Act provides that injuries sustained during voluntary recreation do not arise out of and in the course of employment, the law holds, " . . . [T]he mere fact that a recreational activity is involved does not necessarily trigger the analysis employed in the recreational activities cases." *Eagle Discount Supermarket* at 496.

In *Eagle Discount*, the claimant was on lunch break, without pay, when he tripped and was injured on the employer's parking lot while playing Frisbee. Although the employees were not restricted to the employer's premises, claimant and his fellow employees worked the night shift when the store was closed and had to request that the night manager unlock the door before they could leave the building. The manager would also turn on the parking lot lights so that the employees would have light in which to play. The employer argued that the claimant's injuries were non-compensable for four (4) reasons: (1) The claimant's "parking lot" injury is noncompensable since there was no showing that there existed a hazard other than that to which the general public would be exposed; (2) the injury is a noncompensable "recreational" injury since there was no evidence of employer organization, sponsorship, coercion to participate and benefits derived; (3) the injury, which was sustained during an unpaid and unrestricted lunch break, was not sustained in an activity sufficiently related to the employment; (4) the "personal comfort" doctrine precludes recovery since there was no showing that the employment created an increased risk of injury. *Eagle Disc. Supermarket v. Indus. Comm'n*, 82 Ill. 2d 331, 336, 412 N.E.2d 492, 495 (1980).

The Supreme Court determined that the personal comfort doctrine was applicable in the case, and gave significant weight to two specific factors: (1) the recreational activity was an accepted, regular and normal one; and (2) the injury occurred on the premises during an authorized lunch break. The Supreme Court stated, "In the lunch hour cases, the most critical factor in determining whether the accident arose out of and in the course of employment is the location of the occurrence. Thus, where the employee sustains and injury during the lunch break and is still on the employer's premises, the act of procuring lunch has been held to be reasonably incidental to the employment . . . Other acts during a break time in the employment besides the act of eating have also been held to be acts of personal comfort." *Id.* at 496-97. Consequently, Court held that the

Commission properly found that the claimant's injuries arose out of and in the course of his employment with Respondent, as the activity of playing Frisbee was during an authorized lunch break on the employer's premises, the claimant did not expose himself to an unnecessary or unreasonable risk, and the employer acquiesced to the activity. *Id.*

The personal comfort doctrine appears, in the Arbitrator's view, to be applicable in this case as well. There is no evidence the Arbitrator can find in the record that rebuts that the Petitioner was injured on the Respondent's premises, specifically the inmate gym area, and the employer, by the testimony of Respondent's own witness, acquiesced to the activity, that being pickleball, with regard to various Respondent employees, including Major McAbee himself. The evidence makes it very clear that pickleball was a common activity for a number of correctional officers to participate in during lunch hours, and something that was accepted and acquiesced in by Respondent. An important piece of evidence in this case is that correctional officers, including Petitioner, are not permitted to leave Respondent's premises during the lunch period. Major McAbee testified that COs were required on premises in case of emergencies, and had access to only 5 or 6 areas of the Respondent's premises during lunch hours. While this activity may or may not be one that would typically be considered a personal comfort, such as eating or using the restroom, the Arbitrator notes that in the specific job of a correctional officer, being strong and in good shape would clearly be in such an employee's best interests in terms of having the duty of keeping order among an inmate population. Additionally, the Supreme Court found that an activity, playing Frisbee, which does not specifically appear to promote the duties of a stock worker, was determined to constitute a personal comfort. The Arbitrator thus finds that Petitioner's accidental injuries arose out of and in the course of his employment with Respondent while engaged in an act of personal comfort during an authorized lunch break.

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

The Arbitrator finds that the Petitioner's right knee injury is causally related to the 3/29/17 accident. He testified that he heard a snap in the knee while he was playing pickleball. Several witness statements were presented into evidence which supports that the Petitioner sustained an injury to his right leg playing pickleball on 3/29/17. Dr. Mall has opined that the injury sustained, for which he performed surgery, is causally related to the pickleball incident of 3/29/17, and that medical opinion is unrebutted.

The Arbitrator notes that the Petitioner clearly had a significant preexisting condition in the right knee in terms of a prior ACL reconstruction and an incident about a year prior to the accident where the knee swelled up. However, the preponderance of the evidence here indicates a new injury occurred on 3/29/17, which involved either the cause of the condition or aggravation of the pre-existing condition which, either way, led to the knee for surgery.

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

The Arbitrator finds that the Petitioner is entitled to the medical expenses contained in Petitioner's Exhibit 1, pursuant to Sections 8(a) and 8.2 of the Act. The Arbitrator finds the treatment relevant to these bills to have been reasonable and necessary to treat the Petitioner's right knee condition that resulted from the 3/29/17 accident.

The Respondent is entitled to credit for any of the awarded bills which were paid prior to hearing, pursuant to Sections 8(a), 8(j) and 8.2 of the Act, so long as the Respondent holds the Petitioner harmless with regard to same.

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

No specific prospective medical care has been indicated at this time by Petitioner's physicians. Thus, the Arbitrator makes no specific award of prospective medical care. However, the Petitioner's surgery has been deemed to be causally related, and thus it stands to reason that any ongoing, causally related reasonable and necessary post-surgical treatment would also be causally related.

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

The Arbitrator finds that the Petitioner is entitled to TTD from 4/20/17 through 6/16/17, a total of 8-2/7 weeks. This period covers the time from the right knee surgery through Dr. Mall's release.

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

Alberto Jimenez,
Petitioner,

vs.

NO: 15WC 12519

18IWCC0598

National Tube Supply,
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 medical and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 17, 2018, is hereby affirmed and adopted.

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

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

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 5 - 2018
o092518
MJB/jrc
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

JIMINEZ, ALBERTO
Employee/Petitioner

Case# **15WC012519**

NATIONAL TUBE SUPPLY
Employer/Respondent

18IWCC0598

On 1/17/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1836 RAYMOND M SIMARD PC
205 W RANDOLPH ST
SUITE 815
CHICAGO, IL 60606

1120 BRADY CONNOLLY & MASUDA PC
ANDREW R MAKAUSKAS
10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

18IWCC0598

STATE OF ILLINOIS)
)SS.
COUNTY OF Will)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(B)/8(A)

ALBERTO JIMENEZ,
Employee/Petitioner

v.

NATIONAL TUBE SUPPLY,
Employer/Respondent

Case # 15 WC 12519

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 Carolyn Doherty***, Arbitrator of the Commission, in the city of ***New Lenox***, on ***December 11, 2017***. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, *9/3/2013*, 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. SEE DECISION

In the year preceding the injury, Petitioner earned $*33,959.12*; the average weekly wage was $*653.06*.

On the date of accident, Petitioner was *36* years of age, *married* with *4* dependent children.

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

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

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

ORDER

As the Petitioner's current condition of ill-being is not causally-related to the accident of September 3, 2013, the Petitioner's request for prospective medical care is denied. SEE DECISION

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.

Carolyn M. Doherty

Signature of Arbitrator

1/11/18

Date

ICArbDec19(b)

JAN 17 2018

FINDINGS OF FACT

The 36 year old Petitioner was an employee of Respondent on September 3, 2013. He was working as a crane operator. He testified he was taking out a tube when a hook came loose striking his helmet which then struck Petitioner's nose. Accident is not in dispute. ARB EX 1.

Petitioner received treatment on three occasions in 2013. The treatment took place at Monee Immediate Care Center (a/k/a Riverside Corporate Health), as directed by Respondent. During the initial visit of September 3, 2013, saw L. Healy, a nurse practitioner. She noted that Petitioner described the problem as a contusion/laceration to his nose and described it as constant, moderate throbbing. The laceration bleeding was minimal and his pain level was reported at 5/10. PX 1, RX 1. His current symptoms were noted as swelling and laceration to the bridge of his nose. Nurse Healy noted "a 1.8 cm irregularly shaped laceration is present to bridge of nose discharge not present. A contusion is present. The mucosa is normal. The septum is normal. Tenderness to palpation is not present. There is no active bleeding from the nares. There is no septal hematoma." The assessment was "contusion to nose. laceration to nose and nasal bone fracture." PX 1, RX 1. The nasal fracture was noted to be preliminary and subject to radiologist reading of the x-rays taken on 9/3/13. The radiologist thereafter read the x-rays as negative for fracture abnormality. PX 1, RX 1. Petitioner's laceration was cleaned and treated and he was released at full duty with instructions to return on 9/6/13.

Petitioner returned to Monee Immediate Care Center on September 6, 2013. His pain level at that time was 0/10. Again, on examination of the nose, the septum was normal. There was no active bleeding from the nares. There was no septal hematoma. There remained swelling on the bridge of the nose. Nurse Healy noted the radiologist reading of no fracture or radiopaque foreign body. He was allowed to work full duty and was to return for a follow-up re x-ray visit on October 4, 2013. PX 1, RX 1.

Petitioner did return to Monee Immediate Care Center on October 4, 2013. X-rays of the nose were again taken on this date and compared to the prior x-rays of 9/3/13. The findings indicated "there is no acute nasal bone fracture identified. There are no osseious erosive or destructive changes. The nasal septum is midline. Nasal spine appears intact. There are no radiopaque foreign bodies". The impression reads, "No acute fractures or radiopaque foreign bodies identified." PX 1, RX 1.

Nurse Healy noted that laceration was healed and the swelling was gone. She specifically noted, "Alberto denies any nasal bleeding, blurred vision, headache, or snoring/breathing difficulties. Alberto states that his nose looks crooked." On exam of the nose, Nurse Healy noted, "there is a healed laceration to bridge of the nose. Discharge is not present. A contusion is not present. The mucosa is normal. The **septum appears deviated to the right**. Tenderness to palpation is not present. There is no active bleeding from the nares. There is no septal hematoma." His pain level was 0/10. The final assessment was nasal contusion and laceration of the nose. Petitioner was advised that the laceration site and swelling could take up to 6 months to resolve and that he shoulder return if he had any further problems or "if any problems develop." PX 1, RX 1. Petitioner was discharged at full duty. Petitioner never returned to Monee Immediate Care Center.

On September 20, 2017, 4 years later, Petitioner was seen by Dr. Rakhi Thambi at Specialty Physicians of Illinois, LLC (Otolaryngology). Petitioner saw Dr. Thambi for one visit. The record states "40 year old presents secondary to **left-sided nasal obstruction**. He broke his nose 2 ½ years ago and this problem started after that. This problem increases when he is congested. He does snore. No post nasal drip. No rhinorrhea. No allergies. No sneezing." PX 2. Dr. Thambi performed an ENT exam which revealed "**deviated septum to the left and**

concavity left nasal dorsum." He assessed "deviated septum and nasal deformity." Dr. Thambi noted his plan to "refer to Dr. Dixon at UIC for septorhinoplasty." PX 2. RX 2.

Petitioner testified that he has been having problems with snoring and breathing since the incident, disagreeing with the October 4, 2013 report which indicates that he denied having difficulties with snoring or breathing. Petitioner also denied being instructed that he should contact the Monee Immediate Care Center if any problems developed, disagreeing with what was set forth in the report. Petitioner testified that he has experienced difficulty breathing on the left side of his nose from the date of accident to the present. He has been told that he snores. He did not have these complaints prior to the accident. Petitioner testified that the left side of his nose appears different in appearance and to touch from the right side of his nose. Petitioner testified on cross-examination that he was involved in a motor vehicle accident in 2015. He denied injury to his nose in the accident and testified that he did not require any medical attention after the auto accident.

He testified that he wants to undergo the septorhinoplasty procedure recommended by Dr. Thambi. Petitioner testified that he not had the surgery because he cannot afford the deductible and co-payments required by his group insurance policy.

CONCLUSIONS OF LAW

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

As to Issue F, is Petitioner's current condition of ill-being causally-related to the injury, and to Issue K, is Petitioner entitled to any prospective medical care, the Arbitrator finds the following:

Based on the medical evidence at trial, the Arbitrator finds that Petitioner sustained a nasal laceration and contusion as a result of the work accident on September 3, 2013. The Arbitrator finds that the Petitioner's condition of ill-being subsequent to his last date of treatment on October 4, 2013, is not causally related to the accident of September 3, 2013. Based on the Arbitrator's finding on the issue of causal connection, the Arbitrator further denies Petitioner's request for surgery under Section 8(a) of the Act.

In so finding, the Arbitrator notes that all x-rays taken in 2013 indicate no nasal fracture. The initial treatment records of September 3, 2013, and September 6, 2013, state the septum was not deviated. At the time of the final treatment visit in 2013, October 4, 2013, the report states the septum **appears** deviated to the **right**. The Arbitrator finds it further significant that Petitioner denied having problems with breathing or snoring at the time of his last visit on October 4, 2013, and that it is those conditions on which the current request for surgery is based. No surgical recommendation was made in October 2013. Lastly, the October 4, 2013 report states that Petitioner was instructed to contact the clinic if any problems develop. The Petitioner did not return to the clinic.

The Arbitrator further finds it significant that Petitioner waited almost four years after the last treatment date in 2013 to seek any additional treatment despite his assertion that he continued to have significant breathing and snoring problems during this 4 year period. In addition, the history provided to Dr. Thambi in 2017 does not specifically discuss the September 3, 2013 work incident. Rather, the history discussed Petitioner breaking his nose two and a half years earlier which corresponds with the auto accident in which Petitioner denied injury to his nose. The Arbitrator further notes that Dr. Thambi wrote the Petitioner's septum was deviated to the **left**, not the right as discussed in the prior October 4, 2013 record. Finally, Dr. Thambi did not provide a causal

connection opinion stating that the need for the recommended surgical procedure is related to the September 3, 2013 incident and no such medical opinion was provided or specifically supported by the treating records.

Accordingly, based on the record in its entirety, and specifically, the 4 year gap in treatment for symptoms which Petitioner denied having on his last date of treatment in 2013 after the accident, the Arbitrator finds causal connection for Petitioner's nasal condition through October 4, 2013 only. Specifically, the Arbitrator finds that the chain of events supporting a finding of causal connection for Petitioner's initial complaints through October 4, 2013 was severed thereafter by the 4 year gap in treatment. The Arbitrator denies causal connection for any alleged continued symptoms after October 4, 2013 and further denies Petitioner's request for prospective surgery under Section 8(a) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARIO DAVIS,

Petitioner,

vs.

NO: 15 WC 028156

CITY OF BLOOMINGTON,

18IWCC0599

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of medical treatment and partial 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 November 21, 2017, is hereby affirmed and adopted.

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

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

18IWCC0599

Pursuant to §19(f)(2) of the Act, Respondent shall not be required to file bond. 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 - 2018
KWL/mav
O: 08/07/18
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DAVIS, MARIO
Employee/Petitioner

Case# **15WC028156**

16WC005636
16WC005637

CITY OF BLOOMINGTON
Employer/Respondent

On 11/21/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.41% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0000 RUSIN & MACIOROWSKI LTD
MARK COSIMINI
2506 GALEN DR SUITE 108
CARBONDALE, IL 61821

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

Mario Davis
Employee/Petitioner

v.

Case # **15** WC **28156**

Consolidated cases: **16 WC 05636**
16 WC 05637

City of Bloomington
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Nowak**, Arbitrator of the Commission, in the city of **Bloomington**, on **11-29-16**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **7-29-15**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$59,217.20**; the average weekly wage was **$1138.80**.

On the date of accident, Petitioner was **37** years of age, ***single*** with **1** dependent children.

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

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

Respondent shall be given a credit of **$11,049.43** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$11,049.43**.

Respondent is entitled to a credit of **$6028.04** under Section 8(j) of the Act for this accident and for Petitioner's injuries that he sustained in his companion cases 16 WC 05636 and 16 WC 05637.

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $2,954.00 to Advocate BroMenn Healthcare, $309.00 to Bloomington Radiology, $62.49 to Central Illinois Neuro Health Sciences, $23,271.25 to St. Joseph Medical Center, and $483.43 to Bloomington Medical Lab Physicians, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $6,028.04 under Section 8(j) for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Based on the factors enumerated in §8.1b of the Act, which the Arbitrator addressed in the attached findings of fact and conclusions of law, and the record taken as a whole, Respondent shall pay Petitioner permanent partial disability benefits of $683.28/week for 87.5 weeks, because the injuries sustained caused the 17.5% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

11/14/17
Date

ICArbDec p. 2

FINDINGS OF FACT

Petitioner, a 37-year old solid waste collector, sustained accidental injuries that arose out of an in the course of his employment by Respondent to his lower back on 7-29-15 (15 WC 28156) and 11-9-15 (16 WC 05636). Petitioner also claims he sustained accidental injuries that arose out of an in the course of his employment by Respondent on 1-14-16 (16 WC 05637,) however Respondent disputes this accident. These claims were consolidated for arbitration on 11-29-16.

While working on 7-29-15 (15 WC 28156), Petitioner and a co-worker lifted a heavy, wet, full sized mattress to put it in the back of the Respondent's trash collecting truck. When Petitioner and the co-worker lifted the mattress, it bowed in the middle and Petitioner asked his co-worker to put his end down. As the co-worker put the mattress down, it jerked, or jarred, Petitioner's low back. Petitioner experienced immediate low back and left buttock pain.

After the incident, Petitioner reported increased back pain to his boss, Robert Harmon. Petitioner went home and took some Aleve. Petitioner reported the incident to Medcor, Respondent's workplace injury reporting system, later that day.

On 7-29-15, Medcor produced an incident report which stated that Petitioner injured his low back lifting a heavy mattress into the truck. The report stated that when his co-worker put the end of the mattress down, it jarred Petitioner's lower back. The record states that Petitioner took Aleve with no pain relief, that he is limiting his activity, and that he has pain into the back of the left thigh (PX 2).

On 7-31-15, Petitioner treated at his primary care physician's office, Dr. Vales. Dr. Vales' record states that Petitioner had a history that two days ago, he picked up a wet mattress and developed sudden pain in his lower back with pain extending down the left leg. Dr. Vales stated that Petitioner had previously been able to perform his work activities, however in the office today, he is curled up on the side of the table. Dr. Vales stated that when asked to move, it was extremely slowly. Dr. Vales stated this was unusual for Petitioner and that he is usually very muscular and athletic. Dr. Vales stated that Petitioner's pain was in the lumbar area, that he had positive straight leg raising on both legs, worse on the left, decreased reflexes bilaterally, and some numbness in the lateral aspect of the left leg. Dr. Vales noted that Petitioner had an MRI on his back because of back pain a few months ago. Dr. Vales took a history that Petitioner underwent epidural steroid injections and was doing fine after that. Dr. Vales stated, "He needs a repeat MRI. This is a re-injury on the job, and I suspect this may be something more than injections will correct. We will get an MRI and then put him on Flexeril. No work until I see him back in two weeks. We will set him up for a neurosurgical opinion," (PX 3).

On 8-1-15, Petitioner underwent an MRI which the radiologist, Jonathan Foss, stated showed a left paracentral-lateral focal disc extrusion which extends into the left lateral recess and left neural foramen at L5-S1. Dr. Foss stated that there is a posterior displacement of the left S1 nerve root by approximately 5mm and mild effacement of the left anterolateral aspect of the thecal sac without spinal stenosis. Dr. Foss' impression was a focal left paracentral-lateral disc extrusion at L5-S1 with significant displacement of the left S1 nerve root (PX 4).

Dr. Vales referred Petitioner to Dr. Taimoorazy at Guardian Pain Management on 8-7-15. Kristi M. Chioni, FNP-BC, generated a report on 8-7-15 stating that Petitioner's chief complaint was of low back pain with radiation to the left lower extremity. Ms. Chioni stated that Petitioner had a recent injury at work after lifting a wet mattress and experiencing sudden, severe low back pain followed by weakness of the left lower extremity. On exam. Ms. Chioni found that Petitioner's left Achilles reflexes were slightly diminished and that he had slight weakness in the left lower extremity. Ms. Chioni found positive straight leg raising on the left at 40 degrees and positive Patrick's on the left. Ms. Chioni scheduled Petitioner for a left sacroiliac joint injection and a referral for a neurosurgical consult regarding the extrusion of the disc material at L5-S1 (PX 5).

On 8-11-15, Petitioner underwent a left SI joint injection with Dr. Taimoorazy. Dr. Taimoorazy's note states that Petitioner had left lower extremity weakness without localized sensory deficits (PX 23, p. 15). On 8-24-15, Petitioner followed up with Dr. Taimoorazy's office. Ms. Chioni's record from that date states that the injection gave very little relief and that Petitioner had positive numbness and tingling in his left lower extremity and calf (PX 23, p. 13).

On 8-24-15, Petitioner treated with Dr. Vales. Dr. Vales' record stated that since Petitioner's on the job injury lifting a wet mattress, he has had pain down his left leg with numbness and weakness. Dr. Vales stated that Petitioner had an appointment with Dr. Nardone in the afternoon and that he anticipated that Petitioner would undergo surgery before the week was out (PX 6).

On 8-24-15, Petitioner treated with Dr. Nardone, a neurosurgeon. Dr. Nardone took a history that Petitioner had back issues in the past. Dr. Nardone stated that the situation got worse on 7-29-15 when he picked up a wet heavy mattress with a co-worker. After lifting the mattress, Petitioner started to have severe pain traveling to the posterior lateral portion of the left leg down to his foot. Dr. Nardone took a history that the pain has been rather intense and feels somewhat better when he lies down with heat. Petitioner had tingling into the left calf with no bowel or bladder problems. Dr. Nardone's record states that an MRI of the lumbar spine showed a large left sided disc herniation with extrusion that seemed to have gotten worse compared to the previous MRI done a few months ago. Dr. Nardone recommended a minimally invasive left L5-S1 microdiscectomy (PX 7).

On 9-3-15, Petitioner underwent surgery consisting of a minimally invasive left L5-S1 microdiscectomy and laminectomy. The surgical report states that the disc herniation was identified and that the fragments were mobilized from underneath the S1 nerve root and removed. The post-operative diagnosis was disc herniation (PX 8).

Petitioner testified that, post-surgically, he felt significant pain relief with some ongoing back stiffness. Petitioner underwent physical therapy. On 10-8-15, Dr. Nardone ordered a work conditioning program (PX 9).

Petitioner testified that Respondent would not authorize the work hardening program and he returned to work. Petitioner said that when he returned to work on 11-2-15, he still had back stiffness. Petitioner testified that he followed Dr. Nardone's instructions and limited his sitting to 30 minutes at a time. Petitioner said this helped moderate his symptoms.

Petitioner testified that on 11-9-15 (16 WC 05636), he was driving his automated trash collection truck when he extended the trash collecting mechanical arm to pick up a toter (a 95 pound trash can). Petitioner said that the arm knocked the toter over and he got out of the truck to pick the toter up. Petitioner said that the toter was full of garbage and quite heavy and that as he tried to pick it up, he noticed immediate low back pain with pain into his hamstrings.

Petitioner testified that he tried to work through his pain and that he took Aleve and used ice and heat.

Petitioner treated through Respondent's doctor. Dr. Hauter at IWIN. On 11-17-15, Dr. Hauter's record indicates that the treatment was authorized by Employer. Dr. Hauter took a history that on 11-9-15, Petitioner was picking up a toter when he felt a stiffness in his low back with bilateral hamstring stiffness. Dr. Hauter took a history that the pain was initially 5/10 and that it is currently 5/10. Dr. Hauter diagnosed Petitioner with a lumbar muscle/left SI strain. He prescribed a cold pack, medications and physical therapy (PX 17, p.p. 1, 2).

Respondent referred Petitioner to Dr. Andrew Zelby for a Section 12 evaluation on 11-23-15. In a narrative report, Dr. Zelby evaluated both the 7-29-15 and 11-9-15 accidents. Dr. Zelby concluded that Petitioner's current condition was an exacerbation of an underlying condition dating back to December of 2009. Dr. Zelby stated that Petitioner had a microdiscectomy two months before and that there was no evidence, or any medical basis, to suggest that he sustained an S1 strain. He stated that the symptoms were not suggestive of radiculopathy or a current disc herniation (RX 7, Exhibit 2, p.p. 6, 7).

Petitioner continued with physical therapy at IWIN. Petitioner treated with Dr. Hauter on 12-1-15, 12-5-15, and 12-9-15. On 12-23-15, Dr. Hauter's record indicates that Petitioner's symptoms worsened and that the therapist was concerned about left hip pain. Dr. Hauter recommended a cessation of physical therapy and an MRI of the lumbar spine (PX 17, p. 9).

On 12-29-15, Petitioner underwent an MRI. The radiologist, Dr. Yousuf, stated that Petitioner was status left sided laminectomy and discectomy at L5-S1. Dr. Yousuf stated that Petitioner had a suggestion of a small recurrent left paracentral disc herniation at L5-S1 impinging on the left S1 nerve root sleeve. Dr. Yousuf stated that there was associated post-operative scarring (PX 11).

On 12-30-15, Dr. Hauter reviewed the MRI and diagnosed Petitioner with recurrent L5-S1 disc herniation and nerve root compression as well as a lumbar muscle strain. Dr. Hauter continued Petitioner's work restrictions of medium work and referred Petitioner to Dr. Nardone (PX 17, p. 11).

On 1-11-16, Petitioner treated with Dr. Nardone. Dr. Nardone took a history that Petitioner had a history of L5-S1 minimally invasive microdiscectomy and some recurrent pain after a lifting injury. Dr. Nardone stated that neurologically, Petitioner did not have any deficit and that the MRI showed a small recurrent left sided L5-S1 disc herniation. Dr. Nardone recommended conservative care and ordered a left S1 transforaminal epidural injection. Dr. Nardone stated that he would try to employ all conservative treatment before considering surgery (PX 16, p.p. 13, 14).

On 1-13-16, Dr. Hauter evaluated Petitioner. Dr. Hauter stated that Petitioner's symptoms had improved but he still had pain going from a squat position to standing, that he used heat for symptom relief, and that he

continued on medium work conditions. Dr. Hauter diagnosed Petitioner with lumbar muscle strain with recurrent L5-S1 disc herniation (PX 17, p. 13).

On 1-14-16 (16 WC 05637), Petitioner was trying to open a gate to the Respondent's grounds. Petitioner said that the gate dug into the ground and that while he was pulling on it, he experienced a sharp pain in his right lower back, right hamstring, and right hip. Petitioner said that he kept working.

Respondent authorized treatment with Dr. Hauter on 1-20-16. Dr. Hauter took a history that Petitioner was closing a gate and as he went to pull it, he got a sharp pain in his right lower back and right hamstring. Dr. Hauter stated that Petitioner described his symptoms as a tightness and charley horse pain. Dr. Hauter diagnosed Petitioner with a right hamstring strain with no muscle tear (PX 17, p. 31).

On 1-27-16, Dr. Hauter recommended physical therapy and a cortisone injection with Dr. Taimoorazy (PX 17, p. 15). On 1-27-16, Petitioner began physical therapy. The therapist stated that Petitioner presented with a history of right lumbar and thigh symptoms with an onset date two weeks ago pulling on a stuck gate (PX 17, p. 25).

On 2-12-16, Petitioner underwent another MRI of the lumbar area. The radiologist, Dr. Yousef, stated that Petitioner was status left sided laminectomy and discectomy at L5-S1 with mild post-operative scarring in the left lateral recess and around the left lateral recess and around the left S1 nerve root sleeve. The radiologist stated that there was no evidence of recurrent or residual disc herniation (PX 12).

On 2-17-16, Petitioner underwent a left L5-S1 epidural injection at Dr. Taimoorazy's office (PX 23, p. 8, 9). Petitioner said that he had some improvement post-injection.

On 2-24-16, Dr. Hauter's record states that Petitioner returned for an evaluation of a lumbar muscle strain. Dr. Hauter stated that the symptoms have not improved and that he still has 4/10 pain in the right hamstring. Dr. Hauter noted that Petitioner was on medium work and that the employer is compliant. Dr. Hauter stated that the left sided pain has improved since the 2-19-16 injection, but that he has some positional pain and occasional numbness with sitting for long periods of time. Dr. Hauter stated that Petitioner had positional pain on the right side that is deep and occasionally travels to the hip. Dr. Hauter stated that the MRI demonstrated resolution of the recurrent herniated disc at L5-S1, but the scar tissue remains from the prior surgery. Dr. Hauter released Petitioner to return to work without restriction (PX 17, p. 16).

On 2-29-16, Petitioner treated with Ms. Chioni at Dr. Taimoorazy's office. Ms. Chioni noted that Petitioner had left low back pain with left lower extremity pain, status post L5-S1 microdiscectomy with scarring and SI pain with low back pain. Ms. Chioni noted a positive Patrick's on the right with ongoing right low back pain after pulling a gate at work (PX 23, p. 6).

On 3-7-16, Petitioner treated with Dr. Nardone. Dr. Nardone's record states that Petitioner had a recurrent disc herniation in December and that the left leg pain has improved although he still has a little bit of hip pain. Dr. Nardone stated that Petitioner had an injection which improved the pain. Dr. Nardone stated that Petitioner's last MRI showed pretty much a resolution of the disc herniation with residual disc bulge. Dr.

Nardone recommended that Petitioner progress and advance his activity. Dr. Nardone released Petitioner prn (RX 3).

On 3-9-16. Petitioner treated with Dr. Hauter. Dr. Hauter's record states that Petitioner continued to have pain in his right hamstring and that his current level was "uncomfortable." Dr. Hauter stated that Petitioner had occasional pain which was positional. Dr. Hauter stated that Petitioner had appropriate strength and mobility to return to full work. Dr. Hauter released Petitioner at MMI (RX 4).

On 4-7-16. Petitioner underwent an SI joint injection for the right sacroiliitis with Dr. Taimoorazy's office. Dr. Taimoorazy's diagnosis was right sacroiliitis. low back pain, lumbar spondylosis (PX 23, p. 3, 4).

On 4-21-16, Ms. Chioni released Petitioner at MMI. Ms. Chioni's assessment was right low back pain, right leg pain and SI joint pain, much improved after the SI joint injection. Ms. Chioni instructed Petitioner to call if the pain returns and to repeat the procedure (PX 23, p. 1).

Petitioner testified to previous back pain beginning in 2009.

On 12-28-09, Petitioner had treated with his family doctor, Dr. Vales, for left sided low back pain after shoveling snow in his driveway. Dr. Vales noted that Petitioner had a history of some low back pain in the past after moving furniture. Dr. Vales noted that Petitioner's job for the City of Bloomington required a lot of lifting and twisting and throwing. Dr. Vales diagnosed lumbar strain (RX 1, p.p. 1-3). On 1-8-10, Petitioner underwent an MRI of the lumbar spine which the radiologist, Dr. Vyas, stated showed low grade degenerative changes with no indication of nerve root impingement (PX 13, RX 1, p. 9). Petitioner underwent physical therapy from 2-2-10 through 2-26-10 (RX 1, p.p. 21-23).

Dr. Vales treated Petitioner for left sided sciatica and ordered an MRI on 7-30-10. The radiologist, Dr. Yousef, stated that Petitioner had a moderate size focal left paracentral disc herniation at L5-S1 impinging on the left S1 nerve root sleeve and the lateral recess with a mild degree of central stenosis (PX 14, RX 1, p. 24).

On 9-3-10, Petitioner treated with Dr. Rink for a large L5-S1 disc herniation with left radiculopathy which was improving (RX 1, p. 31). Petitioner treated chiropractically in 2010 (RX 1, p.p. 32-39).

On 10-4-12, Petitioner treated for a work related lumbar back pain. Dr. Griffith diagnosed him with lumbar back muscle sprain and spasm without radicular symptoms (RX 1, p.p. 41, 42). Petitioner underwent treatment through 11-27-12 (RX 1, p.p. 49-56).

On 1-20-15, Petitioner treated with PCP Primary Care for low back and left leg pain (RX 1, p.p. 61-63).

On 5-7-15, Petitioner treated with Dr. Carmichael, a physiatrist, at McLean County Orthopedics. Dr. Carmichael took a history that Petitioner had low back pain which went down the left leg to the knee. Dr. Carmichael stated that Petitioner had this pain for a few months (PX 19, p.p. 20, 21; RX 1, p.p. 74, 75). Dr. Carmichael ordered an MRI on 5-8-15. The radiologist, Dr. Austin, stated that there is a large left paracentral disc protrusion which appears to contact the descending left S1 nerve root. There is severe left neural foraminal narrowing. Under "impression," Dr. Austin stated that Petitioner had a left paracentral disc protrusion at L5-S1

with severe left neural foraminal narrowing. Dr. Austin stated that the disc protrusion appears to contact the left S1 nerve root (PX 15, RX 1, p.p. 76, 77).

On 5-26-15, Dr. Carmichael performed a left L5-S1 transforaminal epidural injection (PX 19, p.p. 22, 23; RX 1, p.p. 80, 81). On 6-11-15, Dr. Carmichael stated that Petitioner had symptoms of left back and leg pain, but that he was feeling quite a bit better. Dr. Carmichael stated that aggravating factors were bending, lifting and twisting at work and that alleviating factors were rest. Dr. Carmichael's working diagnosis was lumbosacral radiculitis. Petitioner was encouraged to continue strength training in the gym. Dr. Carmichael stated that Petitioner was pretty strongly opposed to surgery (PX 19, p. 17; RX 1, p. 85).

Petitioner did not treat for his low back and left leg pain between 6-11-15 until after his accident on 7-29-15. Petitioner testified that he continued full duty work and that his left leg and back pain improved after the 5-26-15 injection. Petitioner said that when he went to work on 7-29-15, he experienced only a slight intermittent pain in his low back towards his left buttock. This testimony is unrebutted.

Petitioner said that after the 7-29-15 accident, he experienced instant pain into his low back and left buttock. Petitioner stated that the pain was constant and severe and that he had trouble walking.

Petitioner said that when he returned to work on 11-2-15, his leg pain was significantly better. Petitioner said that his back was sore and stiff, but he was able to do his job.

Petitioner said that after his 11-9-15 accident, his left leg and hamstring felt weaker and that he had some ongoing left leg pain.

Petitioner testified that after his 1-14-16 accident, he experienced ongoing right hip pain. Petitioner testified that the two injections he received from Dr. Taimoorazy helped somewhat.

At the time of arbitration, Petitioner testified that he continued to experience stiffness in his low back, especially on the right side and right hip. Petitioner said that sitting and standing aggravates his low back and right hip. Petitioner said that his back feels weaker and that he is careful with twisting and turning activities.

Petitioner testified that he was 37 years old at the dates of all 3 accidents, that he had continued to work as a solid waste collector for Respondent since his accidents, and that he had received a small cost of living raise in 2016.

Petitioner testified on cross that he had been a weight lifter for over 20 years before his accident on 7-29-15. Petitioner testified that he had not returned to weight lifting since his 7-29-15 accident.

Dr. Andrew Zelby testified for Respondent by deposition on 8-29-16. Dr. Zelby testified that he was a board certified neurosurgeon for 20 years and that he evaluated Petitioner at Respondent's request on 11-23-15 (RX 7, p.p. 4-6). Dr. Zelby testified that he took a history of Petitioner's 7-29-15 and 11-9-15 accidents and of Petitioner's previous back problems beginning in December of 2009 (RX 7, p.p. 8, 9). Dr. Zelby said that he reviewed records dating back to 2009 including treatment through 2015. Dr. Zelby opined that the medical evidence, Petitioner's symptoms, his findings on exam, and the diagnostic studies, do not allow a reasonable diagnosis that could be associated with a work injury. Dr. Zelby concluded that Petitioner's condition was a

long standing, long symptomatic condition that was not aggravated, exacerbated, accelerated, or even made symptomatic as a result of the work injury (RX 7, p.p. 16. 17). Dr. Zelby testified that Petitioner's left sided microdiscectomy was reasonable and necessary medical care for his underlying condition, but unrelated to any work injury or work activities (RX 7, p. 17).

Dr. Zelby opined that Petitioner's accident in November of 2015 appeared to be an exacerbation of his underlying condition associated with a return to activities two months out from a microdiscectomy. Dr. Zelby stated that the symptoms were not suggestive of radiculopathy or recurrent disc herniation. Dr. Zelby opined that Petitioner would likely have continued episodes of back pain related to his long standing spinal condition (RX 7, p. 18).

On cross, Dr. Zelby stated that his report indicated that Petitioner had a soft tissue muscular strain as a result of his 7-29-15 work accident (RX 7, p.p. 21, 22). On cross, Dr. Zelby acknowledged that lifting a wet mattress in a jerking sensation is the type of injury that could aggravate an already pre-existing herniated disc; however, based on the two MRIs from before and after the accident, he did not think that this occurred (RX 7, p.p. 26, 27).

Dr. Nardone testified by deposition on 8-4-16. Dr. Nardone testified that he is board certified in neurosurgery since 1997 (PX 1, p.p. 4, 5). Dr. Nardone testified that he first treated Petitioner on 8-24-15. Dr. Nardone said that at that time he took a history from Petitioner that he had ongoing back issues with back and left leg pain, but that his situation got worse when he picked up a heavy mattress at work on 7-29-15. Dr. Nardone said that after the 7-29-15 accident, Petitioner's symptoms worsened and he began having more severe pain down the left leg and left foot (PX 1, p.p. 5, 6). Dr. Nardone testified that he reviewed the MRI film of 8-1-15 and found that Petitioner had significant displacement of the left S1 nerve root which caused his left leg symptoms (PX 1, p. 7).

Dr. Nardone testified that he performed surgery on 9-3-15 consisting of a laminectomy and discectomy. Dr. Nardone said during surgery he could appreciate disc fragments that came out of the disc space and were impinging on the nerve (PX 1, p. 8).

Dr. Nardone testified that on 11-16-15 Petitioner gave him a new history of injury picking up a garbage can at work (PX 1, p. 9). Dr. Nardone testified that he treated Petitioner on 1-11-16 and recommended transforaminal epidural injections. Dr. Nardone said that he last treated Petitioner on 3-7-16. At that time, Petitioner's leg pain had improved after the injection and he showed some resolution of the recurrent disc herniation (PX 1, p.p. 11, 12).

Dr. Nardone opined that Petitioner's 7-29-15 work accident aggravated a previous disc herniation. Dr. Nardone testified that the 7-29-15 accident likely increased the size of the disc herniation that made him more clinically symptomatic. Dr. Nardone opined that there is a direct correlation between the 7-29-15 accident and the need for the surgery. Dr. Nardone stated that Petitioner's prognosis was good although he had some scarring around the surgical site and that he had a higher risk of reherniation. Dr. Nardone testified that Petitioner had some bone loss from the laminectomy. Dr. Nardone opined that after the 11-9-15 accident, the 12-29-15 MRI showed a recurrent disc herniation (PX 1, p.p. 14, 15).

On cross, Dr. Nardone testified that he did not remember if he saw the actual films from the MRIs before Petitioner's 7-29-15 accident, but that he had reviewed the radiologist's report and Dr. Carmichael's records (PX 1, p. 16). Dr. Nardone stated that he thought the disc had gotten bigger between the 5-8-15 MRI and the 8-1-15 MRI and that the radiologists stated that the 8-1-15 MRI showed a large disc herniation with more S1 nerve impingement than the 5-8-15 MRI (PX 1, p.p. 17, 18).

On cross, Dr. Nardone opined that Petitioner's disc herniation as shown on the 12-29-15 MRI had resolved and that his symptoms had improved. Dr. Nardone stated that he discharged Petitioner in March, 2016 with no restrictions (PX 1, p. 20).

CONCLUSIONS

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

The Arbitrator relies on the medical records introduced by both parties at Arbitration, Petitioner's testimony, and Dr. Nardone's opinion and finds that Petitioner's 7-29-15 work accident aggravated a pre-existing left sided L5-S1 disc herniation contributing to the need for his surgery on 9-3-15.

In making this finding, the Arbitrator notes that Dr. Nardone was aware of Petitioner's pre-existing condition, including Dr. Carmichael's treatment and the 5-8-15 MRI. He opined that Petitioner's 7-29-15 accident likely increased the size of the disc herniation, making it clinically more symptomatic, so that Petitioner's required surgery.

The Arbitrator finds that Dr. Nardone's opinions are consistent with the contemporaneous medical records. Dr. Vales, Petitioner's treating family doctor, evaluated Petitioner 2 days after the accident and noted that, although Petitioner had a history of prior back problems (including treatment a few months before), his condition changed significantly after picking up a wet mattress on 7-29-15. Dr. Vales had a long history of treating Petitioner and much of the prior back care was through his office (RX 1). On 7-31-15, Dr. Vales stated that Petitioner is usually very muscular and athletic, however he was curled up on the side of the table, he had positive straight leg raising on both legs, worse on the left, decreased reflexes bilaterally, and numbness. Dr. Vales ordered an immediate MRI and referred him to a neurosurgical consult. Dr. Vales further indicated, in his 7-31-15 note, that this was a re-injury on the job and that he suspected this Petitioner's condition was something injections would not correct (PX 3).

The Arbitrator's finding is supported by the records of Dr. Taimoorazy. On 8-7-15, Ms. Chioni treated Petitioner and noted his history of accident on 7-29-15 with sudden severe/low back pain followed by weakness and pain in the left lower extremity. Ms. Chioni's exam was consistent with a left sided neurological deficit and she recommended a neurosurgical consult.

In making a finding of causation, the Arbitrator also relies on the MRI reports of 5-8-15 and 8-1-15 which, although drafted by different radiologists, seem to show a change. On 5-8-15, Dr. Austin stated that there was a large paracentral disc protrusion which appears to contact the descending left S1 nerve root with severe left neural foraminal narrowing (PX 15, RX 1). On the 8-1-15 MRI, Dr. Foss stated that there was posterior displacement of the left S1 nerve root by approximately 5 mm and mild effacement of the left

anterolateral aspect of the thecal sac without spinal stenosis. Dr. Foss' impression was a left paracentral-lateral disc herniation at L5-S1 with significant displacement of the left S1 nerve root (PX 4).

Although Petitioner had several MRIs before 7-29-15, no radiologist had measured the size of the disc herniation until 8-1-15. The terminology, in addition to the measurement, suggests a progression.

In finding causation, the Arbitrator is influenced by Petitioner's testimony and the records which indicate that, although Petitioner treated for low back pain with pain radiating into the left lower extremity in May and June of 2015, his symptoms improved after an epidural injection on 5-26-15. The Arbitrator notes that Petitioner was able to perform his full time duties as a solid waste collector until his accident on 7-29-15. Petitioner was taken off work after 7-29-15 and remained off until after his surgery. The Arbitrator finds that the nature of Petitioner's symptoms changed after the 7-29-15 accident, in that the left leg and back was acute, unrelenting and persistent until the surgery on 9-3-15. Prior to the 7-29-15 accident, Petitioner obtained relief from epidural injections, but after 7-29-15, the injections offered no relief.

The Arbitrator further notes that prior to Petitioner's 7-29-15 accident, no provider referred Petitioner to a back surgeon. After the 7-29-15 accident Dr. Vales referred Petitioner to a neurosurgeon on 7-31-15 and Ms. Chioni referred Petitioner to a neurosurgeon on 8-7-15.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds that Petitionerhas met his burden of establishing that his current condition of ill-being is causally related to the 7-29-15 accident which contributed to a worsening or exacerbation of his L5-S1 disc herniation requiring surgery on 9-3-15.

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

Having found causation, the Arbitrator Orders Respondent to pay the following reasonable and necessary medical services, pursuant to the medical fee schedule, as follows:

Advocate BroMenn Healthcare	$2,954.00
Bloomington Radiology	$309.00
Central Illinois Neuro Health Sciences	$62.49
St. Joseph Medical Center	$23,271.25
Bloomington Med Lab Physicians	$483.46.

Respondent shall be given credit for amounts paid by Respondent's group carrier, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Issue (L): What is the nature and extent of the injury?

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 is to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of §8.1b of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the

treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that neither party submitted an impairment rating. The Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a solid waste collector for Respondent at the time of the accident and that he is able to return to his work in his prior capacity since his injury. The Arbitrator therefore gives *some* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 37 years old at the time of the accident. The Arbitrator finds that Petitioner is a younger individual and concludes that Petitioner's partial disability will be more extensive than that of an older individual. The Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes there is no direct evidence of reduced earning capacity contained in the record. The Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the Petitioner was a credible witness. The Arbitrator finds that Petitioner's testimony that he has continued to experience left sided low back pain and stiffness is supported by the medical records. In finding this, the Arbitrator notes that on 3-7-16, Dr. Nardone stated that Petitioner had some continued pain with some improvement after a recent injection. On 3-9-16, Dr. Hauter stated that Petitioner had occasional right and left pain which was positional.

The Arbitrator also finds that, consistent with Dr. Nardone's opinions, as a result of Petitioner's work accident on 7-29-15 and the resulting surgery, he is pre-disposed to a higher risk of reherniation. In fact, Petitioner re-herniated his L5-S1 disc in an 11-9-15 work accident (see companion case 16 WC 05636). The Arbitrator finds that Petitioner's risk of reherniation after his 7-29-15 accident demonstrates permanency as does the bone loss from the laminectomy, the scar tissue from the discectomy reflected in the subsequent MRIs, and Petitioner's ongoing complaints of low back pain and stiffness.

Because the medical records and evidence taken as a whole corroborate the Petitioner's complaints, the Arbitrator therefore gives *greater* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 17.5% loss of use of the person as a whole pursuant to §8(d)2 of the Act.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARIO DAVIS,

Petitioner,

vs. NO: 16 WC 005636

CITY OF BLOOMINGTON,

Respondent.

18IWCC0600

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection between Petitioner's medical expenses and Petitioner's November 9, 2015, accident 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 presiding Arbitrator found Petitioner failed to establish that his then-current condition of ill-being was causally related to the November 9, 2015, accident. Petitioner testified to accidently knocking over a fully-laden trash can and to experiencing immediate pain in his low back and hamstrings when he went to pick the trash can up. Following this incident, Petitioner underwent a conservative course of medical treatment through IWIN. The medical treatment consisted of physical therapy as well as medication and cold therapy. The medical treatment also included an MRI being taken on December 29, 2015, that suggested a small recurrent left paracentral disc herniation at L5-S1 that impinged on the left S1 nerve root sleeve. Petitioner was accordingly diagnosed by Dr. Hauter, his treating physician, as having a lumbar muscle strain with a recurrent L5-S1 disc herniation. A repeat MRI of Petitioner's low back was taken on February 12, 2016, following another injury to Petitioner's low back on January 14, 2016. This MRI found no evidence of a recurrent or residual disc herniation.

The Commission notes Petitioner had earlier injured his lower back on July 29, 2015, in a

work-related accident and was actively treating symptoms that resulted from that injury when he experienced the accident on November 9, 2015. The injuries that resulted from the November 9, 2015, accident, based on the subsequent medical records, are found to be an aggravation of Petitioner's July 29, 2015, accident and either resolved, i.e. the recurrent disc herniation, or were consumed when Petitioner had his January 14, 2016, accident.

The Commission notes further Petitioner filed a claim with the Commission as a result of his July 29, 2015, accident and was found to have sustained a 17.5% loss of the person as a whole as result of said accident. The Commission declines to award Petitioner benefits under Section 8(d)(2) of the Act for the injuries sustained in the accident that is the subject of this present claim as the those injuries were an aggravation of the injuries sustained as a result of the July 29, 2015, accident and, more significantly, Petitioner failed to demonstrate how this accident and resultant injuries resulted in a permanent partial disability that was demonstrably different and could be separated from the injuries for which compensation was awarded.

The Commission finds Petitioner's November 9, 2015, accident resulted in injuries that reasonably and necessarily required Petitioner to seek medical treatment. The medical treatment obtained from November 9, 2015, until January 13, 2016, is found to be causally related to Petitioner's November 9, 2015, accident. To that end, the Commission modifies the Decision of the Arbitrator to reflect this.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner for medical expenses incurred from November 9, 2015, through January 13, 2016 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.

Pursuant to §19(f)(2) of the Act, Respondent shall not be required to file bond. 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 - 2018
KWL/mav
O: 08/07/18
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DAVIS, MARIO
Employee/Petitioner

Case# **16WC005636**

15WC028156
16WC005637

CITY OF BLOOMINGTON
Employer/Respondent

18IWCC0600

On 11/21/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.41% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0000 RUSIN & MACIOROWSKI LTD
MARK COSIMINI
2506 GALEN DR SUITE 108
CARBONDALE, IL 61821

18IWCC0600

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

Mario Davis
Employee/Petitioner

v.

City of Bloomington
Employer/Respondent

Case # 16 WC 05636

Consolidated cases: 15 WC 28156
16 WC 05637

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Nowak**, Arbitrator of the Commission, in the city of **Bloomington**, on **11-29-16**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

 18IWCC0600

FINDINGS

On **11-9-15**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$59,217.20**; the average weekly wage was **$1138.80**.

On the date of accident, Petitioner was **37** years of age, *single* with **1** dependent children.

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

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

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

Respondent is entitled to a credit of **$6028.04** under Section 8(j) of the Act for this accident and for Petitioner's injuries that he sustained in his companion cases of 15 WC 28156 and 16 WC 05637.

ORDER

Because Petitioner failed to meet his burden of establishing that his current condition of ill-being is causally related to the accident of 11/9/15, benefits are denied. Benefits are, however awarded in companion case 15 WC 28156 for injuries sustained on 7/29/15.

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

11/15/17
Date

NOV 21 2017

FINDINGS OF FACT

Petitioner, a 37-year old solid waste collector, sustained accidental injuries that arose out of an in the course of his employment by Respondent to his lower back on 7-29-15 (15 WC 28156) and 11-9-15 (16 WC 05636). Petitioner also claims he sustained accidental injuries that arose out of an in the course of his employment by Respondent on 1-14-16 (16 WC 05637,) however Respondent disputes this accident. These claims were consolidated for arbitration on 11-29-16.

While working on 7-29-15 (15 WC 28156), Petitioner and a co-worker lifted a heavy, wet, full sized mattress to put it in the back of the Respondent's trash collecting truck. When Petitioner and the co-worker lifted the mattress, it bowed in the middle and Petitioner asked his co-worker to put his end down. As the co-worker put the mattress down, it jerked, or jarred, Petitioner's low back. Petitioner experienced immediate low back and left buttock pain.

After the incident, Petitioner reported increased back pain to his boss, Robert Harmon. Petitioner went home and took some Aleve. Petitioner reported the incident to Medcor, Respondent's workplace injury reporting system, later that day.

On 7-29-15, Medcor produced an incident report which stated that Petitioner injured his low back lifting a heavy mattress into the truck. The report stated that when his co-worker put the end of the mattress down, it jarred Petitioner's lower back. The record states that Petitioner took Aleve with no pain relief, that he is limiting his activity, and that he has pain into the back of the left thigh (PX 2).

On 7-31-15, Petitioner treated at his primary care physician's office, Dr. Vales. Dr. Vales' record states that Petitioner had a history that two days ago, he picked up a wet mattress and developed sudden pain in his lower back with pain extending down the left leg. Dr. Vales stated that Petitioner had previously been able to perform his work activities, however in the office today, he is curled up on the side of the table. Dr. Vales stated that when asked to move, it was extremely slowly. Dr. Vales stated this was unusual for Petitioner and that he is usually very muscular and athletic. Dr. Vales stated that Petitioner's pain was in the lumbar area, that he had positive straight leg raising on both legs, worse on the left, decreased reflexes bilaterally, and some numbness in the lateral aspect of the left leg. Dr. Vales noted that Petitioner had an MRI on his back because of back pain a few months ago. Dr. Vales took a history that Petitioner underwent epidural steroid injections and was doing fine after that. Dr. Vales stated, "He needs a repeat MRI. This is a re-injury on the job, and I suspect this may be something more than injections will correct. We will get an MRI and then put him on Flexeril. No work until I see him back in two weeks. We will set him up for a neurosurgical opinion," (PX 3).

On 8-1-15, Petitioner underwent an MRI which the radiologist, Jonathan Foss, stated showed a left paracentral-lateral focal disc extrusion which extends into the left lateral recess and left neural foramen at L5-S1. Dr. Foss stated that there is a posterior displacement of the left S1 nerve root by approximately 5mm and mild effacement of the left anterolateral aspect of the thecal sac without spinal stenosis. Dr. Foss' impression was a focal left paracentral-lateral disc extrusion at L5-S1 with significant displacement of the left S1 nerve root (PX 4).

Dr. Vales referred Petitioner to Dr. Taimoorazy at Guardian Pain Management on 8-7-15. Kristi M. Chioni, FNP-BC, generated a report on 8-7-15 stating that Petitioner's chief complaint was of low back pain with radiation to the left lower extremity. Ms. Chioni stated that Petitioner had a recent injury at work after lifting a wet mattress and experiencing sudden, severe low back pain followed by weakness of the left lower extremity. On exam. Ms. Chioni found that Petitioner's left Achilles reflexes were slightly diminished and that he had slight weakness in the left lower extremity. Ms. Chioni found positive straight leg raising on the left at 40 degrees and positive Patrick's on the left. Ms. Chioni scheduled Petitioner for a left sacroiliac joint injection and a referral for a neurosurgical consult regarding the extrusion of the disc material at L5-S1 (PX 5).

On 8-11-15, Petitioner underwent a left SI joint injection with Dr. Taimoorazy. Dr. Taimoorazy's note states that Petitioner had left lower extremity weakness without localized sensory deficits (PX 23, p. 15). On 8-24-15, Petitioner followed up with Dr. Taimoorazy's office. Ms. Chioni's record from that date states that the injection gave very little relief and that Petitioner had positive numbness and tingling in his left lower extremity and calf (PX 23, p. 13).

On 8-24-15, Petitioner treated with Dr. Vales. Dr. Vales' record stated that since Petitioner's on the job injury lifting a wet mattress, he has had pain down his left leg with numbness and weakness. Dr. Vales stated that Petitioner had an appointment with Dr. Nardone in the afternoon and that he anticipated that Petitioner would undergo surgery before the week was out (PX 6).

On 8-24-15, Petitioner treated with Dr. Nardone, a neurosurgeon. Dr. Nardone took a history that Petitioner had back issues in the past. Dr. Nardone stated that the situation got worse on 7-29-15 when he picked up a wet heavy mattress with a co-worker. After lifting the mattress, Petitioner started to have severe pain traveling to the posterior lateral portion of the left leg down to his foot. Dr. Nardone took a history that the pain has been rather intense and feels somewhat better when he lies down with heat. Petitioner had tingling into the left calf with no bowel or bladder problems. Dr. Nardone's record states that an MRI of the lumbar spine showed a large left sided disc herniation with extrusion that seemed to have gotten worse compared to the previous MRI done a few months ago. Dr. Nardone recommended a minimally invasive left L5-S1 microdiscectomy (PX 7).

On 9-3-15, Petitioner underwent surgery consisting of a minimally invasive left L5-S1 microdiscectomy and laminectomy. The surgical report states that the disc herniation was identified and that the fragments were mobilized from underneath the S1 nerve root and removed. The post-operative diagnosis was disc herniation (PX 8).

Petitioner testified that, post-surgically, he felt significant pain relief with some ongoing back stiffness. Petitioner underwent physical therapy. On 10-8-15, Dr. Nardone ordered a work conditioning program (PX 9).

Petitioner testified that Respondent would not authorize the work hardening program and he returned to work. Petitioner said that when he returned to work on 11-2-15, he still had back stiffness. Petitioner testified that he followed Dr. Nardone's instructions and limited his sitting to 30 minutes at a time. Petitioner said this helped moderate his symptoms.

Petitioner testified that on 11-9-15 (16 WC 05636), he was driving his automated trash collection truck when he extended the trash collecting mechanical arm to pick up a toter (a 95 pound trash can). Petitioner said that the arm knocked the toter over and he got out of the truck to pick the toter up. Petitioner said that the toter was full of garbage and quite heavy and that as he tried to pick it up, he noticed immediate low back pain with pain into his hamstrings.

Petitioner testified that he tried to work through his pain and that he took Aleve and used ice and heat.

Petitioner treated through Respondent's doctor. Dr. Hauter at IWIN. On 11-17-15, Dr. Hauter's record indicates that the treatment was authorized by Employer. Dr. Hauter took a history that on 11-9-15, Petitioner was picking up a toter when he felt a stiffness in his low back with bilateral hamstring stiffness. Dr. Hauter took a history that the pain was initially 5/10 and that it is currently 5/10. Dr. Hauter diagnosed Petitioner with a lumbar muscle/left SI strain. He prescribed a cold pack, medications and physical therapy (PX 17, p.p. 1, 2).

Respondent referred Petitioner to Dr. Andrew Zelby for a Section 12 evaluation on 11-23-15. In a narrative report, Dr. Zelby evaluated both the 7-29-15 and 11-9-15 accidents. Dr. Zelby concluded that Petitioner's current condition was an exacerbation of an underlying condition dating back to December of 2009. Dr. Zelby stated that Petitioner had a microdiscectomy two months before and that there was no evidence, or any medical basis, to suggest that he sustained an S1 strain. He stated that the symptoms were not suggestive of radiculopathy or a current disc herniation (RX 7, Exhibit 2, p.p. 6, 7).

Petitioner continued with physical therapy at IWIN. Petitioner treated with Dr. Hauter on 12-1-15, 12-5-15, and 12-9-15. On 12-23-15, Dr. Hauter's record indicates that Petitioner's symptoms worsened and that the therapist was concerned about left hip pain. Dr. Hauter recommended a cessation of physical therapy and an MRI of the lumbar spine (PX 17, p. 9).

On 12-29-15, Petitioner underwent an MRI. The radiologist, Dr. Yousuf, stated that Petitioner was status left sided laminectomy and discectomy at L5-S1. Dr. Yousuf stated that Petitioner had a suggestion of a small recurrent left paracentral disc herniation at L5-S1 impinging on the left S1 nerve root sleeve. Dr. Yousuf stated that there was associated post-operative scarring (PX 11).

On 12-30-15, Dr. Hauter reviewed the MRI and diagnosed Petitioner with recurrent L5-S1 disc herniation and nerve root compression as well as a lumbar muscle strain. Dr. Hauter continued Petitioner's work restrictions of medium work and referred Petitioner to Dr. Nardone (PX 17, p. 11).

On 1-11-16, Petitioner treated with Dr. Nardone. Dr. Nardone took a history that Petitioner had a history of L5-S1 minimally invasive microdiscectomy and some recurrent pain after a lifting injury. Dr. Nardone stated that neurologically, Petitioner did not have any deficit and that the MRI showed a small recurrent left sided L5-S1 disc herniation. Dr. Nardone recommended conservative care and ordered a left S1 transforaminal epidural injection. Dr. Nardone stated that he would try to employ all conservative treatment before considering surgery (PX 16, p.p. 13, 14).

On 1-13-16, Dr. Hauter evaluated Petitioner. Dr. Hauter stated that Petitioner's symptoms had improved but he still had pain going from a squat position to standing, that he used heat for symptom relief, and that he

continued on medium work conditions. Dr. Hauter diagnosed Petitioner with lumbar muscle strain with recurrent L5-S1 disc herniation (PX 17, p. 13).

On 1-14-16 (16 WC 05637), Petitioner was trying to open a gate to the Respondent's grounds. Petitioner said that the gate dug into the ground and that while he was pulling on it, he experienced a sharp pain in his right lower back, right hamstring, and right hip. Petitioner said that he kept working.

Respondent authorized treatment with Dr. Hauter on 1-20-16. Dr. Hauter took a history that Petitioner was closing a gate and as he went to pull it, he got a sharp pain in his right lower back and right hamstring. Dr. Hauter stated that Petitioner described his symptoms as a tightness and charley horse pain. Dr. Hauter diagnosed Petitioner with a right hamstring strain with no muscle tear (PX 17, p. 31).

On 1-27-16, Dr. Hauter recommended physical therapy and a cortisone injection with Dr. Taimoorazy (PX 17, p. 15). On 1-27-16, Petitioner began physical therapy. The therapist stated that Petitioner presented with a history of right lumbar and thigh symptoms with an onset date two weeks ago pulling on a stuck gate (PX 17, p. 25).

On 2-12-16, Petitioner underwent another MRI of the lumbar area. The radiologist, Dr. Yousef, stated that Petitioner was status left sided laminectomy and discectomy at L5-S1 with mild post-operative scarring in the left lateral recess and around the left lateral recess and around the left S1 nerve root sleeve. The radiologist stated that there was no evidence of recurrent or residual disc herniation (PX 12).

On 2-17-16, Petitioner underwent a left L5-S1 epidural injection at Dr. Taimoorazy's office (PX 23, p. 8, 9). Petitioner said that he had some improvement post-injection.

On 2-24-16, Dr. Hauter's record states that Petitioner returned for an evaluation of a lumbar muscle strain. Dr. Hauter stated that the symptoms have not improved and that he still has 4/10 pain in the right hamstring. Dr. Hauter noted that Petitioner was on medium work and that the employer is compliant. Dr. Hauter stated that the left sided pain has improved since the 2-19-16 injection, but that he has some positional pain and occasional numbness with sitting for long periods of time. Dr. Hauter stated that Petitioner had positional pain on the right side that is deep and occasionally travels to the hip. Dr. Hauter stated that the MRI demonstrated resolution of the recurrent herniated disc at L5-S1, but the scar tissue remains from the prior surgery. Dr. Hauter released Petitioner to return to work without restriction (PX 17, p. 16).

On 2-29-16, Petitioner treated with Ms. Chioni at Dr. Taimoorazy's office. Ms. Chioni noted that Petitioner had left low back pain with left lower extremity pain, status post L5-S1 microdiscectomy with scarring and SI pain with low back pain. Ms. Chioni noted a positive Patrick's on the right with ongoing right low back pain after pulling a gate at work (PX 23, p. 6).

On 3-7-16, Petitioner treated with Dr. Nardone. Dr. Nardone's record states that Petitioner had a recurrent disc herniation in December and that the left leg pain has improved although he still has a little bit of hip pain. Dr. Nardone stated that Petitioner had an injection which improved the pain. Dr. Nardone stated that Petitioner's last MRI showed pretty much a resolution of the disc herniation with residual disc bulge. Dr.

Nardone recommended that Petitioner progress and advance his activity. Dr. Nardone released Petitioner prn (RX 3).

On 3-9-16. Petitioner treated with Dr. Hauter. Dr. Hauter's record states that Petitioner continued to have pain in his right hamstring and that his current level was "uncomfortable." Dr. Hauter stated that Petitioner had occasional pain which was positional. Dr. Hauter stated that Petitioner had appropriate strength and mobility to return to full work. Dr. Hauter released Petitioner at MMI (RX 4).

On 4-7-16. Petitioner underwent an SI joint injection for the right sacroiliitis with Dr. Taimoorazy's office. Dr. Taimoorazy's diagnosis was right sacroiliitis. low back pain, lumbar spondylosis (PX 23, p. 3, 4).

On 4-21-16, Ms. Chioni released Petitioner at MMI. Ms. Chioni's assessment was right low back pain. right leg pain and SI joint pain, much improved after the SI joint injection. Ms. Chioni instructed Petitioner to call if the pain returns and to repeat the procedure (PX 23, p. 1).

Petitioner testified to previous back pain beginning in 2009.

On 12-28-09, Petitioner had treated with his family doctor, Dr. Vales, for left sided low back pain after shoveling snow in his driveway. Dr. Vales noted that Petitioner had a history of some low back pain in the past after moving furniture. Dr. Vales noted that Petitioner's job for the City of Bloomington required a lot of lifting and twisting and throwing. Dr. Vales diagnosed lumbar strain (RX 1, p.p. 1-3). On 1-8-10, Petitioner underwent an MRI of the lumbar spine which the radiologist, Dr. Vyas, stated showed low grade degenerative changes with no indication of nerve root impingement (PX 13, RX 1, p. 9). Petitioner underwent physical therapy from 2-2-10 through 2-26-10 (RX 1, p.p. 21-23).

Dr. Vales treated Petitioner for left sided sciatica and ordered an MRI on 7-30-10. The radiologist, Dr. Yousef, stated that Petitioner had a moderate size focal left paracentral disc herniation at L5-S1 impinging on the left S1 nerve root sleeve and the lateral recess with a mild degree of central stenosis (PX 14, RX 1, p. 24).

On 9-3-10, Petitioner treated with Dr. Rink for a large L5-S1 disc herniation with left radiculopathy which was improving (RX 1, p. 31). Petitioner treated chiropractically in 2010 (RX 1, p.p. 32-39).

On 10-4-12, Petitioner treated for a work related lumbar back pain. Dr. Griffith diagnosed him with lumbar back muscle sprain and spasm without radicular symptoms (RX 1, p.p. 41, 42). Petitioner underwent treatment through 11-27-12 (RX 1, p.p. 49-56).

On 1-20-15, Petitioner treated with PCP Primary Care for low back and left leg pain (RX 1, p.p. 61-63).

On 5-7-15, Petitioner treated with Dr. Carmichael, a physiatrist, at McLean County Orthopedics. Dr. Carmichael took a history that Petitioner had low back pain which went down the left leg to the knee. Dr. Carmichael stated that Petitioner had this pain for a few months (PX 19, p.p. 20, 21; RX 1, p.p. 74, 75). Dr. Carmichael ordered an MRI on 5-8-15. The radiologist, Dr. Austin, stated that there is a large left paracentral disc protrusion which appears to contact the descending left S1 nerve root. There is severe left neural foraminal narrowing. Under "impression," Dr. Austin stated that Petitioner had a left paracentral disc protrusion at L5-S1

with severe left neural foraminal narrowing. Dr. Austin stated that the disc protrusion appears to contact the left S1 nerve root (PX 15, RX 1, p.p. 76, 77).

On 5-26-15, Dr. Carmichael performed a left L5-S1 transforaminal epidural injection (PX 19, p.p. 22, 23; RX 1, p.p. 80, 81). On 6-11-15, Dr. Carmichael stated that Petitioner had symptoms of left back and leg pain, but that he was feeling quite a bit better. Dr. Carmichael stated that aggravating factors were bending, lifting and twisting at work and that alleviating factors were rest. Dr. Carmichael's working diagnosis was lumbosacral radiculitis. Petitioner was encouraged to continue strength training in the gym. Dr. Carmichael stated that Petitioner was pretty strongly opposed to surgery (PX 19, p. 17; RX 1, p. 85).

Petitioner did not treat for his low back and left leg pain between 6-11-15 until after his accident on 7-29-15. Petitioner testified that he continued full duty work and that his left leg and back pain improved after the 5-26-15 injection. Petitioner said that when he went to work on 7-29-15, he experienced only a slight intermittent pain in his low back towards his left buttock. This testimony is unrebutted.

Petitioner said that after the 7-29-15 accident, he experienced instant pain into his low back and left buttock. Petitioner stated that the pain was constant and severe and that he had trouble walking.

Petitioner said that when he returned to work on 11-2-15, his leg pain was significantly better. Petitioner said that his back was sore and stiff, but he was able to do his job.

Petitioner said that after his 11-9-15 accident, his left leg and hamstring felt weaker and that he had some ongoing left leg pain.

Petitioner testified that after his 1-14-16 accident, he experienced ongoing right hip pain. Petitioner testified that the two injections he received from Dr. Taimoorazy helped somewhat.

At the time of arbitration, Petitioner testified that he continued to experience stiffness in his low back, especially on the right side and right hip. Petitioner said that sitting and standing aggravates his low back and right hip. Petitioner said that his back feels weaker and that he is careful with twisting and turning activities.

Petitioner testified that he was 37 years old at the dates of all 3 accidents, that he had continued to work as a solid waste collector for Respondent since his accidents, and that he had received a small cost of living raise in 2016.

Petitioner testified on cross that he had been a weight lifter for over 20 years before his accident on 7-29-15. Petitioner testified that he had not returned to weight lifting since his 7-29-15 accident.

Dr. Andrew Zelby testified for Respondent by deposition on 8-29-16. Dr. Zelby testified that he was a board certified neurosurgeon for 20 years and that he evaluated Petitioner at Respondent's request on 11-23-15 (RX 7, p.p. 4-6). Dr. Zelby testified that he took a history of Petitioner's 7-29-15 and 11-9-15 accidents and of Petitioner's previous back problems beginning in December of 2009 (RX 7, p.p. 8, 9). Dr. Zelby said that he reviewed records dating back to 2009 including treatment through 2015. Dr. Zelby opined that the medical evidence, Petitioner's symptoms, his findings on exam, and the diagnostic studies, do not allow a reasonable diagnosis that could be associated with a work injury. Dr. Zelby concluded that Petitioner's condition was a

long standing, long symptomatic condition that was not aggravated, exacerbated, accelerated, or even made symptomatic as a result of the work injury (RX 7, p.p. 16. 17). Dr. Zelby testified that Petitioner's left sided microdiscectomy was reasonable and necessary medical care for his underlying condition, but unrelated to any work injury or work activities (RX 7, p. 17).

Dr. Zelby opined that Petitioner's accident in November of 2015 appeared to be an exacerbation of his underlying condition associated with a return to activities two months out from a microdiscectomy. Dr. Zelby stated that the symptoms were not suggestive of radiculopathy or recurrent disc herniation. Dr. Zelby opined that Petitioner would likely have continued episodes of back pain related to his long standing spinal condition (RX 7, p. 18).

On cross, Dr. Zelby stated that his report indicated that Petitioner had a soft tissue muscular strain as a result of his 7-29-15 work accident (RX 7, p.p. 21, 22). On cross, Dr. Zelby acknowledged that lifting a wet mattress in a jerking sensation is the type of injury that could aggravate an already pre-existing herniated disc; however, based on the two MRIs from before and after the accident, he did not think that this occurred (RX 7, p.p. 26, 27).

Dr. Nardone testified by deposition on 8-4-16. Dr. Nardone testified that he is board certified in neurosurgery since 1997 (PX 1, p.p. 4, 5). Dr. Nardone testified that he first treated Petitioner on 8-24-15. Dr. Nardone said that at that time he took a history from Petitioner that he had ongoing back issues with back and left leg pain, but that his situation got worse when he picked up a heavy mattress at work on 7-29-15. Dr. Nardone said that after the 7-29-15 accident, Petitioner's symptoms worsened and he began having more severe pain down the left leg and left foot (PX 1, p.p. 5, 6). Dr. Nardone testified that he reviewed the MRI film of 8-1-15 and found that Petitioner had significant displacement of the left S1 nerve root which caused his left leg symptoms (PX 1, p. 7).

Dr. Nardone testified that he performed surgery on 9-3-15 consisting of a laminectomy and discectomy. Dr. Nardone said during surgery he could appreciate disc fragments that came out of the disc space and were impinging on the nerve (PX 1, p. 8).

Dr. Nardone testified that on 11-16-15 Petitioner gave him a new history of injury picking up a garbage can at work (PX 1, p. 9). Dr. Nardone testified that he treated Petitioner on 1-11-16 and recommended transforaminal epidural injections. Dr. Nardone said that he last treated Petitioner on 3-7-16. At that time, Petitioner's leg pain had improved after the injection and he showed some resolution of the recurrent disc herniation (PX 1, p.p. 11, 12).

Dr. Nardone opined that Petitioner's 7-29-15 work accident aggravated a previous disc herniation. Dr. Nardone testified that the 7-29-15 accident likely increased the size of the disc herniation that made him more clinically symptomatic. Dr. Nardone opined that there is a direct correlation between the 7-29-15 accident and the need for the surgery. Dr. Nardone stated that Petitioner's prognosis was good although he had some scarring around the surgical site and that he had a higher risk of reherniation. Dr. Nardone testified that Petitioner had some bone loss from the laminectomy. Dr. Nardone opined that after the 11-9-15 accident, the 12-29-15 MRI showed a recurrent disc herniation (PX 1, p.p. 14, 15).

On cross, Dr. Nardone testified that he did not remember if he saw the actual films from the MRIs before Petitioner's 7-29-15 accident, but that he had reviewed the radiologist's report and Dr. Carmichael's records (PX 1, p. 16). Dr. Nardone stated that he thought the disc had gotten bigger between the 5-8-15 MRI and the 8-1-15 MRI and that the radiologists stated that the 8-1-15 MRI showed a large disc herniation with more S1 nerve impingement than the 5-8-15 MRI (PX 1, p.p. 17, 18).

On cross, Dr. Nardone opined that Petitioner's disc herniation as shown on the 12-29-15 MRI had resolved and that his symptoms had improved. Dr. Nardone stated that he discharged Petitioner in March, 2016 with no restrictions (PX 1, p. 20).

CONCLUSIONS

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

The Arbitrator finds that Petitioner sustained a small recurrent left paracentral disc herniation at L5-S1, impinging on the left S1 nerve root sleeve, as a result of his 11-9-15 accident. The Arbitrator finds that Petitioner's treatment, including the MRIs of 12-29-15 and 2-12-16 and the left L5-S1 epidural injection on 2-17-16, was causally related to the 11-9-15 accident. The Arbitrator relies on Dr. Hauter's records, Dr. Nardone's records and testimony, and the 2-12-16 MRI, and finds that the disc herniation largely resolved.

The Arbitrator finds that Petitioner's current left sided low back and left hip pain is causally related to his 7-29-15 accident (see companion case 15 WC 28156). The Arbitrator finds that the 11-9-15 accident caused a transient exacerbation of his pre-existing condition with a return to Petitioner's baseline.

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

Respondent paid for Petitioner's related medical bills through its group carrier. Respondent shall be given a credit for amounts paid by Respondent's group carrier, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Issue (L): What is the nature and extent of the injury?

The Arbitrator finds that Petitioner sustained a re-herniation of his L5-S1 disc as a result of his 11-9-15 accident. The Arbitrator finds that Petitioner was pre-disposed to the re-herniation as a result of Petitioner's 7-29-15 accident (see companion case 15 WC 28156). The Arbitrator finds that, consistent with Dr. Nardone's testimony, Petitioner was at higher risk of re-herniation because of his 7-29-15 accident and subsequent surgery. The Arbitrator finds that, because Petitioner had just returned to work after his 7-29-15 accident, it is likely that he had not reached maximum medical improvement as a result of the 7-29-15 accident and that the re-herniation was related to the 7-29-15 accident. The Arbitrator finds that Petitioner's herniation resolved and that this case did not cause a permanent change in Petitioner's condition.

The Arbitrator therefore denies permanency.

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

MARIO DAVIS,

Petitioner,

vs. NO: 16 WC 005637

CITY OF BLOOMINGTON,

Respondent.

18IWCC0601

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses 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 21, 2017, is hereby affirmed and adopted.

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

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

18IWCC0601

Pursuant to §19(f)(2) of the Act, Respondent shall not be required to file bond. 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 - 2018

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

o080718
KWL/MV
042

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DAVIS, MARIO
Employee/Petitioner

Case# **16WC005637**

15WC028156
16WC005636

CITY OF BLOOMINGTON
Employer/Respondent

18IWCC0601

On 11/21/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.41% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0000 RUSIN & MACIOROWSKI LTD
MARK COSIMINI
2506 GALEN DR SUITE 108
CARBONDALE, IL 61821

18IWCC0601

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

Mario Davis
Employee/Petitioner

v.

City of Bloomington
Employer/Respondent

Case # 16 WC 05637

Consolidated cases: 15 WC 28156
16 WC 05636

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Nowak**, Arbitrator of the Commission, in the city of **Bloomington**, on **11-29-16**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

18IWCC0601

FINDINGS

On **1-14-16**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$59,217.20**; the average weekly wage was **$1138.80**.

On the date of accident, Petitioner was **37** years of age, ***single*** with **1** dependent children.

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

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

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

Respondent is entitled to a credit of $ 6028.04 under Section 8(j) of the Act for this accident and for injuries Petitioner sustained in his companion cases of 15 WC 28156 and 16 WC 05636.

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $2081.00 to Guardian Headache Pain Management, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given credit for amounts paid by Respondent's group carrier, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Based on the factors enumerated in §8.1b of the Act, which the Arbitrator addressed in the attached findings of fact and conclusions of law, and the record taken as a whole, Respondent shall pay Petitioner the sum of **$683.28**/week for **10.75** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **5% loss of the right leg.**

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

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

Michael K. Nowak, Arbitrator

11/15/17
Date

ICArbDec p 2

FINDINGS OF FACT

Petitioner, a 37-year old solid waste collector, sustained accidental injuries that arose out of an in the course of his employment by Respondent to his lower back on 7-29-15 (15 WC 28156) and 11-9-15 (16 WC 05636). Petitioner also claims he sustained accidental injuries that arose out of an in the course of his employment by Respondent on 1-14-16 (16 WC 05637,) however Respondent disputes this accident. These claims were consolidated for arbitration on 11-29-16.

While working on 7-29-15 (15 WC 28156), Petitioner and a co-worker lifted a heavy, wet, full sized mattress to put it in the back of the Respondent's trash collecting truck. When Petitioner and the co-worker lifted the mattress, it bowed in the middle and Petitioner asked his co-worker to put his end down. As the co-worker put the mattress down, it jerked, or jarred, Petitioner's low back. Petitioner experienced immediate low back and left buttock pain.

After the incident, Petitioner reported increased back pain to his boss, Robert Harmon. Petitioner went home and took some Aleve. Petitioner reported the incident to Medcor, Respondent's workplace injury reporting system, later that day.

On 7-29-15, Medcor produced an incident report which stated that Petitioner injured his low back lifting a heavy mattress into the truck. The report stated that when his co-worker put the end of the mattress down, it jarred Petitioner's lower back. The record states that Petitioner took Aleve with no pain relief, that he is limiting his activity, and that he has pain into the back of the left thigh (PX 2).

On 7-31-15, Petitioner treated at his primary care physician's office, Dr. Vales. Dr. Vales' record states that Petitioner had a history that two days ago, he picked up a wet mattress and developed sudden pain in his lower back with pain extending down the left leg. Dr. Vales stated that Petitioner had previously been able to perform his work activities, however in the office today, he is curled up on the side of the table. Dr. Vales stated that when asked to move, it was extremely slowly. Dr. Vales stated this was unusual for Petitioner and that he is usually very muscular and athletic. Dr. Vales stated that Petitioner's pain was in the lumbar area, that he had positive straight leg raising on both legs, worse on the left, decreased reflexes bilaterally, and some numbness in the lateral aspect of the left leg. Dr. Vales noted that Petitioner had an MRI on his back because of back pain a few months ago. Dr. Vales took a history that Petitioner underwent epidural steroid injections and was doing fine after that. Dr. Vales stated, "He needs a repeat MRI. This is a re-injury on the job, and I suspect this may be something more than injections will correct. We will get an MRI and then put him on Flexeril. No work until I see him back in two weeks. We will set him up for a neurosurgical opinion," (PX 3).

On 8-1-15, Petitioner underwent an MRI which the radiologist, Jonathan Foss, stated showed a left paracentral-lateral focal disc extrusion which extends into the left lateral recess and left neural foramen at L5-S1. Dr. Foss stated that there is a posterior displacement of the left S1 nerve root by approximately 5mm and mild effacement of the left anterolateral aspect of the thecal sac without spinal stenosis. Dr. Foss' impression was a focal left paracentral-lateral disc extrusion at L5-S1 with significant displacement of the left S1 nerve root (PX 4).

Dr. Vales referred Petitioner to Dr. Taimoorazy at Guardian Pain Management on 8-7-15. Kristi M. Chioni, FNP-BC, generated a report on 8-7-15 stating that Petitioner's chief complaint was of low back pain with radiation to the left lower extremity. Ms. Chioni stated that Petitioner had a recent injury at work after lifting a wet mattress and experiencing sudden, severe low back pain followed by weakness of the left lower extremity. On exam, Ms. Chioni found that Petitioner's left Achilles reflexes were slightly diminished and that he had slight weakness in the left lower extremity. Ms. Chioni found positive straight leg raising on the left at 40 degrees and positive Patrick's on the left. Ms. Chioni scheduled Petitioner for a left sacroiliac joint injection and a referral for a neurosurgical consult regarding the extrusion of the disc material at L5-S1 (PX 5).

On 8-11-15, Petitioner underwent a left SI joint injection with Dr. Taimoorazy. Dr. Taimoorazy's note states that Petitioner had left lower extremity weakness without localized sensory deficits (PX 23, p. 15). On 8-24-15, Petitioner followed up with Dr. Taimoorazy's office. Ms. Chioni's record from that date states that the injection gave very little relief and that Petitioner had positive numbness and tingling in his left lower extremity and calf (PX 23, p. 13).

On 8-24-15, Petitioner treated with Dr. Vales. Dr. Vales' record stated that since Petitioner's on the job injury lifting a wet mattress, he has had pain down his left leg with numbness and weakness. Dr. Vales stated that Petitioner had an appointment with Dr. Nardone in the afternoon and that he anticipated that Petitioner would undergo surgery before the week was out (PX 6).

On 8-24-15, Petitioner treated with Dr. Nardone, a neurosurgeon. Dr. Nardone took a history that Petitioner had back issues in the past. Dr. Nardone stated that the situation got worse on 7-29-15 when he picked up a wet heavy mattress with a co-worker. After lifting the mattress, Petitioner started to have severe pain traveling to the posterior lateral portion of the left leg down to his foot. Dr. Nardone took a history that the pain has been rather intense and feels somewhat better when he lies down with heat. Petitioner had tingling into the left calf with no bowel or bladder problems. Dr. Nardone's record states that an MRI of the lumbar spine showed a large left sided disc herniation with extrusion that seemed to have gotten worse compared to the previous MRI done a few months ago. Dr. Nardone recommended a minimally invasive left L5-S1 microdiscectomy (PX 7).

On 9-3-15, Petitioner underwent surgery consisting of a minimally invasive left L5-S1 microdiscectomy and laminectomy. The surgical report states that the disc herniation was identified and that the fragments were mobilized from underneath the S1 nerve root and removed. The post-operative diagnosis was disc herniation (PX 8).

Petitioner testified that, post-surgically, he felt significant pain relief with some ongoing back stiffness. Petitioner underwent physical therapy. On 10-8-15, Dr. Nardone ordered a work conditioning program (PX 9).

Petitioner testified that Respondent would not authorize the work hardening program and he returned to work. Petitioner said that when he returned to work on 11-2-15, he still had back stiffness. Petitioner testified that he followed Dr. Nardone's instructions and limited his sitting to 30 minutes at a time. Petitioner said this helped moderate his symptoms.

Petitioner testified that on 11-9-15 (16 WC 05636), he was driving his automated trash collection truck when he extended the trash collecting mechanical arm to pick up a toter (a 95 pound trash can). Petitioner said that the arm knocked the toter over and he got out of the truck to pick the toter up. Petitioner said that the toter was full of garbage and quite heavy and that as he tried to pick it up, he noticed immediate low back pain with pain into his hamstrings.

Petitioner testified that he tried to work through his pain and that he took Aleve and used ice and heat.

Petitioner treated through Respondent's doctor. Dr. Hauter at IWIN. On 11-17-15, Dr. Hauter's record indicates that the treatment was authorized by Employer. Dr. Hauter took a history that on 11-9-15, Petitioner was picking up a toter when he felt a stiffness in his low back with bilateral hamstring stiffness. Dr. Hauter took a history that the pain was initially 5/10 and that it is currently 5/10. Dr. Hauter diagnosed Petitioner with a lumbar muscle/left SI strain. He prescribed a cold pack, medications and physical therapy (PX 17, p.p. 1, 2).

Respondent referred Petitioner to Dr. Andrew Zelby for a Section 12 evaluation on 11-23-15. In a narrative report, Dr. Zelby evaluated both the 7-29-15 and 11-9-15 accidents. Dr. Zelby concluded that Petitioner's current condition was an exacerbation of an underlying condition dating back to December of 2009. Dr. Zelby stated that Petitioner had a microdiscectomy two months before and that there was no evidence, or any medical basis, to suggest that he sustained an S1 strain. He stated that the symptoms were not suggestive of radiculopathy or a current disc herniation (RX 7, Exhibit 2, p.p. 6, 7).

Petitioner continued with physical therapy at IWIN. Petitioner treated with Dr. Hauter on 12-1-15, 12-5-15, and 12-9-15. On 12-23-15, Dr. Hauter's record indicates that Petitioner's symptoms worsened and that the therapist was concerned about left hip pain. Dr. Hauter recommended a cessation of physical therapy and an MRI of the lumbar spine (PX 17, p. 9).

On 12-29-15, Petitioner underwent an MRI. The radiologist, Dr. Yousuf, stated that Petitioner was status left sided laminectomy and discectomy at L5-S1. Dr. Yousuf stated that Petitioner had a suggestion of a small recurrent left paracentral disc herniation at L5-S1 impinging on the left S1 nerve root sleeve. Dr. Yousuf stated that there was associated post-operative scarring (PX 11).

On 12-30-15, Dr. Hauter reviewed the MRI and diagnosed Petitioner with recurrent L5-S1 disc herniation and nerve root compression as well as a lumbar muscle strain. Dr. Hauter continued Petitioner's work restrictions of medium work and referred Petitioner to Dr. Nardone (PX 17, p. 11).

On 1-11-16, Petitioner treated with Dr. Nardone. Dr. Nardone took a history that Petitioner had a history of L5-S1 minimally invasive microdiscectomy and some recurrent pain after a lifting injury. Dr. Nardone stated that neurologically, Petitioner did not have any deficit and that the MRI showed a small recurrent left sided L5-S1 disc herniation. Dr. Nardone recommended conservative care and ordered a left S1 transforaminal epidural injection. Dr. Nardone stated that he would try to employ all conservative treatment before considering surgery (PX 16, p.p. 13, 14).

On 1-13-16, Dr. Hauter evaluated Petitioner. Dr. Hauter stated that Petitioner's symptoms had improved but he still had pain going from a squat position to standing, that he used heat for symptom relief, and that he

continued on medium work conditions. Dr. Hauter diagnosed Petitioner with lumbar muscle strain with recurrent L5-S1 disc herniation (PX 17, p. 13).

On 1-14-16 (16 WC 05637), Petitioner was trying to open a gate to the Respondent's grounds. Petitioner said that the gate dug into the ground and that while he was pulling on it, he experienced a sharp pain in his right lower back, right hamstring, and right hip. Petitioner said that he kept working.

Respondent authorized treatment with Dr. Hauter on 1-20-16. Dr. Hauter took a history that Petitioner was closing a gate and as he went to pull it, he got a sharp pain in his right lower back and right hamstring. Dr. Hauter stated that Petitioner described his symptoms as a tightness and charley horse pain. Dr. Hauter diagnosed Petitioner with a right hamstring strain with no muscle tear (PX 17, p. 31).

On 1-27-16, Dr. Hauter recommended physical therapy and a cortisone injection with Dr. Taimoorazy (PX 17, p. 15). On 1-27-16, Petitioner began physical therapy. The therapist stated that Petitioner presented with a history of right lumbar and thigh symptoms with an onset date two weeks ago pulling on a stuck gate (PX 17, p. 25).

On 2-12-16, Petitioner underwent another MRI of the lumbar area. The radiologist, Dr. Yousef, stated that Petitioner was status left sided laminectomy and discectomy at L5-S1 with mild post-operative scarring in the left lateral recess and around the left lateral recess and around the left S1 nerve root sleeve. The radiologist stated that there was no evidence of recurrent or residual disc herniation (PX 12).

On 2-17-16, Petitioner underwent a left L5-S1 epidural injection at Dr. Taimoorazy's office (PX 23, p. 8, 9). Petitioner said that he had some improvement post-injection.

On 2-24-16, Dr. Hauter's record states that Petitioner returned for an evaluation of a lumbar muscle strain. Dr. Hauter stated that the symptoms have not improved and that he still has 4/10 pain in the right hamstring. Dr. Hauter noted that Petitioner was on medium work and that the employer is compliant. Dr. Hauter stated that the left sided pain has improved since the 2-19-16 injection, but that he has some positional pain and occasional numbness with sitting for long periods of time. Dr. Hauter stated that Petitioner had positional pain on the right side that is deep and occasionally travels to the hip. Dr. Hauter stated that the MRI demonstrated resolution of the recurrent herniated disc at L5-S1, but the scar tissue remains from the prior surgery. Dr. Hauter released Petitioner to return to work without restriction (PX 17, p. 16).

On 2-29-16, Petitioner treated with Ms. Chioni at Dr. Taimoorazy's office. Ms. Chioni noted that Petitioner had left low back pain with left lower extremity pain, status post L5-S1 microdiscectomy with scarring and SI pain with low back pain. Ms. Chioni noted a positive Patrick's on the right with ongoing right low back pain after pulling a gate at work (PX 23, p. 6).

On 3-7-16, Petitioner treated with Dr. Nardone. Dr. Nardone's record states that Petitioner had a recurrent disc herniation in December and that the left leg pain has improved although he still has a little bit of hip pain. Dr. Nardone stated that Petitioner had an injection which improved the pain. Dr. Nardone stated that Petitioner's last MRI showed pretty much a resolution of the disc herniation with residual disc bulge. Dr.

Nardone recommended that Petitioner progress and advance his activity. Dr. Nardone released Petitioner prn (RX 3).

On 3-9-16, Petitioner treated with Dr. Hauter. Dr. Hauter's record states that Petitioner continued to have pain in his right hamstring and that his current level was "uncomfortable." Dr. Hauter stated that Petitioner had occasional pain which was positional. Dr. Hauter stated that Petitioner had appropriate strength and mobility to return to full work. Dr. Hauter released Petitioner at MMI (RX 4).

On 4-7-16, Petitioner underwent an SI joint injection for the right sacroiliitis with Dr. Taimoorazy's office. Dr. Taimoorazy's diagnosis was right sacroiliitis, low back pain, lumbar spondylosis (PX 23, p. 3, 4).

On 4-21-16, Ms. Chioni released Petitioner at MMI. Ms. Chioni's assessment was right low back pain, right leg pain and SI joint pain, much improved after the SI joint injection. Ms. Chioni instructed Petitioner to call if the pain returns and to repeat the procedure (PX 23, p. 1).

Petitioner testified to previous back pain beginning in 2009.

On 12-28-09, Petitioner had treated with his family doctor, Dr. Vales, for left sided low back pain after shoveling snow in his driveway. Dr. Vales noted that Petitioner had a history of some low back pain in the past after moving furniture. Dr. Vales noted that Petitioner's job for the City of Bloomington required a lot of lifting and twisting and throwing. Dr. Vales diagnosed lumbar strain (RX 1, p.p. 1-3). On 1-8-10, Petitioner underwent an MRI of the lumbar spine which the radiologist, Dr. Vyas, stated showed low grade degenerative changes with no indication of nerve root impingement (PX 13, RX 1, p. 9). Petitioner underwent physical therapy from 2-2-10 through 2-26-10 (RX 1, p.p. 21-23).

Dr. Vales treated Petitioner for left sided sciatica and ordered an MRI on 7-30-10. The radiologist, Dr. Yousef, stated that Petitioner had a moderate size focal left paracentral disc herniation at L5-S1 impinging on the left S1 nerve root sleeve and the lateral recess with a mild degree of central stenosis (PX 14, RX 1, p. 24).

On 9-3-10, Petitioner treated with Dr. Rink for a large L5-S1 disc herniation with left radiculopathy which was improving (RX 1, p. 31). Petitioner treated chiropractically in 2010 (RX 1, p.p. 32-39).

On 10-4-12, Petitioner treated for a work related lumbar back pain. Dr. Griffith diagnosed him with lumbar back muscle sprain and spasm without radicular symptoms (RX 1, p.p. 41, 42). Petitioner underwent treatment through 11-27-12 (RX 1, p.p. 49-56).

On 1-20-15, Petitioner treated with PCP Primary Care for low back and left leg pain (RX 1, p.p. 61-63).

On 5-7-15, Petitioner treated with Dr. Carmichael, a physiatrist, at McLean County Orthopedics. Dr. Carmichael took a history that Petitioner had low back pain which went down the left leg to the knee. Dr. Carmichael stated that Petitioner had this pain for a few months (PX 19, p.p. 20, 21; RX 1, p.p. 74, 75). Dr. Carmichael ordered an MRI on 5-8-15. The radiologist, Dr. Austin, stated that there is a large left paracentral disc protrusion which appears to contact the descending left S1 nerve root. There is severe left neural foraminal narrowing. Under "impression," Dr. Austin stated that Petitioner had a left paracentral disc protrusion at L5-S1

with severe left neural foraminal narrowing. Dr. Austin stated that the disc protrusion appears to contact the left S1 nerve root (PX 15, RX 1, p.p. 76, 77).

On 5-26-15, Dr. Carmichael performed a left L5-S1 transforaminal epidural injection (PX 19, p.p. 22, 23; RX 1, p.p. 80, 81). On 6-11-15, Dr. Carmichael stated that Petitioner had symptoms of left back and leg pain, but that he was feeling quite a bit better. Dr. Carmichael stated that aggravating factors were bending, lifting and twisting at work and that alleviating factors were rest. Dr. Carmichael's working diagnosis was lumbosacral radiculitis. Petitioner was encouraged to continue strength training in the gym. Dr. Carmichael stated that Petitioner was pretty strongly opposed to surgery (PX 19, p. 17; RX 1, p. 85).

Petitioner did not treat for his low back and left leg pain between 6-11-15 until after his accident on 7-29-15. Petitioner testified that he continued full duty work and that his left leg and back pain improved after the 5-26-15 injection. Petitioner said that when he went to work on 7-29-15, he experienced only a slight intermittent pain in his low back towards his left buttock. This testimony is unrebutted.

Petitioner said that after the 7-29-15 accident, he experienced instant pain into his low back and left buttock. Petitioner stated that the pain was constant and severe and that he had trouble walking.

Petitioner said that when he returned to work on 11-2-15, his leg pain was significantly better. Petitioner said that his back was sore and stiff, but he was able to do his job.

Petitioner said that after his 11-9-15 accident, his left leg and hamstring felt weaker and that he had some ongoing left leg pain.

Petitioner testified that after his 1-14-16 accident, he experienced ongoing right hip pain. Petitioner testified that the two injections he received from Dr. Taimoorazy helped somewhat.

At the time of arbitration, Petitioner testified that he continued to experience stiffness in his low back, especially on the right side and right hip. Petitioner said that sitting and standing aggravates his low back and right hip. Petitioner said that his back feels weaker and that he is careful with twisting and turning activities.

Petitioner testified that he was 37 years old at the dates of all 3 accidents, that he had continued to work as a solid waste collector for Respondent since his accidents, and that he had received a small cost of living raise in 2016.

Petitioner testified on cross that he had been a weight lifter for over 20 years before his accident on 7-29-15. Petitioner testified that he had not returned to weight lifting since his 7-29-15 accident.

Dr. Andrew Zelby testified for Respondent by deposition on 8-29-16. Dr. Zelby testified that he was a board certified neurosurgeon for 20 years and that he evaluated Petitioner at Respondent's request on 11-23-15 (RX 7, p.p. 4-6). Dr. Zelby testified that he took a history of Petitioner's 7-29-15 and 11-9-15 accidents and of Petitioner's previous back problems beginning in December of 2009 (RX 7, p.p. 8, 9). Dr. Zelby said that he reviewed records dating back to 2009 including treatment through 2015. Dr. Zelby opined that the medical evidence, Petitioner's symptoms, his findings on exam, and the diagnostic studies, do not allow a reasonable diagnosis that could be associated with a work injury. Dr. Zelby concluded that Petitioner's condition was a

long standing, long symptomatic condition that was not aggravated, exacerbated, accelerated, or even made symptomatic as a result of the work injury (RX 7, p.p. 16, 17). Dr. Zelby testified that Petitioner's left sided microdiscectomy was reasonable and necessary medical care for his underlying condition, but unrelated to any work injury or work activities (RX 7, p. 17).

Dr. Zelby opined that Petitioner's accident in November of 2015 appeared to be an exacerbation of his underlying condition associated with a return to activities two months out from a microdiscectomy. Dr. Zelby stated that the symptoms were not suggestive of radiculopathy or recurrent disc herniation. Dr. Zelby opined that Petitioner would likely have continued episodes of back pain related to his long standing spinal condition (RX 7, p. 18).

On cross, Dr. Zelby stated that his report indicated that Petitioner had a soft tissue muscular strain as a result of his 7-29-15 work accident (RX 7, p.p. 21, 22). On cross, Dr. Zelby acknowledged that lifting a wet mattress in a jerking sensation is the type of injury that could aggravate an already pre-existing herniated disc; however, based on the two MRIs from before and after the accident, he did not think that this occurred (RX 7, p.p. 26, 27).

Dr. Nardone testified by deposition on 8-4-16. Dr. Nardone testified that he is board certified in neurosurgery since 1997 (PX 1, p.p. 4, 5). Dr. Nardone testified that he first treated Petitioner on 8-24-15. Dr. Nardone said that at that time he took a history from Petitioner that he had ongoing back issues with back and left leg pain, but that his situation got worse when he picked up a heavy mattress at work on 7-29-15. Dr. Nardone said that after the 7-29-15 accident, Petitioner's symptoms worsened and he began having more severe pain down the left leg and left foot (PX 1, p.p. 5, 6). Dr. Nardone testified that he reviewed the MRI film of 8-1-15 and found that Petitioner had significant displacement of the left S1 nerve root which caused his left leg symptoms (PX 1, p. 7).

Dr. Nardone testified that he performed surgery on 9-3-15 consisting of a laminectomy and discectomy. Dr. Nardone said during surgery he could appreciate disc fragments that came out of the disc space and were impinging on the nerve (PX 1, p. 8).

Dr. Nardone testified that on 11-16-15 Petitioner gave him a new history of injury picking up a garbage can at work (PX 1, p. 9). Dr. Nardone testified that he treated Petitioner on 1-11-16 and recommended transforaminal epidural injections. Dr. Nardone said that he last treated Petitioner on 3-7-16. At that time, Petitioner's leg pain had improved after the injection and he showed some resolution of the recurrent disc herniation (PX 1, p.p. 11, 12).

Dr. Nardone opined that Petitioner's 7-29-15 work accident aggravated a previous disc herniation. Dr. Nardone testified that the 7-29-15 accident likely increased the size of the disc herniation that made him more clinically symptomatic. Dr. Nardone opined that there is a direct correlation between the 7-29-15 accident and the need for the surgery. Dr. Nardone stated that Petitioner's prognosis was good although he had some scarring around the surgical site and that he had a higher risk of reherniation. Dr. Nardone testified that Petitioner had some bone loss from the laminectomy. Dr. Nardone opined that after the 11-9-15 accident, the 12-29-15 MRI showed a recurrent disc herniation (PX 1, p.p. 14, 15).

On cross, Dr. Nardone testified that he did not remember if he saw the actual films from the MRIs before Petitioner's 7-29-15 accident, but that he had reviewed the radiologist's report and Dr. Carmichael's records (PX 1, p. 16). Dr. Nardone stated that he thought the disc had gotten bigger between the 5-8-15 MRI and the 8-1-15 MRI and that the radiologists stated that the 8-1-15 MRI showed a large disc herniation with more S1 nerve impingement than the 5-8-15 MRI (PX 1, p.p. 17, 18).

On cross, Dr. Nardone opined that Petitioner's disc herniation as shown on the 12-29-15 MRI had resolved and that his symptoms had improved. Dr. Nardone stated that he discharged Petitioner in March, 2016 with no restrictions (PX 1, p. 20).

CONCLUSIONS

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

Petitioner testified that on 1-14-16, he was trying to open a gate to Respondent's maintenance yard. Petitioner said that the gate dug into the ground and that while pulling on it, he experienced a sharp pain in his right lower back. On 1-20-16, Dr. Hauter's record gives a history of accident consistent with Petitioner's testimony.

The Arbitrator finds that Petitioner's work activities on 1-14-16 placed him at greater risk than the general public. The Arbitrator finds that Petitioner sustained an accidental injury which arose out of and in the course of his employment on 1-14-16.

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

Petitioner experienced immediate right lower back, right hamstring, and right hip pain after his 1-14-16 accident. Dr. Hauter's 1-20-16 record indicates that Petitioner had a sharp pain into his right lower back and right hamstring which he described as a tightness and charley horse pain. Dr. Hauter diagnosed Petitioner with a right hamstring strain with no muscle tear (PX 17, p. 31). Petitioner underwent physical therapy for the right sided pain through Dr. Hauter's office, as well as an SI joint injection for right sacroiliitis with Dr. Taimoorazy's office on 4-7-16.

The Arbitrator finds that before Petitioner's accident on 1-14-16, his treatment was for left sided back and leg pain and that after his accident, he suffered right sided pain. The Arbitrator finds that as a result of the 1-14-16 accident, Petitioner sustained right low back pain, right SI joint pain, and a right sided hamstring strain.

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

Having found that Petitioner sustained an accidental injury on 1-14-16 and having found a causal relationship between Petitioner's right sided low back pain, right sided SI joint pain, and right sided hamstring strain, the Arbitrator orders Respondent to pay the Guardian Headache Pain Management bill of $2,081 pursuant to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act.

The Arbitrator further finds that Respondent shall be given credit for medical benefits paid by Respondent's group carrier. and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Issue (L): What is the nature and extent of the injury?

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 is to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of §8.1b of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that neither party submitted an impairment rating. The Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes the record reveals that Petitioner was employed as a solid waste collector for Respondent at the time of the accident and that he is able to return to his work in his prior capacity since his injury. The Arbitrator therefore gives *lesser* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 37 years old at the time of the accident. The Arbitrator finds that Petitioner is a younger individual and concludes that Petitioner's partial disability will be more extensive than that of an older individual. The Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes there is no direct evidence of reduced earning capacity contained in the record. The Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the Petitioner was a credible witness. The Arbitrator finds that Petitioner's testimony that he has continued to experience right sided back and hip pain is supported by the medical records. The Arbitrator notes that on 3-9-16, Dr. Hauter's record indicates that Petitioner had continued right hamstring pain. The Arbitrator finds that, although Petitioner had some improvement after his 4-7-16 SI joint injection for right sacroiliitis, he continued to have some right sided low back pain and right leg pain as reflected in Ms. Chioni's 4-21-16 record. The Arbitrator therefore gives *greater* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 5% loss of use of the right leg pursuant to §8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DENNIS EVITTS, SR.,

Petitioner,

vs. NO: 16 WC 18628

GOLDEN STATE FOODS,

Respondent.

18IWCC0602

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, 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.

The Commission finds that Petitioner is entitled to TTD benefits from November 19, 2016 through December 2, 2016. After reviewing the record, the Commission notes that on October 14, 2016, Respondent's Section 12 examiner, Dr. An, opined that Petitioner needed an additional two to three weeks of work hardening before he could return to work. Thereafter, Petitioner underwent an unrelated gallbladder surgery on October 19, 2016. Petitioner resumed physical therapy for his work injury on November 3, 2016. Respondent, however, terminated Petitioner's benefits on November 18, 2016, at which time Petitioner was still undergoing physical therapy for his work injury. Petitioner then saw Dr. Vargas-Zapata on December 3, 2016 and requested that he be released back to work as his workers' compensation benefits had been terminated. Petitioner returned to work on December 3, 2016. The Commission is not persuaded by Dr. An's opinion relative to Petitioner's return to work as Petitioner was never given the opportunity to complete physical therapy as Respondent prematurely terminated his benefits. Accordingly, the Commission finds that Petitioner is entitled to TTD benefits from November 19, 2016 through December 2, 2016.

18IWCC0602

Upon his return to work, Petitioner testified that he continued to complain of lumbar pain. Petitioner underwent a series of lumbar injections and was released from care on April 10, 2017. The Petitioner has requested payment of the medical bills for treatment received on December 3, 2016, February 13, 2017, February 20, 2017, February 23, 2017, March 13, 2017, April 4, 2017, and April 10, 2017. The Commission has reviewed the record and finds that the treatment received on those dates was in relation to his work injury and the treatment was reasonable and necessary. Accordingly, Respondent is liable for payment of those bills subject to the medical fee schedule.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $798.08 per week for a period of 27-4/7 weeks, May 24, 2016 through December 2, 2016, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent is entitled to a credit of $20,538.51 for TTD previously paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $718.85 per week for a period of 25 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the 5% loss of use of the man-as-a-whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $2,832.19 for medical expenses under §8(a) of the Act, and subject to the medical fee schedule.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $22,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 5 - 2018

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

MJB/tdm
O: 9/25/18
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

EVITTS, DENNIS
Employee/Petitioner

Case# **16WC018628**

GOLDEN STATE FOODS
Employer/Respondent

18IWCC0602

On 11/14/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.36% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2333 WOODRUFF JOHNSON & EVANS
LYNN TAYLOR
4234 MERIDIAN PKWY SUITE 134
AURORA, IL 60504

0532 HOLECEK & ASSOCIATES
GRANT MILLER
161 N CLARK ST SUITE 800
CHICAGO, IL 60601

18IWCC0602

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

DENNIS EVITTS
Employee/Petitioner

v.

GOLDEN STATE FOODS
Employer/Respondent

Case # 16 WC 18628

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Glaub**, Arbitrator of the Commission, in the city of **Chicago**, on **August 28, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On 4/1/2016, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $62,300.16; the average weekly wage was $1,198.08.

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

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

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

Respondent shall be given a credit of $20,424.41 for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $20,424.41.

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

ORDER

The Petitioner has failed to prove that his condition of ill-being after December 3, 2017 was causally related to a compensable work accident or injury. As such, the Petitioner is not entitled to TTD or medical benefits after December 3, 2017.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as an order selector at the time of the accident and that he is able to return to work in his prior capacity as a result of said injury. The Arbitrator notes that this job is physical, involving lifting and bending. Because of the physical nature of the job, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 56 years old at the time of the accident. Because he is closer to the end of his career and will not endure his pain as long as a younger worker, the Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that the Petitioner is earning the same as before per his collective bargaining agreement and is working overtime. Because of lack of diminishment in earning capacity, the Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that the medical records show little to no ongoing symptoms and highlight pre-existing pain in the Petitioner's low back. Because of his return to baseline and pre-existing symptoms, the Arbitrator therefore gives lesser weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 5% loss of use of the person as a whole pursuant to §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

November 14, 2017
Date

NOV 14 2017

Dennis Evitts v Golden State Foods
16 WC 18628

FINDINGS OF FACT

Testimony of Petitioner

The Petitioner testified that he worked for Golden State Food as an order selector for nine years. T. 9. The Petitioner testified that his job involves working in a freezer. *Id.* The Petitioner testified that his job involves selecting, stacking and palletizing product and lifting 30 to 40 pounds. *Id.* The Petitioner testified that he uses electric jacks to assist with lifting. *Id.*

The Petitioner testified that on April 1, 2016 he experienced right lower back pain while reaching for and lifting a box in a freezer. T. 10. The Petitioner testified that he spoke with his supervisor, Vince, on April 1, 2016 and noted back pain but was told that if he reported his accident he would have to go to the hospital. T. 12. The Petitioner testified that he chose to continue working through his pain. *Id.*

The Petitioner testified that eventually, his pain was too much, after working for five weeks. T. 13. The Petitioner testified that at that time, he was sent to the hospital and eventually underwent physical therapy and an MRI. T. 14. The Petitioner testified that his understanding was that the MRI revealed disc bulges at four levels. *Id.* The Petitioner testified that he understood that he had a back sprain. *Id.*

The Petitioner testified that physical therapy helped. T. 15. He testified that he began work hardening on September 27, 2016. *Id.* The Petitioner testified that, after that date, he had his gallbladder removed in an unrelated surgery. T. 16. The Petitioner testified that he never finished work conditioning. *Id.*

The Petitioner testified that he returned to work on December 3, 2016 in a light-duty capacity. T. 16. The Petitioner testified that after one week, he returned to work full duty. T. 17. The Petitioner testified that he asked to return to full duty because he wished to work overtime hours and he was missing out on overtime because he was doing light-duty work. *Id.*

The Petitioner testified that he worked full duty through and until he followed up with his doctor in February of 2017. T. 30. The Petitioner testified that he was taking pain medication between December of 2016 and February of 2017, but that he did not see his doctor during that time. T. 31. His doctor referred him to a pain management physician in February, 2017.

The Petitioner testified that after he saw the pain management physician, he received an injection to his lumbar spine on February 23, 2017. T. 18. The Petitioner testified that, thereafter, his pain resolved for one week. T. 19. The Petitioner testified that he has stiffness and soreness in his back after work now. T. 21. He testified that he occasionally takes ibuprofen. T. 22.

Cross-Examination of Petitioner

The Petitioner testified on cross-examination that he did have a past Workers' Compensation claim for a 2% loss of use of the person as a whole settlement for a low back injury. The Petitioner testified that he received physical therapy treatment, diagnostics and took pain medication as a result of a 2012 injury to his low back. T. 24.

The Petitioner admitted that he is still working as an order picker today. T. 30. He testified that he is working overtime hours at this time. T. 30.

The Petitioner testified that he was 56 years old at the time of his injury. T. 29.

The Petitioner admitted that between December of 2016 and February of 2017 he did not see his doctor. T. 31. He admitted to have x-rays to his back prior to his work accident. T. 34.

Testimony of Jesse Wisch

Jesse Wisch testified that he is a warehouse supervisor for Golden State Food. T. 36. He testified that he oversees personnel, scheduling and performance evaluations for the order selectors and warehouse workers. *Id.*

Mr. Wisch testified that he is familiar with Dennis Evitts and he works with him. T. 37. He testified that Mr. Evitts is working full-duty hours and overtime. *Id.* Mr. Wisch testified that the Petitioner's job performance is acceptable. T. 38. Mr. Wisch testified that the Petitioner's production and job performance are the same as his other co-workers. *Id.*

Mr. Wisch testified that the Petitioner earns the same amount of money as his co-worker per a collective bargaining agreement. T. 37. Mr. Wisch testified that the Petitioner does not take extra breaks, does not complain about pain, does not ask for extra help and does not take pain medications while working. T. 39.

Medical Records

The Petitioner presented to his PCP on May 12, 2017 and complained of back pain without provided a history of a work accident or injury. RX 7. The Petitioner noted that he had tried lotions and creams on his back, but nothing helped. *Id.* He was given Celebrex. *Id.*

The Petitioner presented to Adventist La Grange Memorial Hospital for medical treatment on May 22, 2016. The Petitioner complained right lower back pain for the past several weeks that have become progressively worse. Petitioner was diagnosed with muscle spasms and low back pain and a lumbar strain. He was prescribed Norco and instructed to follow up if necessary. PX 5.

After that, the Petitioner presented to his primary care physician on May 24, 2016 and noted that his low back had been bothering him for several weeks. The doctor diagnosed right-sided back pain, sinusitis and obesity. The Petitioner was given pain medications and instructed to undergo an MRI and physical therapy. PX 3. The Petitioner had an initial evaluation for physical therapy on June 16, 2016. PX 6. He also had an MRI on June 21, 2016 which showed a disc bulge at L4-5 which caused neuroforaminal stenosis and an L5-S1 bulge causing moderate bilateral neuroforaminal stenosis. PX 4.

The Petitioner saw his primary care physician, Dr. Rafael Vargas-Zapata, on June 27, 2016. PX 3. The Petitioner complained of soreness and stiffness when sitting for too long. The doctor diagnosed right-sided back pain and sinusitis and obesity and instructed the Petitioner continue pain medications and physical therapy. *Id.*

The Petitioner presented to Dr. Howard An for an Independent Medical Evaluation on July 1, 2016. RX 1. The Petitioner noted that he was reaching out to get an object and felt a sharp pain in his lower lumbar region on April 1, 2016. He stated that he worked through the pain until May 21, 2016 and felt a significant increase in his back pain while engaged in

repetitive bending and lifting activities. He admitted to a lumbar strain two years before but stated that he had had no significant back pain in recent months. He noted that he was unable to work since May 21, 2016 due to back pain and he only had two visits of physical therapy. The doctor reviewed the MRI films and diagnosed underlying lumbar spondylosis and stenosis with disc bulging and noted the Petitioner was having mechanical low back pain due to spondylosis and did not have any significant radiculopathy. The doctor noted that the Petitioner did not require epidural injections or surgery and should have physical therapy for three weeks and then would be able to return to work and should reach MMI at that time. In the meantime, the Petitioner was able to work light duty with no lifting greater than 20 pounds. *Id.*

The Petitioner then continued seeing his primary care physician and attempting physical therapy until a follow-up IME on October 14, 2016 with Dr. Howard An. Dr. An noted that the Petitioner continued to have mechanical back pain which was getting better with conservative treatment including physical therapy and work conditioning. The doctor anticipated that after two to three weeks of physical therapy the Petitioner would be able to return to work without restrictions. The doctor noted that the Petitioner's work accident did aggravate a pre-existing condition of lumbar back pain. RX 2.

The Petitioner continued seeing Dr. Rafael Vargas-Zapata with decreasing symptoms and pain complaints until he returned to work in December 2016. PX 3.

The Petitioner did not receive medical care between December 3, 2016 and February 13, 2017.

On February 13, 2017, the Petitioner reported to Dr. Rafael Vargas-Zapata. PX 3. He complained of stiffness and soreness and he requested information about a cortisone injection. The doctor diagnosed right-sided low back pain, instructed the Petitioner continue taking Hydrocodone and make an appointment with a specialist. After that, the Petitioner presented to Expert Pain Physicians Pain & Spine Wellness Center on February 20, 2017 at which time the doctor diagnosed radiculopathy of the lumbar region with spondylosis without myelopathy or radiculopathy. The doctor recommended physical therapy and decided that the Petitioner should consider an epidural steroid injection. PX 2.

The Petitioner received his epidural steroid injection on February 23, 2017. After that, he was seen again on March 13, 2017 and again in April of 2017 and was released from care. PX 2.

CONCLUSIONS OF LAW

The Arbitrator notes and the parties stipulated that the Petitioner sustained an accident arising out of and in the course of his employment. The issues in this matter are the causal connection between the Petitioner's work accident and his alleged condition after December 3, 2016; the Petitioner's entitlement to TTD benefits; and the nature and extent of the Petitioner's injuries.

AS TO ISSUE F, is the Petitioner's current condition of ill-being causally related to the injury?

It is axiomatic the Petitioner must prove every element of his claim by a preponderance of the credible evidence. It is within the province of the Commission to evaluate competing evidence and determine the weights to be accorded to conflicting medical opinions and reports. The Petitioner must provide evidence of his condition, diagnosis, prognosis and need for treatment.

The Arbitrator finds that the Petitioner failed to prove by a preponderance of the credible evidence that his ongoing condition to his low back after December 3, 2016 was causally related to a work accident or injury. The Arbitrator notes that the Petitioner had a low impact injury on April 1, 2016 and was inexplicably off of work for over six months. The Arbitrator notes that the Petitioner attempted physical therapy, work conditioning and other treatment in order to return to work full duty in December of 2016. After that, he provided no medical records confirming a causal connection between the April 1, 2016 incident and his ongoing low back condition.

The Arbitrator notes that the only orthopedic surgeon in this case that gave an opinion for either party was Dr. Howard An. Dr. An noted that the Petitioner simply had an aggravation of spondylosis without radiculopathy could return to his regular duty job three weeks after his Independent Medical Evaluation on October 14, 2016. Further, Dr. An noted that the Petitioner

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had an aggravation of his low back condition that was temporary and will resolve after three more weeks of physical therapy.

The Arbitrator finds that the Petitioner's return for medical care in February of 2017 was related to Petitioner's underlying and pre-existing health condition. The Petitioner admitted to past issues with back pain, previous bouts of physical therapy and x-ray diagnostics and a previous settlement for a low back injury. As such, it appears as though the Petitioner's flare up of back pain in February of 2017 for which he does not cite a specific accident or injury is unrelated to the April 1, 2016 event. The Arbitrator notes that in support of this conclusion, the Petitioner had returned to his regular duty job, had ceased receiving medical care and was working overtime hours. While the Petitioner claims that he was taking pain medications in the interim, this is not confirmed by the medical records submitted by the Petitioner in evidence.

The Arbitrator finds that any condition the Petitioner is suffering from today as well as any condition the Petitioner was suffering from after December 3, 2016 is unrelated to the April 1, 2016 work incident.

AS TO ISSUE J was the treatment rendered to the Petitioner reasonable and necessary? Has the respondent paid for all appropriate medical charges?

The Arbitrator finds that the Petitioner is not entitled to payment of medical bills after December 3, 2016 given that the Petitioner's ongoing condition of ill-being was not causally related to the April 1, 2016 work accident. The Arbitrator notes that the Petitioner received an injection which, specifically, Dr. An noted was not reasonable nor necessary nor causally related to the April 1, 2016 incident. The Arbitrator finds that the Petitioner's condition had stabilized and he had reached MMI in December, 2016. As such, he required no further treatment as related to the April 1, 2016 event.

The Arbitrator also notes that the treatment the Petitioner received was from his primary care physician and a physical therapist, not from a licensed and Board Certified orthopedic surgeon. Thus, the Arbitrator finds the opinions of Dr. An more persuasive than those of the Petitioner's primary care physician. The Arbitrator declines to award the outstanding medical

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bills for the treatment the Petitioner received from Expert Pain Physicians or his primary care physician in 2017.

AS TO ISSUE K, is the Petitioner entitled to TTD benefits?

The Petitioner claims entitlement to TTD benefits after November 18, 2016 up until December 2, 2016. The Arbitrator notes that during that time period, the Petitioner had not returned to work though Dr. An, the only orthopedic surgeon to give an opinion in this matter, opined that the Petitioner was capable of returning to work without restrictions.

The Arbitrator notes that the Petitioner requested to return to work in a light-duty capacity at one point and then further requested to return to work in a regular duty capacity because he wanted to work overtime hours, which calls into question his need for restrictions.

Based upon the medical opinions of Dr. Howard An, the Arbitrator declines to award TTD benefits from November 18, 2016 until December 2, 2016 as the Arbitrator believes that a preponderance of evidence shows that the Petitioner was capable of working at that time. Further, the Petitioner has failed to present medical records from his treating physicians that kept him off of work, and thus, there is no basis for an award of TTD benefits.

AS TO ISSUE L, what is the nature and extent of the injury?

The Petitioner's injury occurred on April 1, 2016 which is after the September 2011 amendments to the Illinois Workers' Compensation Act. As such, the Arbitrator must consider the five factors listed in the Illinois Workers' Compensation Act when assessing the Petitioner's disability.

In applying the five factors in Section 8.1b of the Illinois Workers' Compensation Act, the Arbitrator finds as follows:

1. As to the AMA impairment rating, neither the Petitioner nor the Respondents admitted an AMA impairment rating into evidence in this case. As such, the Arbitrator gives this factor no weight.

2. As to occupation, the Petitioner testified that he worked as an order selector. The Arbitrator notes that Respondent's Exhibit 4 is the job description for the Petitioner's job as an

operator. The Arbitrator notes that the job involves engaging in receiving, selection, loading, cleaning and safety practices relative to food products. The Arbitrator notes the amounts that the Petitioner is required to lift are from 1 pound to 67 pounds with the average weighing between 20 to 60 pounds. The Arbitrator notes that the Petitioner testified himself that the boxes that he has to lift are between 30 and 40 pounds. The Arbitrator also notes that the Petitioner is able to use different equipment in doing his job including an electric palletizer machine. The Arbitrator notes that Respondent's Exhibit 4 shows that the Petitioner's job involves constant walking and lifting with reaching and handling.

The Arbitrator notes that this factor weighs in favor of a higher disability rating in this case given that the Petitioner's job is somewhat labor intensive and involves constant lifting, loading and handling of objects.

3. As to the Petitioner's age, the Petitioner testified that he was 56 years old at the time of his April 1, 2016 injury. The Arbitrator notes that the Petitioner is closer toward the end of his career and thus, will not have to deal with the effects of his disability for as long as a younger worker or somebody just entering the workforce. As such, the Arbitrator finds that this factor weighs in favor of a lower PPD Award.

4. As to future earning capacity, the Arbitrator finds that the Petitioner's future earning capacity has not been diminished given the fact that he continues to work his full duty job in the same capacity. Further, the Respondent's witness testified that the Petitioner continues to meet production requirements and expectations, has good work attendance and continues to work overtime. Additionally, per the Petitioner's union collective bargaining agreement, the Petitioner continues to enjoy the same raises and increases as his co-workers and has suffered no diminished earning capacity whatsoever. Based on the testimony of the Respondent's witness, it appears clear that the Petitioner has an ongoing career with the Respondent. As such, the Arbitrator finds that this factor weighs in favor of a lower PPD Award.

5. As to evidence of disability in the medical records, the Arbitrator notes that the Petitioner did not receive medical treatment from December 3, 2016 until he returned on February 20, 2017. Even when the Petitioner did return for treatment in February of 2017, the Petitioner noted some stiffness and soreness after working but his pain complaints were not high and his physical examination findings were mostly normal. It is clear that the Petitioner has not

received medical care in over four months since his April 2017 visits with his pain management physician since receiving his injection.

Further, the medical records have little, if any, evidence of ongoing difficulties and show that the Petitioner has a history of low back pain and difficulties in the past. As such, the Arbitrator notes that the Petitioner's baseline of health is somewhat lower than other workers of his age. As such, the Arbitrator finds that this is factor weighs in favor of a lower PPD award.

In considering all of the above, the Arbitrator awards the Petitioner 5% loss of use of the person as a whole for his occupational injuries.

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 ☐ up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CARLOS CORDERO RIOS,

Petitioner,

vs. NO: 14 WC 31003

REVCOR,

Respondent.

18IWCC0603

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, 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. A separate decision has been issued for case 15 WC 19960, which was consolidated with case 14 WC 31003 at trial.

The Commission modifies the Decision of the Arbitrator and finds that the Petitioner is entitled to 30% loss of use of the right arm. The Commission agrees with the Arbitrator's analysis of Section 8.1(b) of the Act but disagrees with the weight assigned to subsection (ii) and (v) of Section 8.1(b).

In support of its Decision, the Commission notes that Petitioner underwent right ulnar nerve decompression, right elbow medial epicondylectomy, and right flexor pronator debridement as a result of his work accident. Following the surgery, Petitioner testified that he would experience constant pain and pressure in his right elbow and he would also experience shooting pain to his fingers. He further testified that his right arm will get tired, which has some impact on his work duties. During his post-surgery visit with Dr. Balaram, Petitioner reported that he would experience an occasional zinging like sensation through the right elbow. Dr. Balaram's

18IWCC0603

examination revealed mild tenderness to palpation over the lateral epicondyle and discomfort with deep palpation over the ulnar nerve.

Based on the above, the Commission assigns moderate weight to subsection (ii) noting that Petitioner's injury has had an impact on his work duties. The Commission also assigns significant weight to subsection (v) as Petitioner's subjective complaints are supported by the objective medical evidence. Accordingly, the Commission modifies the Decision of the Arbitrator and finds that Petitioner sustained 30% loss of use of the right arm.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the arbitrator filed November 6, 2017, 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 $315.27 per week for a period of 2-1/7 weeks, January 15, 2015 through January 29, 2015, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $286.00 per week for a period of 75.9 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 30% loss of use of the right arm.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $21,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 5 - 2018

Michael J. Brennan

MJB/tdm
O: 9/25/18
052

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CORDERO RIOS, CARLOS
Employee/Petitioner

Case# **14WC031003**

15WC019960

REVCOR
Employer/Respondent

18IWCC0603

On 1/30/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.62% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1836 RAYMOND M SIMARD PC
205 W RANDOLPH ST
SUITE 815
CHICAGO, IL 60606

2461 NYHAN BAMBRICK KINZIE & LOWRY
BRIAN RUDD
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

18IWCC0603

☐ 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

Carlos Cordero Rios
Employee/Petitioner

v.

Revcor
Employer/Respondent

Case # **14** WC **31003**

Consolidated cases: **15 WC 19960**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Wheaton**, on **November 6, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's 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

18IWCC0603

On **August 17, 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 $23,645.25; the average weekly wage was $472.91~~

On the date of accident, Petitioner was **37** years of age, ***married*** with **1** dependent child.

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

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

Respondent shall be given a credit of **$630.54** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$630.54**.

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 $315.27/week for 2 1/7 weeks, commencing January 15, 2015 through January 29, 2015, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $630.54 for temporary total disability benefits that have been paid.

Respondent shall pay Petitioner permanent partial disability benefits of $286.00/week for 37.95 weeks, because the injuries sustained caused the 15% loss of the Right Arm, 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

January 26, 2018
Date

ICArbDec p. 2

JAN 30 2018

18IWCC0603

Statement of Facts

This matter was heard in conjunction with consolidated case 15 WC 19960 (DOA: 2/13/15). A single transcript was prepared but the Arbitrator has issued two separate decisions.

Petitioner Carlos Cordero Rios testified that on August 17, 2013, he was employed by Respondent Revcor. He began work for Respondent in 2007. Petitioner testified that he had a high school education and a certificate in Electronics. He had previously worked in a warehouse and as a laborer. These jobs required heavy lifting. Petitioner's job with Respondent was as a main blade balancer for propellers. He would pick up the blade, put it in a machine and use a hole punch to punch a hole in the blade. The punch was 18-20 inches long. It resembled a bolt cutter. He testified he did several hundred pieces per shift. He held the left arm flexed firmly at 90 degrees to steady the fan blade and would then flex the right arm at the elbow to bring up the punch part of the tool to punch the hole. Petitioner testified that his wage was $11.81 per hour through the end of 2013, at which time it was increased to $12.40 per hour beginning in 2014. Respondent offered Petitioner's wage records as RX 6.

Petitioner testified that on August 17, 2013, he was punching holes in stainless steel blades which are harder that aluminum blades. While doing his job duties, he felt a snap and pain in the right elbow. Petitioner testified he told his boss. He finished the remaining hour of his shift. He noticed pain the next day in his elbow. On Monday, he was sent to Physicians Immediate Care by Human Resources. Petitioner's Application for Adjustment of Claim filed September 16, 2014 alleges a repetitive trauma injury (RX 1). The amended Application filed October 23, 2017 states the accident occurred punching holes in fan blades (RX 2).

Petitioner presented to Physicians Immediate Care on August 19, 2013 with pain in the right elbow since August 17, 2013. He provided a history of a sudden onset of pain. He stated he was punching a hole into steel when material slipped and he felt immediate pain. Petitioner was diagnosed with medial epicondylitis. He was given medication and placed on a 5 pound lifting restriction with no strong gripping or repetitive motion of the right elbow (PX 1). Petitioner testified that Respondent accommodated his restricted duty. He worked a position called "set screws." He performed this job until his surgery in January 2015.

On August 26, 2013, Petitioner reported improvement in the right elbow, but pain in the right wrist. Physical examination noted tenderness in the medial and lateral epicondyle and was otherwise unremarkable. Petitioner was to continue restricted duty (PX 1). On September 3, 2013, Petitioner complained of pain inside the elbow. His wrist was much better. Petitioner had an injection into the elbow. He was continued on restrictions. Petitioner was prescribed physical therapy on September 11, 2013 (PX 1). He began therapy on October 1, 2013. Petitioner had a second injection into the right elbow on October 31, 2013. On December 3, 2013, Petitioner reported worsening symptoms. He was referred to Dr. Vender at Hand to Shoulder Associates and was to continue therapy and restricted duty (PX1).

Petitioner was seen on January 24, 2014 by Dr. Ajay Balaram at Hand to Shoulder Associates. Petitioner complained of medial and lateral right elbow pain with weakness and hand numbness. Petitioner gave a history of a sudden onset of right elbow pain following an incident at work. On October 19, 2013, Petitioner was using a tool twisting, using pliers and he felt pain in his right elbow and it started to swell. Examination showed tenderness over the elbow condyles and a positive Tinel sign over the cubital tunnel. He had pain with resisted wrist flexion and extension. Dr. Balaram diagnosed medial and lateral epicondylitis. He prescribed

Meloxicam and one month of physical therapy. Dr. Balaram released Petitioner to light duty work with no repetitive movements or lifting greater than 5 pounds (PX 3).

On March 12, 2014, Petitioner reported improvement but continued stiffness and pain. On April 25. 2014, Petitioner noted improvement on the outside of his elbow, but the inside has continued pain and zinging type sensations. He also reported numbness and tingling into the small finger (PX 3). An EMG/NCV performed by Dr. Scott Heller on July 2, 2014 found no evidence of ulnar neuropathy in either elbow of Petitioner. It did note median neuropathy (PX 3). Dr. Balaram noted that the EMG results did not match his clinical findings of tenderness over the right medial epicondyle, a positive Tinel sign over the cubital tunnel and a positive elbow compression test. Dr. Balaram prescribed Meloxicam, an elbow brace and continued light duty (PX 3).

Dr. Balaram ordered an MRI of the right elbow which was reported as essentially normal on August 25, 2014. On September 15, 2014, Dr. Balaram again found tenderness over the right medial epicondyle and radiating pain on medial compression of the ulnar nerve. Dr. Balaram referred Petitioner to his partner, Dr. Michael Vender, for a second opinion. He released Petitioner to unrestricted work (PX 3). Petitioner testified that he did not return to regular duty and continued to perform the set screw position.

Dr. Vender examined Petitioner on September 22, 2010. Dr. Vender noted that the right ulnar nerve was unstable with complete subluxation out of the cubital tunnel over the medial epicondyle which caused significant pain when the elbow was passively flexed or extended. Dr. Vender prescribed surgery (PX 3).

On January 5, 2015, Dr. Balaram performed a right in-situ ulnar nerve decompression, a right medial epicondylectomy and a right flexor pronator origin debridement. Petitioner was taken off work. Petitioner attended therapy for his right elbow beginning January 19, 2015. On January 30, 2015, Dr. Balaram released Petitioner to restricted duty with no use of the right arm (PX 3).

Petitioner continued therapy on the right arm. The notes reflect complaints only in the right elbow. On March 20, 2015, Dr. Balaram notes Petitioner has returned to work on light duty. Petitioner noted exacerbation of the zinging type pain after his last therapy session. Dr. Balaram allowed Petitioner to continue work with 5-pound lifting, pushing, pulling on the right (PX 3). Petitioner concluded therapy on April 23, 2015. On April 24, 2015, Dr. Balaram continued a 10-pound lifting restriction. The restriction was increased to 25 pounds on June 17, 2015 and 50 pounds on July 17, 2015. Petitioner was released to unrestricted duty on August 28, 2015 with respect to the right arm (PX 3).

Petitioner testified that Respondent accommodated his restriction after his January surgery. He was returned to work weighing blades. He would take the blades which were 20 inches long and weighed 4.8 pounds in his left hand and placed them on a scale. He testified he lifted one or two at a time in his left hand with the palm down. He would then place the blades on a table. The table had a magnet to help hold the blade in place. He testified he needed to flip the blades. He did this job 5 days per week, 8 hours per day. He testified he did about 1000 blades per shift.

Michael Martinko, Respondent's manager, testified that Petitioner was off work from January 15, 2015. His first shift back was February 2, 2015. He worked 7 shifts before reporting left arm complaints on February 13, 2015. Petitioner was assigned to blade scaling. RX 10 documents the scale and the heaviest blade weighed. Some blades would be lighter. Petitioner could work at his own pace. He could do up to 1000 blades per shift. He testified that Petitioner also worked setting screws in hubs, in the tool room and changing light bulbs. He

would use a scissor lift to change bulbs, not a ladder. There were no production records of Petitioner's work assignments. Petitioner testified on cross examination that RX 11 showed the light bulb he changed. He would use his left hand to change bulbs. He would use a lift truck to reach the ceiling.

Petitioner testified that while doing the job weighing blades beginning after January 30, 2015, he noticed a burning sensation in his left elbow shooting down his arm. He testified he had noticed some left elbow symptoms 2 to 3 months before his right elbow surgery. RX 4 is the Petitioner's Application for Adjustment of Claim filed June 16, 2016 alleging a 1/30/15 repetitive trauma injury to the left arm. Petitioner then testified he felt a swelling sensation before his surgery and a burning and numbness after scaling blades.

Petitioner testified he told his boss Mike. He was again sent to Physicians Immediate Care. Petitioner was first seen on February 13, 2015. The Medical Authorization from the visit is for left hand pain. Although the history lists right upper extremity pain, it documents that Petitioner states he has had to use his left arm at work for the last year due to surgery on his right arm. He describes a gradual onset. The examination is to the left arm and notes tenderness and pain against resistance. The diagnosis is lateral epicondylitis. Petitioner was given restrictions to avoid repetitive twisting and given a brace (PX 2). On February 23, 2015, the restrictions were adjusted to limit palm down activities. Petitioner had follow up visits with Physicians Immediate Care and physical therapy for the left elbow through May 21, 2015. The records note various light duty positions he performed. On March 12, 2015, he notes driving a cart proved to be too much for his left arm pain. He had an injection on May 6, 2015. On May 12, 2015, he notes that he is doing overhead changing of light bulbs. His restrictions were modified to include no over shoulder activity. On May 21, 2015, he was restricted from ladder climbing (PX 2).

Petitioner saw Dr. Balaram on June 27, 2015 for follow up on his right arm. He reported problems with his left elbow as well. He denied any new injury. The evaluation noted tenderness over the lateral epicondyle and mild pain with resisted wrist extension and resisted finger extension (PX 3). Petitioner saw Dr. Vender on June 25, 2015 with complaints of left elbow pain for 5 months. Dr. Vender diagnosed lateral epicondylitis. He released Petitioner to unrestricted work (PX 3). On July 6, 2015, Dr. Balaram records a history of left elbow cramping developing at work in February. He restricted Petitioner to 15 pounds lifting. Petitioner had a corticosteroid injection on July 17, 2015 (PX 3).

Petitioner returned to Dr. Balaram on November 6, 2015. He reported 5 days relief from the injection. On December 11, 2015, Petitioner reported occasional numbness and tingling into his fingers. Dr. Balaram notes Petitioner is a candidate for surgery on the left elbow. He injected the radial tunnel to determine if Petitioner also had radial tunnel syndrome. On January 15, 2016, Petitioner reported 10 days relief from the radial tunnel injection. Dr. Balaram notes that the lateral epicondylitis is a surgical problem. He would also propose a radial tunnel decompression. On February 12, 2016, Petitioner advised Dr. Balaram that he decided not to undergo surgery. Dr. Balaram ordered a functional capacity evaluation (PX 3).

Petitioner underwent a functional capacity evaluation at Athletico on March 9, 2016. The test was determined to be valid. Petitioner was released to work at the medium physical demand level with lifting up to 25 pounds. The job description provided was for a heavy machine operator. The job was within the medium physical demand level with 2 hand occasional lifting of 50 pounds. The performance noted 9/16 job demand were met by Petitioner. The demands for lifting between 25 and 50 pounds were not met. On April 1, 2016, Dr. Balaram released Petitioner with a permanent 25 pound lifting restriction per the FCE. Petitioner was to be seen as needed (PX 3).

Petitioner testified that he is still working for Respondent. He operates the welding machine. He works with parts weighing between 3 to 4.5 pounds. The Respondent no longer has the blade scaler job. It was automated. Petitioner is earning the same wage he did before the accident. He notices pain over the right elbow and arm weakness. His pain radiates into the little, ring and middle fingers of the right hand. He has pain in his left elbow on the lateral side which radiates into the left little, ring and middle fingers. He has difficulty sleeping. He takes over-the-counter medication.

Dr. Balaram testified by evidence deposition taken July 19, 2017 (PX 4). He testified to his treatment for the right arm including the surgery and post-operative care, he released Petitioner to return to regular duty for the right arm on August 28, 2015. He noted his diagnosis of medial and lateral epicondylitis and complaints consistent with right ulnar nerve irritation. Dr. Balaram testified that Petitioner reported some problems with the left elbow on June 17, 2015. Dr. Vender diagnosed left lateral epicondylitis on June 25, 2015. Petitioner reported five months of elbow pain at that time. Dr. Balaram testified that the history he received on July 6, 2015 was that Petitioner was at work in February when he developed cramping to the left elbow and forearm. Petitioner was placed on a restriction for the left elbow. Petitioner was offered left elbow surgery but decided not to undergo the surgery. Petitioner had an FCE and was released with permanent restrictions per the FCE. Dr. Balaram opined that the right elbow was causally connected to an acute injury as reported to him. The mechanism of injury is consistent.

Dr. Balaram was provided a hypothetical question that Petitioner performed a job from January 24, 2014 called "Brooches" consisting of operating a machine and manipulating parts weighing up to 8 pounds. Then Petitioner began weighing fan blades weighing 4.8 pounds. Dr. Balaram opined that if there was forceful grasping and lifting with the palm down away from the body over a long period of time, development of lateral epicondylitis could have occurred based on this movement. Whether the fan blade weighing job was a contributing factor depends on the mechanism of lifting and if there was forceful grasping. If there was palm down lifting with extension of the wrist over 300 times over the course of his shift with a 5-pound weight, you can develop inflammation associated with the lateral epicondyle. Dr. Balaram testified that lateral epicondylitis can occur without any known cause (PX 4).

Petitioner was examined at Respondent's request by Dr. Barakat on November 2, 2016. Dr. Barakat testified by evidence deposition taken September 28, 2017 (RX 12). He testified to the medical records he reviewed and his examination of Petitioner. He testified to the history provided by Petitioner of noticing pain in his right elbow while punching holes into steel blades on August 17, 2013. Dr. Barakat testified he took a history of developing pain in the left elbow in May or June 2015. He examined multiple treating records and stated that the first mention of left arm complaints was Dr. Balaram's June 17, 2015 office note. He was not provided the Physician's Immediate Care records from January or February 2015. He noted on physical examination that Petitioner had complaints of pain in the right elbow and some objective evidence of ongoing discomfort. He opined that there was a causal connection between the August 17, 2013 accident and the condition of ill being in the right arm. Dr. Barakat's physical examination of the left elbow noted moderate tenderness over the lateral epicondyle and mild tenderness at the medical epicondyle. He diagnosed left lateral epicondylitis with some mild medial epicondylitis. He initially opined that this was causally related to his work activity pushing a punch press repetitively and with force. He then opined that the blade scaler job would not cause epicondylitis. He found Petitioner was at maximum medical improvement for both arms (RX 12).

Dr. Barakat performed an AMA impairment rating. He opined that Petitioner has a 7% impairment of the right arm and a 2 % impairment of the left arm (RX 12).

Conclusions of Law

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

To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that he suffered a disabling injury that arose out of and in the course of the claimant's employment. If an injury can be traceable to a definite time, place and cause and the injury occurs in the course of the employment, the injury is accidental within the meaning of the act. *E. Baggot Co. v. Industrial Comm'n.*, 290 Ill. 530, 533 (Ill. 1919). An injury occurs "in the course of' employment when it occurs during employment and at a place where the claimant may reasonably perform employment duties, and while a claimant fulfills those duties or engages in some incidental employment duties. An injury "arises out of" one's employment if it originates from a risk connected with, or incidental to, the employment and involves a causal connection between the employment and the accidental injury.

While Petitioner testified to performing the blade balancer position for several years, he described a singular incident on August 17, 2013 as the first onset of symptoms. The testimony is consistent with the medical histories for the right elbow injury. The injury occurred while Petitioner was fulfilling his duties for Respondent and originated in the risk of punching holes into the stainless steel blades which it was agreed is more difficult that the lighter aluminum blades. The Arbitrator does not find the date discrepancy in Dr. Balaram's records significant. Nor does the Arbitrator place significant weight on the original claim listing repetitive trauma since Petitioner had also performed this same function for an extended period of time.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proved by a preponderance of the evidence that he suffered accidental injuries arising out of and in the course of his employment with Respondent on August 17, 2013.

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

The claimant in a workers' compensation case has the burden of proving, by a preponderance of the evidence, all of the elements of his claim. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253, 403 N.E.2d 221, 38 Ill. Dec. 133 (1980). Included within that burden is proof that his current condition of ill-being is causally connected to a work-related injury. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003).

Based upon the Arbitrator's finding with respect to Accident, Petitioner is entitled to compensation for any condition of ill being causally connected to the August 17, 2013 accident. The medical records document that Petitioner complained of pain in the right elbow and also complaints into the right wrist. Physicians Immediate Care diagnosed medial epicondylitis. Dr. Balaram diagnosed medial and lateral epicondylitis. He also noted complaints consistent with right ulnar nerve irritation. Dr. Balaram performed surgery consisting of a right in-situ ulnar nerve decompression, a right medial epicondylectomy and a right flexor pronator origin debridement.

Dr. Balaram testified that Petitioner's condition of ill being in the right elbow was causally connected to an acute injury as reported to him. The mechanism of injury is consistent. Dr. Barakat also opined that there was a causal connection between the August 17, 2013 accident and the condition of ill being in the right arm.

Based upon the record as a whole and the Arbitrator's finding with respect to Accident, the Arbitrator finds that Petitioner has proved by a preponderance of the evidence that his condition of ill being in the right arm is causally connected to the accidental injury sustained on August 17, 2017.

In support of the Arbitrator's decision with respect to (K) Temporary Compensation and (N) Credit, the Arbitrator finds as follows:

Based upon the Arbitrator's findings with respect to Accident and Causal Connection, Petitioner is entitled to Temporary Total disability for the period he was unable to work as a result of the condition of ill being in the right arm. The undisputed evidence is that Respondent accommodated Petitioner's restricted duty from August 17, 2013 through his surgery date on January 15, 2015 and again after his release to restricted duty on January 30, 2015 through his release to regular work with respect to the right arm on August 28, 2015. Petitioner was temporarily totally disabled from January 15, 2015 through January 29,2015.

RX 8 documents two payments of temporary compensation of $315.27 each printed January 27, 2015 and February 3, 2015. Two subsequent payments were voided.

Based upon the record as a whole and the Arbitrator's findings with respect to Accident and Causal Connection, the Arbitrator finds that Petitioner is entitled to 2 1/7 weeks of Temporary Total Disability for the period commencing January 15, 2015 through January 29, 2015. Respondent is entitled to credit for the two payments made and received by Petitioner totaling $630.54.

In support of the Arbitrator's decision with respect to (L) Nature and Extent, the Arbitrator finds as follows:

Petitioner's date of accident is after September 1, 2011 and therefore the provisions of Section 8.1b of the Act are applicable to the assessment of partial permanent disability in this matter.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that the record contains an impairment rating of 7% of the upper extremity as determined by Dr. Barakat, pursuant to the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment (RX 12). The Arbitrator notes that this level of impairment does not necessarily equate to permanent partial disability under the Workers' Compensation Act, but instead is a factor to be considered in making such a disability evaluation. The doctor noted his review of the medical records and his physical examination as well as the methodology used to reach the impairment rating. Because of this, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a blade balancer for Respondent at the time of the accident and that he is able to return to work in his prior capacity as a result of said injury having been released to unrestricted duty for the right arm as of August 28, 2015. The Arbitrator notes that Petitioner is continuing to work for Respondent in a different capacity in part due to the elimination of his prior position and also because of the restrictions he has been provided in conjunction with his left arm complaints which are the subject of the

consolidated claim 15 WC 19960 decided in conjunction with this matter. Because of these facts, the Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 37 years old at the time of the accident. Petitioner would be considered a younger individual and would be expected to remain in the workforce with the condition of ill-being for an extended period of many years. Because of this, the Arbitrator therefore gives some weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner was released to return to unrestricted duty with respect to the right arm on August 28,2015. Although he is now performing a different job for Respondent within the restrictions required for his left arm condition, he has suffered no loss of income. Because of this, the Arbitrator therefore gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner has been diagnosed with medial and lateral epicondylitis and has had complaints consistent with ulnar neuropathy. He has undergone surgery on the right elbow consisting of a right in-situ ulnar nerve decompression, a right medial epicondylectomy and a right flexor pronator origin debridement. He was released to return to unrestricted work as of August 28, 2015. The physical examination at that time noted mild tenderness over the medial and lateral epicondyle and discomfort with deep palpation over the ulnar nerve. Dr. Barakat noted on physical examination that Petitioner had complaints of pain in the right elbow and some objective evidence of ongoing discomfort. Because of these facts, the Arbitrator therefore greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 15% loss of use of Right Arm pursuant to §8(e) of the Act.

In support of the Arbitrator's decision with respect to (M) Penalties, the Arbitrator finds as follows:

At trial, Petitioner sought penalties under Sections 19(k) and 16 for a frivolous Accident defense. The Arbitrator notes that no formal Penalty Petition was filed and no unpaid benefits were demanded.

The standard for awarding penalties and attorney fees under sections 19(k) and 16 is higher than the standard for awarding penalties under section 19(l) because sections 19(k) and (16) require more than an "unreasonable delay" in payment of benefits. For the award of penalties and attorney fees under sections 19(k) and 16, it is not enough for the claimant to show that the employer simply failed, neglected, or refused to make payment or unreasonably delayed payment without good and just cause. Instead, penalties and attorney fees under sections 19(k) and 16 are intended to address situations where there is not only delay, but the delay is deliberate or the result of bad faith or improper purpose. In addition, while section 19(l) penalties are mandatory, the imposition of penalties and attorney fees under sections 19(k) and 16 is discretionary.

The Arbitrator finds no bad faith or improper purpose in requiring Petitioner to prove accident in this matter given the alternate theories originally raised in the Applications for Adjustment of Claim filed and

the discrepancy in the date of accident raised in Dr. Balaram's records. The Arbitrator finds no delay was caused by placing the additional issues in dispute at trial.

Petitioner's demand for penalties is therefore denied.

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

CARLOS CORDERO RIOS,
Petitioner,
vs.

NO: 15 WC 19960

REVCOR,
Respondent.

18IWCC0604

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, temporary total disability (TTD), and permanent partial disability (PPD), and being advised of the facts and applicable law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. A separate decision has been issued for case 14 WC 31003, which was consolidated with case 15 WC 19960 at trial.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 6, 2017 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $11,200.00. 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 5 - 2018
MJB/tdm
O: 9/25/18
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CORDERO RIOS, CARLOS
Employee/Petitioner

Case# **15WC019960**
14WC031003

REVCOR
Employer/Respondent

On 1/30/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.62% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1836 RAYMOND M SIMARD PC
205 W RANDOLPH ST
SUITE 815
CHICAGO, IL 60606

2461 NYHAN BAMBRICK KINZIE & LOWRY
BRIAN RUDD
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

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

Carlos Cordero Rios
Employee/Petitioner

v.

Revcor
Employer/Respondent

Case # **15** WC **19960**

Consolidated cases: **14 WC 31003**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Wheaton**, on **November 6, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **February 13, 2015**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$23,157.41**; the average weekly wage was **$486.08**.

On the date of accident, Petitioner was **38** years of age, ***married*** with **1** dependent child.

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

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

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

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

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $291.65/week for 37.95 weeks, because the injuries sustained caused the 15% loss of the Left Arm, 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

January 26, 2018
Date

ICArbDec p. 2

JAN 30 2018

Statement of Facts

This matter was heard in conjunction with consolidated case 14 WC 31003 (DOA: 8/17/13). A single transcript was prepared but the Arbitrator has issued two separate decisions. Prior to hearing, Petitioner's motion to amend the application to allege an accident date from January 30, 2015 to February 13, 2015 was granted. The Amended Application for Adjustment of Claim was admitted as Arbitrator's Exhibit 3.

Petitioner Carlos Cordero Rios testified that on August 17, 2013, he was employed by Respondent Revcor. He began work for Respondent in 2007. Petitioner testified that he had a high school education and a certificate in Electronics. He had previously worked in a warehouse and as a laborer. These jobs required heavy lifting. Petitioner's job with Respondent was as a main blade balancer for propellers. He would pick up the blade, put it in a machine and use a hole punch to punch a hole in the blade. The punch was 18-20 inches long. It resembled a bolt cutter. He testified he did several hundred pieces per shift. He held the left arm flexed firmly at 90 degrees to steady the fan blade and would then flex the right arm at the elbow to bring up the punch part of the tool to punch the hole. Petitioner testified that his wage was $11.81 per hour through the end of 2013, at which time it was increased to $12.40 per hour beginning in 2014. Respondent offered Petitioner's wage records as RX 6.

Petitioner testified that on August 17, 2013, he was punching holes in stainless steel blades which are harder that aluminum blades. While doing his job duties, he felt a snap and pain in the right elbow. Petitioner testified he told his boss. He finished the remaining hour of his shift. He noticed pain the next day in his elbow. On Monday, he was sent to Physicians Immediate Care by Human Resources. Petitioner's Application for Adjustment of Claim filed September 16, 2014 alleges a repetitive trauma injury (RX 1). The amended Application filed October 23, 2017 states the accident occurred punching holes in fan blades (RX 2).

Petitioner presented to Physicians Immediate Care on August 19, 2013 with pain in the right elbow since August 17, 2013. He provided a history of a sudden onset of pain. He stated he was punching a hole into steel when material slipped and he felt immediate pain. Petitioner was diagnosed with medial epicondylitis. He was given medication and placed on a 5-pound lifting restriction with no strong gripping or repetitive motion of the right elbow (PX 1). Petitioner testified that Respondent accommodated his restricted duty. He worked a position called "set screws." He performed this job until his surgery in January 2015.

On August 26, 2013, Petitioner reported improvement in the right elbow, but pain in the right wrist. Physical examination noted tenderness in the medial and lateral epicondyle and was otherwise unremarkable. Petitioner was to continue restricted duty (PX 1). On September 3, 2013, Petitioner complained of pain inside the elbow. His wrist was much better. Petitioner had an injection into the elbow. He was continued on restrictions. Petitioner was prescribed physical therapy on September 11, 2013 (PX 1). He began therapy on October 1, 2013. Petitioner had a second injection into the right elbow on October 31, 2013. On December 3, 2013, Petitioner reported worsening symptoms. He was referred to Dr. Vender at Hand to Shoulder Associates and was to continue therapy and restricted duty (PX1).

Petitioner was seen on January 24, 2014 by Dr. Ajay Balaram at Hand to Shoulder Associates. Petitioner complained of medial and lateral right elbow pain with weakness and hand numbness. Petitioner gave a history of a sudden onset of right elbow pain following an incident at work. On October 19, 2013, Petitioner was using a tool twisting, using pliers and he felt pain in his right elbow and it started to swell. Examination

showed tenderness over the elbow condyles and a positive Tinel sign over the cubital tunnel. He had pain with resisted wrist flexion and extension. Dr. Balaram diagnosed medial and lateral epicondylitis. He prescribed Meloxicam and one month of physical therapy. Dr. Balaram released Petitioner to light duty work with no repetitive movements or lifting greater than 5 pounds (PX 3).

On March 12, 2014, Petitioner reported improvement but continued stiffness and pain. On April 25. 2014, Petitioner noted improvement on the outside of his elbow, but the inside has continued pain and zinging type sensations. He also reported numbness and tingling into the small finger (PX 3). An EMG/NCV performed by Dr. Scott Heller on July 2, 2014 found no evidence of ulnar neuropathy in either elbow of Petitioner. It did note median neuropathy (PX 3). Dr. Balaram noted that the EMG results did not match his clinical findings of tenderness over the right medial epicondyle, a positive Tinel sign over the cubital tunnel and a positive elbow compression test. Dr. Balaram prescribed Meloxicam, an elbow brace and continued light duty (PX 3).

Dr. Balaram ordered an MRI of the right elbow which was reported as essentially normal on August 25, 2014. On September 15, 2014, Dr. Balaram again found tenderness over the right medial epicondyle and radiating pain on medial compression of the ulnar nerve. Dr. Balaram referred Petitioner to his partner, Dr. Michael Vender, for a second opinion. He released Petitioner to unrestricted work (PX 3). Petitioner testified that he did not return to regular duty and continued to perform the set screw position.

Dr. Vender examined Petitioner on September 22, 2010. Dr. Vender noted that the right ulnar nerve was unstable with complete subluxation out of the cubital tunnel over the medial epicondyle which caused significant pain when the elbow was passively flexed or extended. Dr. Vender prescribed surgery (PX 3).

On January 15, 2015, Dr. Balaram performed a right in-situ ulnar nerve decompression, a right medial epicondylectomy and a right flexor pronator origin debridement. Petitioner was taken off work. Petitioner attended therapy for his right elbow beginning January 19, 2015. On January 30, 2015, Dr. Balaram released Petitioner to restricted duty with no use of the right arm (PX 3).

Petitioner continued therapy on the right arm. The notes reflect complaints only in the right elbow. On March 20, 2015, Dr. Balaram notes Petitioner has returned to work on light duty. Petitioner noted exacerbation of the zinging type pain after his last therapy session. Dr. Balaram allowed Petitioner to continue work with 5-pound lifting, pushing, pulling on the right (PX 3). Petitioner concluded therapy on April 23, 2015. On April 24, 2015, Dr. Balaram continued a 10-pound lifting restriction. The restriction was increased to 25 pounds on June 17, 2015 and 30 pounds on July 17, 2015. Petitioner was released to unrestricted duty on August 28, 2015 with respect to the right arm (PX 3).

Petitioner testified that Respondent accommodated his restriction after his January surgery. He was returned to work weighing blades. He would take the blades which were 20 inches long and weighed 4.8 pounds in his left hand and placed them on a scale. He testified he lifted one or two at a time in his left hand with the palm down. He would then place the blades on a table. The table had a magnet to help hold the blade in place. He testified he needed to flip the blades. He did this job 5 days per week, 8 hours per day. He testified he did about 1000 blades per shift.

Michael Martinko, Respondent's manager, testified that Petitioner was off work from January 15, 2015. His first shift back was February 2, 2015. He worked 7 shifts before reporting left arm complaints on February 13, 2015. Petitioner was assigned to blade scaling. RX 10 documents the scale and the heaviest blade weighed.

Some blades would be lighter. Petitioner could work at his own pace. He could do up to 1000 blades per shift. He testified that Petitioner also worked setting screws in hubs, in the tool room and changing light bulbs. He would use a scissor lift to change bulbs, not a ladder. There were no production records of Petitioner's work assignments. Petitioner testified on cross examination that RX 11 showed the light bulb he changed. He would use his left hand to change bulbs. He would use a lift truck to reach the ceiling.

Petitioner testified that while doing the job weighing blades beginning after January 30, 2015, he noticed a burning sensation in his left elbow shooting down his arm. He testified he had noticed some left elbow symptoms 2 to 3 months before his right elbow surgery. RX 4 is the Petitioner's Application for Adjustment of Claim filed June 16, 2016 alleging a 1/30/15 repetitive trauma injury to the left arm. Petitioner then testified he felt a swelling sensation before his surgery and a burning and numbness after scaling blades.

Petitioner testified he told his boss Mike. He was again sent to Physicians Immediate Care. Petitioner was first seen on February 13, 2015. The Medical Authorization from the visit is for left hand pain. Although the history lists right upper extremity pain, it documents that Petitioner states he has had to use his left arm at work for the last year due to surgery on his right arm. He describes a gradual onset. The examination is to the left arm and notes tenderness and pain against resistance. The diagnosis is lateral epicondylitis. Petitioner was given restrictions to avoid repetitive twisting and given a brace (PX 2). On February 23, 2015, the restrictions were adjusted to limit palm down activities. Petitioner had follow up visits with Physicians Immediate Care and physical therapy for the left elbow through May 21, 2015. The records note various light duty positions he performed. On March 12, 2015, he notes driving a cart proved to be too much for his left arm pain. He had an injection on May 6, 2015. On May 12, 2015, he notes that he is doing overhead changing of light bulbs. His restrictions were modified to include no over shoulder activity. On May 21, 2015, he was restricted from ladder climbing (PX 2).

Petitioner saw Dr. Balaram on June 27, 2015 for follow up on his right arm. He reported problems with his left elbow as well. He denied any new injury. The evaluation noted tenderness over the lateral epicondyle and mild pain with resisted wrist extension and resisted finger extension (PX 3). Petitioner saw Dr. Vender on June 25, 2015 with complaints of left elbow pain for 5 months. Dr. Vender diagnosed lateral epicondylitis. He released Petitioner to unrestricted work (PX 3). On July 6, 2015, Dr. Balaram records a history of left elbow cramping developing at work in February. He restricted Petitioner to 15 pounds lifting. Petitioner had a corticosteroid injection on July 17, 2015 (PX 3).

Petitioner returned to Dr. Balaram on November 6, 2015. He reported 5 days relief from the injection. On December 11, 2015, Petitioner reported occasional numbness and tingling into his fingers. Dr. Balaram notes Petitioner is a candidate for surgery on the left elbow. He injected the radial tunnel to determine if Petitioner also had radial tunnel syndrome. On January 15, 2016, Petitioner reported 10 days relief from the radial tunnel injection. Dr. Balaram notes that the lateral epicondylitis is a surgical problem. He would also propose a radial tunnel decompression. On February 12, 2016, Petitioner advised Dr. Balaram that he decided not to undergo surgery. Dr. Balaram ordered a functional capacity evaluation (PX 3).

Petitioner underwent a functional capacity evaluation at Athletico on March 9, 2016. The test was determined to be valid. Petitioner was released to work at the medium physical demand level with lifting up to 25 pounds. The job description provided was for a heavy machine operator. The job was within the medium physical demand level with 2 hand occasional lifting of 50 pounds. The performance noted 9/16 job demand were met by Petitioner. The demands for lifting between 25 and 50 pounds were not met. On April 1, 2016, Dr. Balaram

released Petitioner with a permanent 25 pound lifting restriction per the FCE. Petitioner was to be seen as needed (PX 3).

Petitioner testified that he is still working for Respondent. He operates the welding machine. He works with parts weighing between 3 to 4.5 pounds. The Respondent no longer has the blade scaler job. It was automated. Petitioner is earning the same wage he did before the accident. He notices pain over the right elbow and arm weakness. His pain radiates into the little, ring and middle fingers of the right hand. He has pain in his left elbow on the lateral side which radiates into the left little, ring and middle fingers. He has difficulty sleeping. He takes over-the-counter medication.

Dr. Balaram testified by evidence deposition taken July 19, 2017 (PX 4). He testified to his treatment for the right arm including the surgery and post-operative care, he released Petitioner to return to regular duty for the right arm on August 28, 2015. He noted his diagnosis of medial and lateral epicondylitis and complaints consistent with right ulnar nerve irritation. Dr. Balaram testified that Petitioner reported some problems with the left elbow on June 17, 2015. Dr. Vender diagnosed left lateral epicondylitis on June 25, 2015. Petitioner reported five months of elbow pain at that time. Dr. Balaram testified that the history he received on July 6, 2015 was that Petitioner was at work in February when he developed cramping to the left elbow and forearm. Petitioner was placed on a restriction for the left elbow. Petitioner was offered left elbow surgery but decided not to undergo the surgery. Petitioner had an FCE and was released with permanent restrictions per the FCE. Dr. Balaram opined that the right elbow was causally connected to an acute injury as reported to him. The mechanism of injury is consistent.

Dr. Balaram was provided a hypothetical question that Petitioner performed a job from January 24, 2014 called "Brooches" consisting of operating a machine and manipulating parts weighing up to 8 pounds. Then Petitioner began weighing fan blades weighing 4.8 pounds. Dr. Balaram opined that if there was forceful grasping and lifting with the palm down away from the body over a long period of time, development of lateral epicondylitis could have occurred based on this movement. Whether the fan blade weighing job was a contributing factor depends on the mechanism of lifting and if there was forceful grasping. If there was palm down lifting with extension of the wrist over 300 times over the course of his shift with a five pound weight, you can develop inflammation associated with the lateral epicondyle. Dr. Balaram testified that lateral epicondylitis can occur without any known cause (PX 4).

Petitioner was examined at Respondent's request by Dr. Barakat on November 2, 2016. Dr. Barakat testified by evidence deposition taken September 28, 2017 (RX 12). He testified to the medical records he reviewed and his examination of Petitioner. He testified to the history provided by Petitioner of noticing pain in his right elbow while punching holes into steel blades on August 17, 2013. Dr. Barakat testified he took a history of developing pain in the left elbow in May or June 2015. He examined multiple treating records and stated that the first mention of left arm complaints was Dr. Balaram's June 17, 2015 office note. He was not provided the Physician's Immediate Care records from January or February 2015. He noted on physical examination that Petitioner had complaints of pain in the right elbow and some objective evidence of ongoing discomfort. He opined that there was a causal connection between the August 17, 2013 accident and the condition of ill being in the right arm. Dr. Barakat's physical examination of the left elbow noted moderate tenderness over the lateral epicondyle and mild tenderness at the medical epicondyle. Dr. Barakat diagnosed left lateral epicondylitis with some mild medial epicondylitis. He initially opined that this was causally related to his work activity pushing a punch press repetitively and with force. He then opined that the blade scaler job would not cause epicondylitis. He found Petitioner was at maximum medical improvement for both arms (RX 12).

Dr. Barakat performed an AMA impairment rating. He opined that Petitioner has a 7% impairment of the right arm and a 2 % impairment of the left arm (RX 12).

Conclusions of Law

In support of the Arbitrator's decision with respect to (C) Accident, (D) Date of Accident and (F) Causal Connection, the Arbitrator finds as follows:

The claimant in a workers' compensation case has the burden of proving, by a preponderance of the evidence, all of the elements of his claim. To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that he suffered a disabling injury that arose out of and in the course of the claimant's employment. An injury occurs "in the course of' employment when it occurs during employment and at a place where the claimant may reasonably perform employment duties, and while a claimant fulfills those duties or engages in some incidental employment duties. An injury "arises out of" one's employment if it originates from a risk connected with, or incidental to, the employment and involves a causal connection between the employment and the accidental injury.

Petitioner is alleging that his condition of ill being in the left arm is caused by his employment with Respondent based upon a theory of repetitive trauma. An employee who suffers a repetitive-trauma injury still may apply for benefits under the Act, but must meet the same standard of proof as an employee who suffers a sudden injury. *Durand v. Industrial Comm'n,* 224 Ill. 2d 53, 65, 862 N.E.2d 918, 308 Ill. Dec. 715 (2006). Also Included within the Petitioner's burden is proof that his current condition of ill-being is causally connected to a work-related injury. In a repetitive trauma case, issues of accident and causation are intertwined. Therefore, a review of the evidence allows both issues to be resolved together. *Boettcher v. Spectrum Property Group and First Merit Venture Realty Group*, 97 W.C. 44539, 99 I.I.C. 0961. In cases relying on the repetitive-trauma concept, the claimant generally relies on medical testimony establishing a causal connection between the work performed and claimant's disability." *Williams v. Industrial Comm'n*, 244 Ill. App. 3d 204, 209, 614 N.E.2d 177, 180, 185 Ill. Dec. 43 (1993).

Petitioner presented the opinions of Dr. Balaram to support his claim. Respondent presented the opinions of Dr. Barakat. It is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 406-07, 459 N.E.2d 963, 76 Ill. Dec. 828 (1984); *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999). Expert testimony shall be weighed like other evidence with its weight determined by the character, capacity, skill and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts. *Madison Mining Company v. Industrial Commission*, 309 Ill. 91, 138 N.E. 211 (1923). The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion. *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, 960 N.E.2d 587, 355 Ill. Dec. 705. If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable. Expert opinions must be supported by facts and are only as valid as the facts underlying them. *In re Joseph S.*, 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87, 274 Ill. Dec. 284

(2003). A finder of fact is not bound by an expert opinion on an ultimate issue, but may look 'behind' the opinion to examine the underlying facts.

Petitioner was restricted with respect to the use of his right arm beginning August 19, 2013. He worked with limited use of the right arm until his January 15, 2015 right arm surgery. He testified to multiple duties he performed during this period including the physical requirement on his left arm. Following his surgery, he returned to work with a restriction of no use of the right arm. He testified to the blade scaling duties. He testified to the mechanism of performing this task. He also may have performed other duties as well prior to his seeking medical treatment on February 13, 2015. While Mr. Martinko disputed that Petitioner performed this job continuously for the 7 shifts following his return to work, he did not dispute the mechanism or weight of the blades and admitted that 1000 blades per shift was possible. Petitioner testified he noticed some symptoms while performing restricted duty before his surgery, but testified to a change in the nature and intensity of the symptoms while doing the blade scaling duties. His medical histories are consistent in raising this job duty as a mechanism causing the onset of his symptoms.

The aram provided a causation opinion in response to a hypothetical question which included a duties a job called "brooches." The Petitioner did not testify to a job with this name. However, Dr. Balaram opined that if there was forceful grasping and lifting with the palm down away from the body over of time, development of lateral epicondylitis could have occurred based on this movement. Whether an blade weighing job was a contributing factor depends on the mechanism of lifting and if there was forceful grasping. If there was palm down lifting with extension of the wrist over 300 times over the course of his shift with a 5-pound weight, you can develop inflammation associated with the lateral epicondyle.

Respondent's examiner Dr. Barakat initially opined that there was a causal connection between the left elbow condition and Petitioner's work based upon a job description of pushing a punch press repetitively and with force against resistance. When he was advised that the job was handling blades weighing 4.8 pounds at Petitioner's own pace, he opined that there was no causal connection. His opinion in part included the fact that the Petitioner first raised complaints in the left arm in May or June 2015. He was provided no information as to the mechanism of how the lifting was accomplished, the force required or the number of repetitions per shift..

After weighing the medical opinions and considering the basis of each, the facts underlying them, the character, capacity, skill and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts, the Arbitrator finds the opinions of Dr. Balaram that the mechanism of lifting with forceful grasping and palm down lifting with extension of the wrist over 300 times over the course of his shift with a five pound weight can develop inflammation associated with the lateral epicondyle supported by the testimony and medical evidence and more persuasive than the opinions of Dr. Barakat.

Respondent has raised the Petitioner's initial filed Application claiming the accident date as January 30, 2015 and trial date amendment to February 13, 2015 as an element of its defense to this claim. The standard for determining the manifestation date in a repetitive trauma case is flexible and fact-specific and is guided by considerations of fairness. *Durand*, 224 Ill. 2d at 69, 71 ("The facts must be closely examined in repetitive-injury cases to ensure a fair result for both the faithful employee and the employer's insurance carrier."); see also *Oscar Mayer & Co. v. Industrial Comm'n*, 176 Ill. App. 3d 607, 612, 531 N.E.2d 174, 126 Ill. Dec. 41 (1988); *Three "D" Discount Store v. Industrial Comm'n*, 198 Ill. App. 3d 43, 49, 556 N.E.2d 261, 144 Ill. Dec. 794 (1989). The date on which the employee notices a repetitive trauma injury is not necessarily the manifestation date. *Oscar Mayer & Co.*, 176 Ill. App. 3d at 611; see also Durand, 224 Ill. 2d at 68. Instead, the

date on which the employee became unable to work, due to physical collapse or medical treatment, helps determine the manifestation date. *Oscar Mayer & Co.*, 176 Ill. App. 3d at 611; see also *Durand*, 224 Ill. 2d at 68-69. "[C]ourts considering various factors have typically set the manifestation date on either the date on which the employee requires medical treatment or the date on which the employee can no longer perform work activities." *Durand*, 224 Ill. 2d at 72. A formal diagnosis is not required. *Id.* However, because repetitive trauma injuries are progressive, the employee's medical treatment, as well as the severity of the injury and particularly how it affects the employee's performance, are relevant in determining objectively when a reasonable person would have plainly recognized the injury and its relation to work. *Id.*; see also *Oscar Mayer & Co.*, 176 Ill. App. 3d at 610. Based upon the evidence submitted, February 13, 2015, the date upon which Petitioner testified he reported the left arm condition and first sought medical treatment is an appropriate date of manifestation for the condition of ill being alleged.

Based upon the record as a whole, the Arbitrator finds that Petitioner proved by a preponderance of the evidence that he suffered repetitive trauma accidental injuries arising out of and in the course of his employment with Respondent with a manifestation date of February 13, 2015 and that Petitioner's condition of ill being in the left elbow is causally connected to said accidental injury.

In support of the Arbitrator's decision with respect to (G) Average Weekly Wage, the Arbitrator finds as follows:

Petitioner claimed an average weekly wage of $486.08 on the Request for Hearing Form submitted as Arbitrator's Exhibit 2. Petitioner testified that he earned $11.81 per hour through 2013 and then was earning $12.40 per hour. He testified he worked 5 days per week, 8 hours per day. Respondent submitted RX 6 which included a listing of checks paid to Petitioner from February 9, 2014 through February 8, 2015. The exhibit does not list hourly rates or the number of hours per day or days per week worked. The Arbitrator notes that at least through the check on June 15, 2014, it appears that Petitioner was being paid $11.81 per hour rather that $12.40 per hour. As of July 13, 2014, Petitioner was receiving $12.40 per hour. Based upon the evidence submitted, the Arbitrator finds that Petitioner received the increase from $11.81 per hour to $12.40 per hour at some time during this period in the summer 2014. Using this finding, Petitioner's claim of a wage of $486.08 is within the values which can be calculated and is the best figure that the Arbitrator can calculate from the evidence submitted.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proved an average weekly wage of $486.08 by a preponderance of the evidence.

In support of the Arbitrator's decision with respect to (L) Nature and Extent, the Arbitrator finds as follows:

Petitioner's date of accident is after September 1, 2011 and therefore the provisions of Section 8.1b of the Act are applicable to the assessment of partial permanent disability in this matter.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that the record contains an impairment rating of 2% of upper extremity as determined by Dr. Barakat, pursuant to the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment (RX 12). The Arbitrator notes that this level of impairment does not necessarily equate to permanent partial disability under the Workers' Compensation Act, but instead is a factor to be considered in making such a disability evaluation. The doctor

noted his review of the medical records and his physical examination as well as the methodology used to reach the impairment rating. Because of this, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a blade balancer before the August 17, 2013 accident and had been a blade scaler at the time of the February 13, 2015 accident. The blade balancer job was automated and eliminated by Respondent. Petitioner was released with permanent restrictions per the FCE performed. While the FCE found Petitioner could not perform all the functions of a heavy machine operator, none of the jobs he described performing included the occasional 50 pound lifting that the FCE noted was above his capacity. The only restriction provided by Dr. Balaram was no lifting over 25 pounds. No evidence admitted established that any of the Petitioner's jobs with Respondent required lifting of over 25 pounds. Petitioner has been working for Respondent as a welder since his release. The Arbitrator does note that, before being hired by Respondent, Petitioner had worked in heavy labor and that such jobs would now be beyond his current physical capacity per the FCE. Because of these facts, the Arbitrator therefore gives lessor weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 38 years old at the time of the accident. Petitioner would be considered a younger individual and would be expected to remain in the workforce with the condition of ill-being for an extended period of many years. Because of this, the Arbitrator therefore gives some weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner was released to return to work within the limits of the FCE. He has been accommodated with a current assignment within his physical capacity without loss of income. Although he is now performing a different job for Respondent within the restrictions required for his left arm condition, he has suffered no loss of income. As more fully discussed with respect to Section 8.1b(b) above, no evidence was offered to document that any job Petitioner performed for Respondent exceeded his current physical capacity although prior to being hired by Respondent, Petitioner had been employed in heavy labor. Such work would no longer be within his physical capabilities per the FCE. Because of this, the Arbitrator therefore gives lessor weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner was diagnosed left lateral epicondylitis. Petitioner was offered left elbow surgery but decided not to undergo the surgery. Petitioner had an FCE and was released with permanent restrictions of 25 pounds lifting. Because of this, the Arbitrator therefore gives greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 15% loss of use of Left Arm pursuant to §8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
KANKAKEE

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Holly Nietfeldt,
Petitioner,

vs.

NO: 12WC 31358
18IWCC0605

Menard's,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, temporary total disability, medical, permanent partial disability, penalities/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 January 6, 2017 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $20,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 9 - 2018

Charles J. DeVriendt

Joshua D. Luskin

Kevin W. Lamborn

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CJD/rlc
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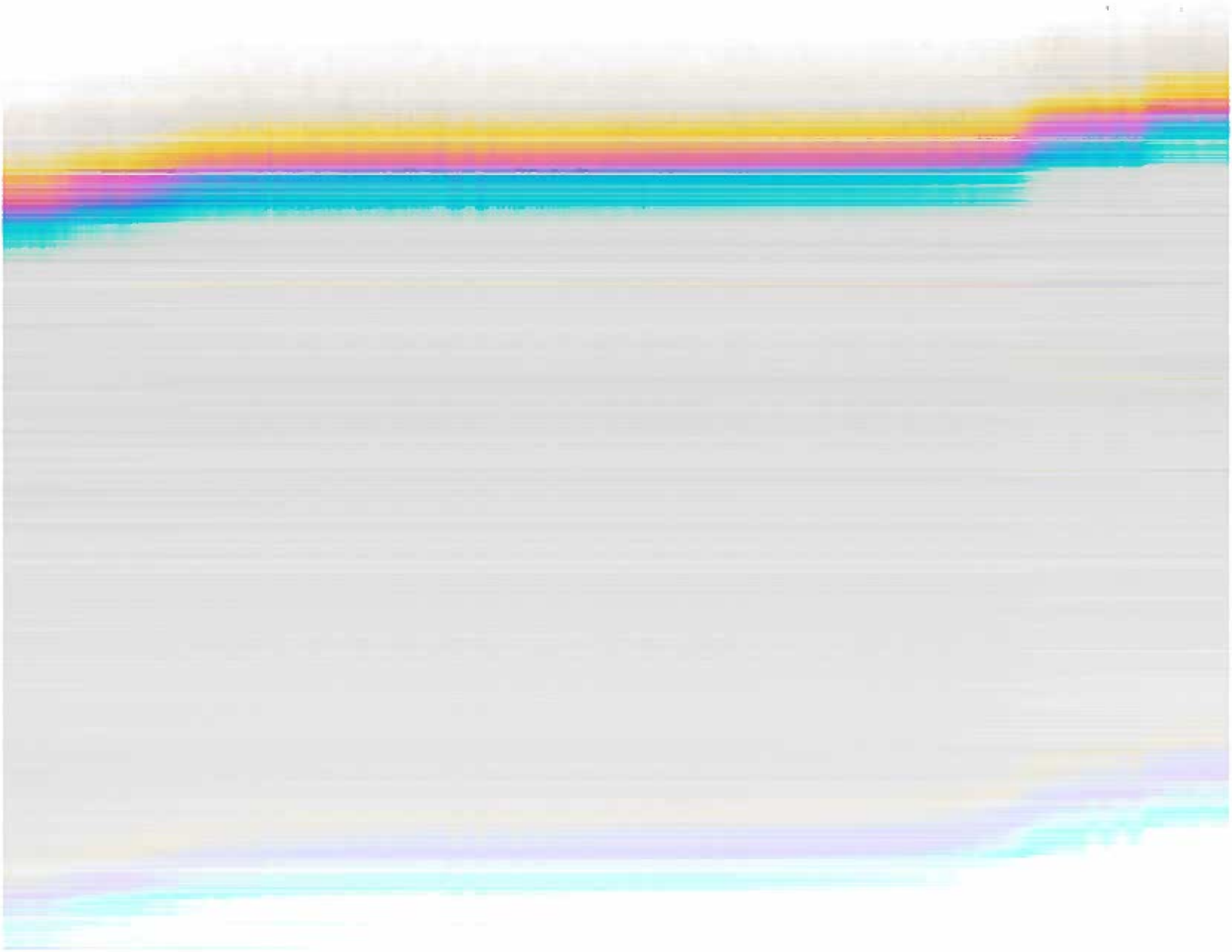


ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

NIETFELDT, HOLLY
Employee/Petitioner

Case# **12WC031358**

MENARD'S
Employer/Respondent

18IWCC0605

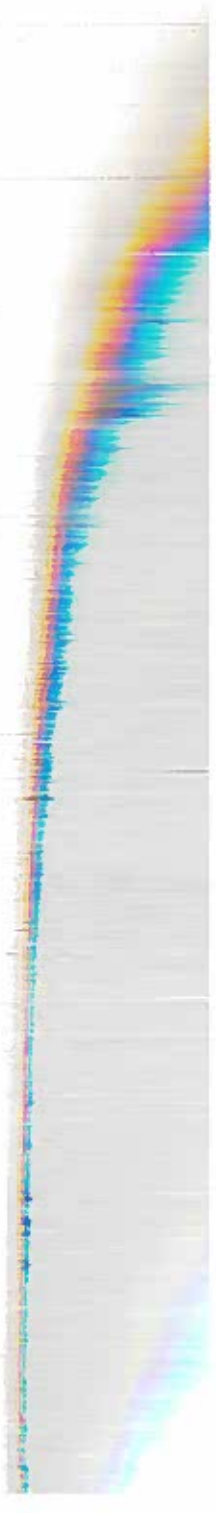
On 1/6/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.63% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0874 FREDERICK & HAGLE
PHILLIP W PEAK
129 W MAIN ST
URBANA, IL 61801

0210 GANAN & SHAPIRO PC
JAMES M BYRNES
210 W ILLINOIS ST
CHICAGO, IL 60654



18IWCC0605

STATE OF ILLINOIS)
)SS.
COUNTY OF KANKAKEE)

☐ 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

Holly Nietfeldt
Employee/Petitioner

v.

Menard's
Employer/Respondent

Case # **12WC 31358**

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 **Kankakee**, on **12/21/2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

18IWCC0605

FINDINGS

On **7/24/2012**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$28,963.02**; the average weekly wage was **$451.55**.

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

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

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

Respondent shall be given a credit of **$14,019.40** for TTD, **$1,962.37** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$15,981.77**.

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 **$301.03**/week for **46-6/7** weeks, commencing **7/24/2012** through **11/25/2012**, and **2/15/2013** through **8/28/2013** as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary partial disability benefits, commencing **11/26/2012** through **2/14/2013**, representing **11-3/7** weeks as provided in Section 8(a) of the Act.

Respondent shall be given a credit of **$15,981.77** for temporary total and temporary partial disability benefits that have been paid for the periods noted above.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, for medical services rendered to Petitioner between July 24, 2012 and March 15, 2013, as provided in Sections 8(a) and 8.2 of the Act, and shall be entitled to credit for any amounts paid prior to the date of hearing for services rendered during that same period of time.

Respondent is not liable for payment of any penalties under Section 19(k) or 19(l) of the Act, or attorney's fees under Section 16 of the Act.

Based on the record as a whole, and noting the findings attached hereto, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of **15%** disability to the person as a whole, pursuant to **§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.

Robert E Johnson
Signature of Arbitrator

January 5, 2017
Date

12 WC 31358
HOLLY NIETFELDT V. MENARD'S

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

On July 24, 2012, the Petitioner was employed by Respondent Menard's as a service desk cashier. She had been employed by Menard's in that position for approximately 6 to 7 years. On that date, the Petitioner was walking through the parking lot to her car when she was struck by a pickup truck. According to the police report, the pickup truck was driven by Pedro Santos, who struck the Petitioner as he turned his vehicle to the left at the end of a lane of traffic. (PX 22) The Petitioner testified that she was struck on her entire right side by the pickup truck, flew back and landed on the concrete, striking the back of her head. She does not recall whether she lost consciousness, but does recall attempting to get up and hearing voices which told her not to get up and to stay down, due to the possible severity of her injuries. She also recalls speaking with the emergency medical technicians when they arrived on the scene, asking what happened, where she hurt and any medications she was on at the time. She was able to answer all of their questions.

The accident was witnessed by two individuals, Delores Cox and Roderick Sessions. Ms. Cox testified that she was driving past the Menard's parking lot when she witnessed the accident. According to Ms. Cox, the pickup truck hit the Petitioner and knocked her four feet into the air. The Petitioner then landed on her back and struck her head on the pavement. Ms. Cox drove over to assist the Petitioner and told her to stay down and wait for the ambulance. She testified that the Petitioner was scared, but was able to hold a conversation with her and did not notice any problems with her speech. Ms. Cox left the scene after the ambulance took the Petitioner to the hospital.

The other witness, Roderick Sessions, testified that he was parked approximately ten feet from the scene of the accident and saw it occur while he was sitting in his vehicle. He noticed that the Petitioner was walking west through the parking lot when a big pickup truck barreled into her (he doesn't believe they saw each other). The pickup truck hit the Petitioner on her right side and she fell to the ground, striking her head on the pavement. According to Mr. Sessions, the Petitioner was not knocked into the air and he didn't believe the truck was moving fast enough to knock her into the air; she simply fell back to the ground and struck her head. He did not have any conversations with the Petitioner, but did hear other people telling her to stay down and wait for the ambulance.

The Petitioner was taken by ambulance from the scene to Provena St. Mary's Hospital. According to the ambulance report, the Petitioner was sitting up by the time the ambulance arrived. The Petitioner gave a history of being struck by a pickup truck and hitting her head on the pavement, but she denied any loss of consciousness. It is also noted that the pickup truck exhibited no damage. (PX 4)

Upon arrival at the emergency room, the Petitioner complained of a bump to the back of her head, a headache, facial pain and neck pain and stiffness. A CT scan of the head was performed on the date of the accident and the results showed soft tissue swelling over the left posteroparietal high convexity with no underlying fracture and no intracranial pathology. (PX 4) A CT scan of the cervical spine was also conducted on that date and the results were negative. (Id.) She was diagnosed with a scalp contusion and cervical muscle strain and was discharged home. (Id.)

The Petitioner followed up with her family physician, Dr. Douglas Morr, on July 25, 2012, the day after the accident. She testified that "everything hurt," including her head, neck, back and thighs. Dr. Morr's treatment notes reflect soreness in the right lumbar muscles and right flank, as well as paresthesias in both thighs for a few minutes earlier that morning. (PX 1) The doctor's examination showed normal straight leg raising, and normal reflexes and sensation. (Id.) The doctor diagnosed status-post MVA with multiple contusions and muscle strains. He prescribed rest and medication, as well as no work, and advised her to follow up with him in one week. (Id.)

The Petitioner followed up with Dr. Morr on July 30, 2012. At that time, she complained of headaches and vertigo and complained of pain in her cervical, dorsal and lumbar spine, as well as pain in both shoulders and lower rib pain. She also complained of nausea due to the medication. The examination showed mild diffuse tenderness in the dorsal and lumbar spine, as well as muscle spasms. He recommended various diagnostic tests. (PX 1)

On July 30, 2012, the Petitioner was seen at Riverside Medical Center for diagnostic testing. Specifically, x-rays of the lumbar spine showed mild early degenerative changes but no acute findings. (PX 5) X-rays of the thoracic spine were normal, as were x-rays of the chest and ribs. (Id.) On August 1, 2012, a CT scan of the abdomen and pelvis was performed and there were no acute traumatic findings. (Id.) On August 6, 2012, Dr. Morr prescribed a course of physical therapy. (PX 1)

The Petitioner commenced physical therapy at Riverside Medical Center on August 14, 2012. According to the Initial Evaluation report, her chief complaint was neck pain and headaches, and also complained of dizziness if she stands too long, as well as other difficulties with activities of daily living. (PX 5) The clinical impression of the therapist on that date included "significant levels of muscle guarding and tension throughout the spine, upper shoulders and trunk." (Id.) It is also noted that the Petitioner presented with poor posture, limited ROM and limited tolerance for static positions and transitioning between positions. (Id.) The therapist expressed the opinion that the complaints of dizziness with prolonged standing "is likely due to orthostatic hypotension from recent sedentary lifestyle." (Id.) It was recommended that she participate in 8 weeks of physical therapy, 3 times per week, including aquatherapy, ROM, strengthening and stabilization exercises, as well as other therapeutic exercises and modalities. (Id.)

At the office visit with Dr. Morr on August 31, 2012, the Petitioner complained of occasional blurred vision and pressure behind her eyes, as well as occasional nausea and difficulty with focusing while reading. The doctor prescribed an MRI scan of the brain, which was conducted on September 4, 2012. (PX 1) The results showed a probable small scalp hematoma within the posterior left parietal region, but was otherwise normal, with no evidence of acute intracranial hemorrhage, infarct, mass lesion, mass effect or midline shift. All other findings were normal. (PX 5)

The Petitioner followed up with Dr. Morr on September 12, 2012. It was noted that an ophthalmologic exam was normal as well the MRI scan of the brain. (PX 1) She complained of occasional vertigo and dizziness, as well as persistent back pain and neck stiffness. The doctor recommended that she continue with physical therapy to treat the back and neck issues, as well as the vertigo issue. (Id.)

The Petitioner followed up with Dr. Morr on October 18, 2012. At that time, she complained of dizziness during physical therapy, which the doctor related to orthostatic hypotension. (PX 1) She also complained of numbness in her left arm over the past few months, which the doctor noted she had not complained of prior to that office visit. (Id.) The treatment note from that date also states that the "patient requests (a) neurologic opinion," and so Dr. Morr referred the Petitioner to Dr. Dodt. He also prescribed an EMG/NCV test of the left upper extremity. (Id.)

The Petitioner was initially seen by Dr. Bruce Dodt on November 7, 2012. She complained of dizziness during physical therapy, as well as back pain and daily headaches. Dr. Dodt prescribed an ultrasound of the carotid arteries, as well as the EMG/NCV test. (PX 2) The ultrasound test was conducted on November 9, 2012 and the results showed mild arteriosclerotic changes, but no evidence for hemodynamically significant stenosis. (Id.) The EMG/NCV test was conducted on November 21, 2012 and the impression was a normal EMG of the left arm as well as the cervical paraspinous muscles, as well as normal distal latencies, nerve conduction velocities, amplitude and sensory latencies of the left median and left ulnar nerves. (Id.)

Dr. Dodt reviewed the test results on November 21, 2012 and further noted that he did not find any deficits on neurological exam. (PX 2) He advised her to continue with physical therapy and also deemed her capable of returning to light duty work for half days, as of November 26, 2012. (Id.)

The Petitioner testified that she returned to work on November 26, 2012 and continued to work on a part time basis through February 14, 2013. She testified that she continued to experience pain and dizziness during this period, but worked through it.

The Petitioner followed up with Dr. Dodt on December 12, 2012, complaining of neck pain and occipital headaches which increased since returning to work. She had no complaints of numbness or weakness, no loss of vision, no further syncope and no other new complaints. (PX 2) The examination was essentially normal, including strength, sensory, reflexes, coordination and gait and station. (Id.) Dr. Dodt referred her to a pain management specialist.

The Petitioner was initially seen by Dr. Jasmine Maly at the Pain Care Center on December 28, 2012, complaining of headaches, shoulder pain and low back pain. She reported that the low back pain was responding to physical therapy and felt the neck pain was the cause of her headaches. (PX 3) The physical examination showed tenderness in the occipital area and trigger points in the neck area, as well as paraspinal tenderness in the neck and low back. (Id.) Based on her examination, Dr. Maly diagnosed occipital neuralgia, myofascial in origin and from cervical facet syndrome. She recommended a course of occipital nerve blocks and trigger point injections, as well as cervical facet blocks. (Id.)

The Petitioner continued to treat with Dr. Maly from December 28, 2012 through September 16, 2013. (PX 3) During that approximately nine month period, Dr. Maly performed over 20 injections, including occipital nerve blocks, trigger point injections to the neck and shoulders, and cervical, thoracic and lumbar facet blocks. (Id.) The Petitioner testified that the occipital nerve blocks helped to relieve pressure in her head, but the neck and low back injections only provided temporary relief of her symptoms. The doctor recommended radiofrequency ablation but the Petitioner did not wish to go through with such a procedure. By the time of her last appointment on September 16, 2013, the Petitioner noted that her neck pain was significantly better, but was still complaining of mid and low back pain. It was noted that overall, the pain was under control and she was advised to follow up on an as-needed basis. (Id.)

During her treatment with Dr. Maly, the Petitioner underwent several more diagnostic tests. On April 15, 2013, she underwent an MRI scan of the thoracic spine and the results were normal, with no evidence acute osseous abnormalities and no disc herniations, central canal stenosis or foraminal compromise. (PX 5) An MRI scan of the lumbar spine was conducted on the same date and the results showed no acute osseous abnormalities, a subtle posterior disc bulge at L4-5 with annular tear, but no focal disc herniations, central canal stenosis or foraminal compromise. (Id.) An MRI scan of the cervical spine was conducted on June 18, 2013, and the results showed minimal degenerative changes in the upper cervical region, but no acute osseous abnormalities and no focal disc herniations, central canal stenosis or foraminal compromise. (Id.)

The Petitioner testified that she began to use a cane for balance and ambulation issues in June of 2013. She testified that the use of the cane was recommended by Dr. Morr, her family physician. The Petitioner saw Dr. Morr on June 20, 2013, at which time the doctor notes that the patient ambulates with a cane for back pain and balance instability. (PX 1) During his deposition, Dr. Morr did not recall actually prescribing the use of the cane. (PX 33, p. 36) He also agreed that prior to that date, she was walking normally. (Id.) The Petitioner testified that she applied for SSDI benefits shortly thereafter.

The Petitioner was examined at the request of the Respondent by Dr. Norman Kohn, a neurologist, on June 24, 2013. Dr. Kohn reviewed the treatment records from the date of the accident, took a history from the Petitioner and performed a physical examination. On that date, the Petitioner complained of continuing low back pain with radiation to her hips, made worse with prolonged standing or sitting. She also complained of persistent headaches, as well as pain between her neck and her head. She also mentioned shoulder pain and vertigo, but reported substantial improvement with regard to those symptoms. (PX 29)

Based on the history, symptoms and examination, Dr. Kohn diagnosed cervical spine disease and cervicogenic headache, which he related to a cervical spine injury rather than postconcussive headaches. He also diagnosed abnormal vibration sensation and abnormal gait, which he related to possible vitamin B12 deficiency or a cervical spine injury. He noted that she had recently undergone an MRI scan of the cervical spine, which would be relevant to his diagnosis and prognosis. He opined that the current symptoms of back pain, neck pain and headaches were caused by the work accident of July 24, 2012 and that she was currently unable to work. He also recommended further evaluation of the cervical spine. (PX 29)

Following the examination of June 24, 2013, Dr. Kohn reviewed the cervical MRI films from the scan conducted on June 18, 2013. In his supplemental report of September 20, 2013, he noted that the films demonstrated minimal degenerative changes within the upper cervical region, including subtle diffuse disc bulge and tiny joint osteophytes at C3-4. He felt these changes were not unusual for the Petitioner's age and did not account for her symptoms and were not caused by the work accident of July 24, 2012. (PX 29) Furthermore, now having the benefit of the MRI films, he opined that her symptoms during the June 24, 2013, examination were not related to the work accident and that she had reached MMI from the results of the work injury. (Id.) In his opinion, the Petitioner's persistent complaints of pain and abnormality are caused by chronic degenerative joint disease, chronic B12 deficiency disease of the spinal cord and deconditioning, including her limited physical activity. "These chronic conditions, unrelated to the subject workplace incident, have also resulted in deconditioning, which contributes further to her symptoms." (Id.)

The Petitioner testified that after her discharge by Dr. Maly, she continued to treat with Dr. Dodt through the end of 2013, for both ongoing headaches and carpal tunnel syndrome, the latter condition which she does not consider to be related to the work accident. She testified that she continued to experience occasional headaches, but by the end of 2013, they were not as severe. This is confirmed by Dr. Dodt's treatment report of December 9, 2013. (PX 2) The records also reflect that the Petitioner followed up with Dr. Dodt on one more occasion, April 9, 2014. At that time, she noted that her headaches were much less in terms of frequency and duration, which was attributed to her use of Topamax. She testified that by that time, her headaches were pretty much gone and the bump on her head had subsided as well. The doctor prescribed ongoing use of Topamax and advised her to follow up with him in six months, but there is no evidence of any further treatment with Dr. Dodt after April 9, 2013. (Id.)

The Petitioner also completed a course of occupational therapy by the end of 2013. She testified that by the end of the occupational therapy program, she was still experiencing problems with endurance and a lack of energy due to ongoing pain. According to the Riverside Medical Center discharge report of December 17, 2013, she demonstrated impairments with musculoskeletal functions and performance skills because of pain, multiple trigger points, impaired posture, decreased ROM, decreased endurance and decreased tolerance for prolonged positions. (PX 5) The report also notes that Petitioner complained of a headache and pain in her shoulders, lower back and hips, with pain rated at a level of 5 out of 10. (Id.) She also reported pain at a level of 3 out of 10 while at rest, no limitations with low back ROM, two to three headaches per week, minimal pain with household chores and three to four hours of sleep per night. (Id.)

According to the Petitioner, she has not received much active treatment since her discharge from occupational therapy on December 17, 2013 and discharge by Dr. Dodt on April 9, 2014. She continues to treat with Dr. Morr every 6 months or so, for chronic pain symptoms and other health issues. The records from Dr. Morr reflect occasional office visits through 2015 and 2016, with the most recent taking place on November 4, 2016. On that date, she was complaining of burning pain in her feet, which started 3 days prior and had improved to only a residual ache. (PX 1) The doctor noted possible relation to a rash (erythema multiforme) which was resolved. (Id.) She was advised to follow up in 4 weeks if symptoms did not resolve.

The Petitioner was seen by Dr. Hilliard Slavick at the request of the Respondent on March 1, 2016. Dr. Slavick is board certified in adult neurology. (RX 1) At the time of the March 1, 2016 examination, Dr. Slavick took a history from the Petitioner and had previously reviewed the treatment records and diagnostic films, as well as a job description for Petitioner's position as a service desk cashier. (Id.) The Petitioner complained of daily back pain in the thoracic and lumbosacral regions bilaterally, as well as in the shoulder girdle and scapula. She rated her pain in the range of 4 to 8 on a 10 point scale. (Id.) The examination by Dr. Slavick revealed a normal neurologic exam, with intact motor strength to all four limbs, no sign of muscle atrophy, normal reflexes and intact sensation to all modalities. Gait and station was normal with normal walking and tandem walk. Neck range of motion was normal with no tenderness of the cervical, thoracic or lumbar paraspinal muscles. No trigger points were felt and straight leg raising was negative bilaterally. (Id.)

Based on the history provided by the Petitioner, his review of the treatment records and films, as well as his physical examination, it was the impression of Dr. Slavick that the Petitioner had multiple subjective complaints and no objective findings that would cause the extreme and persistent pain that she described. (RX 1) He opined that the accident of July 24, 2012 caused mild muscular spasms and did not suffer any significant neurologic dysfunction. He felt that the treatment she received was to treat the subjective complaints without

any objective neurological findings and that she reached a state of maximum medical improvement by March 15, 2013. Her pain had improved by that point and further diagnostic studies did not reveal any results that would correlate with her clinical complaints. Finally, he expressed the opinion that she was capable of returning to her regular work activities with Menard's, given that her complaints were purely subjective with no objective findings to support the presence, persistence or severity of the complaints. (Id.)

The Petitioner was also examined by Dr. Steven Mather at the Respondent's request on February 11, 2016. Dr. Mather is a board certified orthopaedic spine surgeon. (RX 2, p. 4) He took a history from the Petitioner and also reviewed treatment records and diagnostic films prior to the examination of the Petitioner. The Petitioner's complaints at that time included bilateral neck, thoracic and low back pain. She rated her pain at a level of 6 out of 10 on a daily basis, with a range of 4 out of 10 on a good day and up to 8 out of 10 on a bad day. She also reported difficulty with balance and the need to use a cane since the accident. (Id.)

The physical examination by Dr. Mather revealed a very deconditioned-type female. (RX 2) She walked with a cane but Dr. Mather felt "she can clearly walk normally without it." (Id.) She exhibited diffuse and nonfocal tenderness, from the occiput down to the sacrum; the doctor notes that "there is no area in the spine that is nontender. She even has significant subjective tenderness in the right trapezial area even with light pressure, even just mildly rubbing the skin. She jumps with every palpation. She states it hurts. She has pain in the neck with mild axial compression of the head." (Id.)

During the course of the interview, the Petitioner could easily rotate her head to the right, but on focused examination would only rotate it to approximately 40 degrees due to complaints of right neck and right trapezial pain. The pain was the same with rotation of the head to the left. The same pain was present with lateral bending to the right and left, and extension and flexion of the neck, all of which was limited due to subjective complaints of pain. (RX 2)

With regard to examination of the lumbar spine, Dr. Mather notes that seated straight leg raising was completely negative for any pain behaviors or pain complaints. However, supine straight leg raising caused severe complaints of back pain. Straight leg raising to 90 degrees did not bring on any radicular complaints, only lower back pain. (RX 2)

Based on the history provided by the Petitioner, his review of the medical treatment records and diagnostic films, as well as review of the job description, Dr. Mather diagnosed cervical, thoracic and lumbar strain syndrome, with psychogenic overlay. He expressed the opinion that the cervical, thoracic and lumbar strains were caused by the work accident of July 24, 2012, but had resolved. In his opinion, she exhibited significant subjective complaints without any objective findings on physical examination or any substantial changes on her imaging to support her severe complaints of pain. He notes that the basis for his conclusions include the patient's significant diffuse subjective complaints which do not appear to be focal in nature, a normal physical examination without any clinical signs of nerve root compression by examination and failure of the diagnostic tests to reveal anything other than normal degenerative changes consistent with Petitioner's age of 52 years. (RX 2)

Dr. Mather also performed an AMA impairment rating evaluation. Based on his evaluation pursuant to the *AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition*, the Petitioner's overall whole person impairment equals 0%. (RX 2)

The Petitioner testified that she currently experiences mid and low back pain on a constant basis, as well as neck pain, but not as bad as her mid to low back pain. She feels her endurance is low due to the pain in the back and she does not do much in terms of daily activities. She also reports occasional loss of balance. With regard to the possibility of returning to work, she testified that she does not feel capable of performing any type of work, even sedentary work, as it hurts to sit in a chair for extended periods of time. She has not made any effort to find work since last working for Menard's on February 14, 2013. She does not feel that her condition has improved since July of 2015.

FINDINGS OF LAW

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

The witness testimony establishes that as a result of the accident on July 24, 2012, the Petitioner was struck on the right side by a pickup truck and as a result, landed on her back and struck her head on the pavement of the Menard's parking lot. The testimony and initial treatment records also establish that the Petitioner did not lose consciousness as a result of the accident. A CT scan of her head on the date of the accident revealed soft tissue swelling but no intracranial pathology. A CT scan of the cervical spine on the date of the accident was negative. As such, the immediate diagnosis was that of a scalp contusion and cervical strain.

X-rays of the thoracic spine, lumbar spine, chest and ribs, conducted on July 30, 2012 (within a week of the accident), were all negative. A CT scan of the abdomen and pelvis, conducted on August 1, 2012, was negative. An MRI scan of the brain, conducted on September 4, 2012, showed evidence of probable small scalp hematoma within the posterior left parietal region, but was otherwise normal, with no evidence of acute intracranial hemorrhage, infarct, mass lesion, mass effect or midline shift. All other findings were normal.

An EMG/NCV test of the left upper extremity, conducted on November 21, 2012, was normal. An MRI scan of the thoracic spine, conducted on April 15, 2013 was normal, with no evidence acute osseous abnormalities and no disc herniations, central canal stenosis or foraminal compromise. An MRI scan of the lumbar spine was conducted on the same date and the results showed no acute osseous abnormalities, a subtle posterior disc bulge at L4-5 with annular tear, but no focal disc herniations, central canal stenosis or foraminal compromise. An MRI scan of the cervical spine was conducted on June 18, 2013, and the results showed minimal degenerative changes in the upper cervical region, but no acute osseous abnormalities and no focal disc herniations, central canal stenosis or foraminal compromise.

In sum, the diagnostic tests conducted in this matter establish that at most, the Petitioner sustained a small scalp hematoma, but no objective evidence of disc or nerve pathology. These findings (or lack thereof) confirm the diagnoses of Dr. Kohn (Petitioner suffers from an unrelated degenerative condition), Dr. Slavick (Petitioner sustained mild muscle spasms without significant neurologic dysfunction) and Dr. Mather (Petitioner sustained cervical, thoracic and lumbar strains). In fact, Dr. Morr testified during his deposition that Petitioner's injuries involve soft tissue, including muscles, fascia, tendons and ligaments. (PX 33, p. 45) He further testified that she did not suffer from disc herniations or an orthopaedic or neurologic problem. (Id. pp. 57-58)

In his supplemental report of September 20, 2013, Dr. Kohn expressed the opinion that Petitioner had reached maximum medical improvement from the results of the work injury. This opinion was drafted in light of his examination of the Petitioner on June 24, 2013 and review of the cervical MRI scan conducted on June 18, 2013. Dr. Slavick stated in his report of April 10, 2016 and testified during his deposition of July 26, 2016 that Petitioner had reached maximum medical improvement from the results of the accident by March 15, 2013. Dr. Mather testified that in his opinion, the Petitioner reached maximum medical improvement within 4 weeks of the original injury. (RX 2, p. 40)

With regard to the treating physicians, the Petitioner received nine months of pain management treatment from Dr. Maly, from December 2012 through September 2013. Dr. Dodt focused his treatment on her complaints of ongoing headaches and has not seen her since April 2014. And other than occasional office visits with Dr. Morr, her family physician, the Petitioner has not been under active treatment since her discharge from occupation therapy on December 17, 2013. A review of Dr. Morr's treatment notes in 2014, 2015 and 2016 reveal that in addition to seeing the Petitioner for unrelated conditions, he essentially renews her prescriptions but otherwise offers no further treatment. (PX 1)

The treatment notes of Dr. Morr reveal that prior to the work accident of July 24, 2012, the Petitioner had a history of headaches, nausea, chest pains and back pain. Dr. Morr's treatment note of August 29, 2011 sets forth complaints of nausea with vomiting, headaches, chest pains and back pains for the previous 5 weeks. The treatment note of January 12, 2012 sets forth complaints of a "pounding" and "band-like" headache with photophobia since the day prior; Dr. Morr ordered a CT scan of the brain. On January 16, 2012, she continued to complain of a headache, but to a lesser extent. Dr. Morr diagnosed possible migraine headaches. On June 28, 2012 (less than one month before the work accident), the Petitioner complained of occasional headaches. (PX 1) Dr. Morr testified that the Petitioner had taken medications prior to the work accident to treat the various conditions, including nausea with vomiting, headaches, chest pain and back pain. (PX 33, p. 53)

Based on the above, the Arbitrator finds that as a result of the work accident on July 24, 2012, the Petitioner sustained a scalp contusion and small scalp hematoma and cervical, thoracic and lumbar strains. These conditions likely resolved by March 15, 2013, as noted by Dr. Slavick. Any subjective complaints thereafter are likely related to the Petitioner's pre-existing condition or her psychogenic condition, as testified to by Dr. Mather, but are certainly not supported by any objective diagnostic or physical findings. As such, the Arbitrator finds that Petitioner's current condition of ill-being is not related to the work injury of July 24, 2012.

On the issue of **(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 makes the following findings of law:

The Arbitrator has found that the Petitioner reached maximum medical improvement from the results of the work injury by March 15, 2013. Dr. Morr testified that the treatment rendered by Dr. Maly would be considered reasonable, necessary and causally related to the work accident. (PX 33, p. 32) He did not render an opinion with regard to the treatment rendered by Dr. Dodt, although he did refer the Petitioner to that physician for treatment. He further testified that the cardiac treatment rendered to Petitioner in January of 2013 was not causally related to the work accident. (Id., p. 37)

Dr. Slavick opined that the treatment rendered to the Petitioner prior to March 15, 2013 was reasonable, necessary and causally related to the work accident. (RX 1, pp. 14-15) Dr. Mather opined that Petitioner reached maximum medical improvement within 4 weeks of the accident (RX 2, p. 40), that the injections performed by Dr. Maly did not meet the criteria of the American Pain Society to be considered medically necessary (Id.), and did not require more than 10 physical therapy visits, under ODG guidelines. (Id., p. 41)

Taking all of the evidence into account, including the injuries sustained as a result of the work accident (scalp contusion/hematoma, cervical, thoracic and lumbar strains), and the negative diagnostic tests, the Arbitrator finds the opinion of Dr. Slavick to be most credible in regard to when Petitioner reached maximum medical improvement and as such, treatment rendered to Petitioner prior to March 15, 2013 to treat the head, neck and back injuries is considered to be reasonable, necessary and causally related to the work accident.

Based on the above, the Arbitrator finds Respondent liable for treatment rendered to Petitioner from the date of the accident on July 24, 2012 through March 15, 2013, by the following providers, for treatment related to the injuries noted above (scalp contusion/hematoma, cervical, thoracic and lumbar strains):

- Presence St. Mary's Hospital	(PX 8)
- Riverside Medical Center	(PX 9)
- Bradley Fire Department	(PX 10)
- Associated Radiologists of Joliet	(PX 11)
- EMP of Kankakee County	(PX 12)
- Kankakee Family Medicine	(PX 13)
- Central IL Radiological Assoc.	(PX 14)
- University Pathologists	(PX 15)
- Dr. Bruce Dodt	(PX 16)
- Pain Care Center (Dr. Maly)	(PX 17)
- EPMG of Illinois	(PX 18)
- Prescription Expenses	(PX 20)

The Arbitrator also finds that Respondent is entitled to credit for any amounts paid prior to trial to the above providers for services rendered to Petitioner between July 24, 2012 and March 15, 2013, as set forth in RX 3. The Arbitrator further finds that Respondent's liability for payment of such bills is limited to the amounts set forth in the Illinois Medical Fee Schedule. The Arbitrator recognizes that Petitioner's group health insurance, Blue Cross/Blue Shield, was through her husband and thus Respondent is not entitled to credit under

Section 8(j) for any amounts paid by that carrier. Nevertheless, Respondent's liability for reimbursement is limited to the amounts set forth in the Illinois Medical Fee Schedule or reflected in the negotiated rate, for those services rendered to Petitioner prior to March 15, 2013, whichever is less. Respondent to hold Petitioner harmless on said bills as well

On the issue of **(K) what temporary benefits are in dispute**, the Arbitrator makes the following findings of law:

The parties stipulated that the Petitioner was entitled to temporary total disability benefits from July 24, 2012 through November 25, 2012; and from February 17, 2013 through August 28, 2013. The parties also stipulated that the Petitioner was entitled to temporary partial disability from November 26, 2012 through February 16, 2013. The parties also agreed that all benefits due during those time periods have been properly paid. The sole remaining issue is temporary total disability since August 29, 2013.The Petitioner is seeking payment of TTD benefits from that date through July 21, 2015, an additional 98-6/7 weeks.

As noted *supra*, the Petitioner was discharged from occupational therapy at Riverside Medical Center on December 17, 2013. By her own testimony, she has not undergone any active treatment since her discharge from occupational therapy on December 17, 2013. She saw Dr. Dodt for a refill of her Topamax medication on April 9, 2014 and has continued to see Dr. Morr for refills of other medications in the last three years, but has not undergone any additional therapy or treatment with another specialist. Nor has the doctor ordered any additional diagnostic tests. He simply sees her to refill her pain medications. The only significance of July 21, 2015 is that is the date the Petitioner asked Dr. Morr to fill out a Social Security questionnaire, in conjunction with her application for Social Security disability benefits. (PX 1, PX 33, p. 9) This date does not represent a point at which the Petitioner reached a state of maximum medical improvement from the results of the work injury.

The Arbitrator has found that the Petitioner reached maximum medical improvement from the results of the work accident by March 15, 2013. The parties have stipulated that TTD benefits were due and owing through August 28, 2013. (ARBX1) Due solely to the fact of this stipulation, the Arbitrator finds that Petitioner is entitled to TTD through that date, but not thereafter.

On the issue of **(L) what is the nature and extent of the injury**, the Arbitrator makes the following findings of law:

The Petitioner alleges that as a result of the work accident of July 24, 2012, she is incapable of working and thus should be deemed permanently and totally disabled. The Appellate Court set forth the standards for determining whether a Petitioner is entitled to permanent total disability benefits in the case of *ABB C-E Services v. Industrial Commission,* 5-99-0697WC (5th Dist.2000):

> "Thus, pursuant to the analytical framework set forth in *Valley Mould,* there are three ways by which employees can demonstrate that they are permanently and totally disabled: by a preponderance of the medical evidence, by showing a diligent but unsuccessful job search, or by demonstrating that because of their age, training, education, experience, and condition, no jobs are available to a person in their circumstances." (Id.)

As such, the burden falls on the Petitioner to prove that she is permanently and totally disabled based on the preponderance of the medical evidence, by showing a diligent but unsuccessful job search or by demonstrating that no jobs are available to a person in her circumstances. She testified that that she has made no effort to find work since leaving her part-time position with Menard's on February 14, 2013. Likewise, apart from testifying that she worked as a service desk cashier for Menard's for six or seven years, she offered no evidence that her previous training and education is so limited that she is incapable of performing any other work for which a stable labor market exists. In short, she is contending that she is permanently and totally disabled based on the medical evidence, not evidence that she falls into the "odd lot" category of permanent and total disability.

The Arbitrator has found that as a result of the work injury of July 24, 2012, the Petitioner sustained a scalp contusion and scalp hematoma, as well as cervical, thoracic and lumbar strains. The records establish that she did not lose consciousness on the date of the accident. According to Dr. Slavick, since she did not lose consciousness, she did not meet the criteria of sustaining a concussion and thus did not suffer from post-concussion syndrome. (RX 1, p. 29)

Dr. Morr testified that in his opinion, the Petitioner is incapable of returning to work for Menard's in her usual capacity, (PX 33, p. 47) or any other setting on a full time basis. (Id., p. 48) He bases this opinion on his current diagnosis of chronic pain secondary to trauma, as well as post-concussion syndrome, (Id., p. 44) although he admits that he does not know why she is still having pain. (Id., p. 45)

The Arbitrator notes that the only opinion offered by Petitioner with regard to her claim of permanent and total disability is that of Dr. Morr, her family physician. He testified that he is board certified in family medicine, but is not a neurologist or neurosurgeon, is not an orthopaedic surgeon, is not a pain specialist, is not a rehabilitation specialist and is not a physiatrist. (PX 33, p. 51) The Petitioner treated with a neurologist (Dr. Dodt) and a pain medicine specialist (Dr. Maly), but did not offer an opinion for either specialist concerning her permanent disability.

As for his opinion that the Petitioner is incapable of returning to work in any capacity, Dr. Morr admitted that this opinion is largely based upon the Petitioner advising him that she doesn't feel capable of returning to work (as opposed to a formal work evaluation). (PX 33, p. 62) He also testified that a functional capacity evaluation was never ordered or performed. (Id.) The doctor also testified that it was his understanding that the Petitioner worked as a stock clerk for Menard's. (Id., p. 61) In fact, she testified that she worked as a service desk cashier, and so the doctor did not have a correct understanding as to her usual work activities.

In contrast to the opinion of Dr. Morr, both Dr. Slavick, a board certified neurologist, and Dr. Mather, a board certified orthopaedic spine surgeon, opined that Petitioner is capable of returning to her regular work activities and specifically disagreed with Dr. Morr's diagnosis and opinion.

In his report of April 10, 2016, Dr. Slavick notes that, "I reviewed her job description, but in essence, she worked at the front desk scanning merchandise and performing transactions for customers at the front of the store." (RX 1, Exhibit 2, p. 1) He also states in his report that:

> "In my opinion, she has no focal neurological deficits based on my exam of 3-1-16. She, thus, could return to normal duty work that she was performing before the accident of 7-24-12 at Menard's. I feel that her complaints are purely subjective and have no

objective findings to support their presence nor their persistence and severity. A functional capacity evaluation could certainly be performed, but neurologically I found her exam to be completely normal and do not feel that she has any organic symptoms at this time." (Id., Exhibit 2, p. 6)

The doctor reiterated this opinion during his deposition, stating that she could return to the type of work that she was performing at Menard's before the accident on July 24, 2012, based on the finding of no focal neurological deficits and normal testing. (Id., p. 17)

Dr. Slavick also testified that he reviewed the treatment records of Dr. Morr, as well as his deposition transcript. He was specifically asked whether he agreed with Dr. Morr's opinion that Petitioner is incapable of returning to work in any capacity and he stated that he disagreed with this assessment. (RX 1, p. 16) Specifically, he states: "She offered complaints that, in my opinion, far outweighed the type of injuries she suffered and the negative studies that were obtained following the injury, and I do not feel that his assessment as to whether she could return to work was accurate." (Id., p. 17)

In his report of February 11, 2016, Dr. Mather expresses the opinion that Petitioner "has significant functional overlay as the cause of her ongoing symptoms," but he does not feel this prevents her from returning to work. "I do believe that she is able to return to work without restrictions." (RX 2, Exhibit 2, pp. 6-7) He also confirmed in that report that he reviewed the job description for Petitioner's service desk position at Menard's, "which requires her to lift up to 50 pounds occasionally, 25 pounds frequently and 10 pounds constantly." (Id., Exhibit 2, p. 4)

Dr. Mather also testified that he reviewed the deposition transcript of Dr. Morr and he disagreed with the doctor's diagnoses of chronic pain, neck pain, low back pain and post-concussion syndrome. (RX 2, pp. 39-40)

Taking all of the above into account, the Arbitrator finds that Petitioner has failed to prove that she is permanently and totally disabled from a medical perspective. The only treating physician to offer an opinion in this regard is Dr. Morr, the petitioner's family physician, who admittedly is not an expert in the treatment of head or back injuries. He also admits that his opinion concerning the Petitioner's ability to work is based largely on the Petitioner's own opinion concerning her abilities, rather than a functional capacity evaluation. Finally, he does not have an accurate understanding of the Petitioner's former job duties with the Respondent.

In contrast, both Dr. Slavick and Dr. Mather reviewed the job description for the position of a service desk cashier. They reviewed the medical treatment records, diagnostic films and the deposition transcript of Dr. Morr. They each performed a physical examination of the Petitioner and came to the same conclusion: that her subjective complaints are not supported by any objective findings and that she is capable of returning to her regular work activities. The Arbitrator finds the opinions of Dr. Slavick and Dr. Mather to be more credible than that of Dr. Morr.

The Arbitrator does find, however, that Petitioner did sustain a certain level of permanent disability as a result of the work accident of July 24, 2012. Pursuant to Section 8.1b of the Act, the Arbitrator sets forth the criteria used to determine the Petitioner's level of permanent partial disability:

(i) AMA Impairment Rating

- Dr. Mather prepared an AMA Impairment Report, dated March 6, 2016, in conjunction with his examination of the Petitioner on February 11, 2016 (RX 2, Exhibit 3) Due to the lack of objective findings on physical examination, as well as the lack of similar findings documented on multiple visits in the treatment records, Dr. Mather calculated an overall whole person impairment of 0%. The Arbitrator places *greater* weight on this factor.

(ii) Occupation of Petitioner

- The Petitioner testified that she was employed as a service desk cashier for 6 to 7 years prior to the work accident. After reviewing the job description, treatment records and diagnostic films, and conducting physical examinations, both Dr. Slavick and Dr. Mather expressed the opinion that she is capable of returning to her regular work activities.
The Arbitrator places *greater* weight on this factor.

(iii) Age of Petitioner

- The Petitioner was 48 years old at the time of the accident on July 24,2012.
The Arbitrator places *greater* weight on this factor.

(iv) Petitioner's Future Earning Capacity

- The Petitioner contends that she essentially has no future earning capacity, due to an inability to return to work from a medical perspective. The Arbitrator has rejected this claim and finds that she is capable of returning to work in her former capacity as a service desk cashier, based on the opinions of Dr. Slavick and Dr. Mather. As such, the Arbitrator finds the Petitioner has failed to prove that the injuries she sustainjed would affect her future ability to earn wages.
The Arbitrator places *greater* weight on this factor.

(v) Evidence of Disability Corroborated by Treating Medical Records

- The treating medical records set forth a plethora of subjective complaints by the Petitioner, which are unsupported by the diagnostic tests. Such tests, including x-rays, EMG,CT scans and MRI scans of the head, abdomen, ribs, pelvis, cervical spine, thoracic spine and lumbar spine, show at most a scalp hematoma and degenerative spine changes appropriate to the Petitioner's age. Even her subjective complaints were inconsistent throughout the treatment records and varied throughout the course of the treatment. She testified that her headaches were "pretty much gone" by the time of her last visit with Dr. Dodt on April 9, 2014, but also testified that she currently experiences "four to five headaches per month." Finally, the only opinion rendered by a treating physician concerning the Petitioner's permanent disability was Dr. Morr, the Petitioner's family physician, rather than any of the specialists (Dr. Dodt or Dr. Maly).
The Arbitrator places *lesser* weight on the opinion of Dr. Morr and *greater* weight on the opinions of Dr. Slavick and Dr. Mather with regard to this factor.

Based on the above factors, the Arbitrator finds that Petitioner is permanently partially disabled to the extent of 15% disability to the person as a whole, pursuant to Section 8(d)2 of the Act.

On the issue of **(M) should penalties or fees be imposed upon Respondent,** the Arbitrator makes the following findings of law:

As noted above, the Arbitrator has found that Petitioner reached maximum medical improvement from the results of the work accident by March 15, 2013. The Respondent continued to pay medical expenses and TTD benefits through that date and beyond. The Respondent relied upon the opinion of Dr. Kohn to terminate such benefits by the end of August, 2013, based on the doctor's opinion that the June 18, 2013 cervical MRI scan showed degenerative changes which were unrelated to the work accident and that she had reached maximum medical improvement. Previous diagnostic tests had also proven to be negative. This opinion was subsequently corroborated by the opinions of Dr. Slavick and Dr. Mather. The Respondent's decision to terminate benefits in this matter was neither vexatious nor unreasonable.

Based on the above factors, the Arbitrator finds that Respondent is not liable for payment of penalties under Sections 19(k) or (l) of the Act, or attorney's fees under Section 16 of the Act.

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

Mary Dornbusch,
Petitioner,
vs.

NO: 15WC 5956
18IWCC0606

Illinois State Toll Highway Authority,
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, notice, temporary total disability, 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 December 28, 2016 is hereby affirmed and adopted.

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

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

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

DATED: OCT 9 - 2018

Charles J. DeVriendt

Joshua D. Luskin

Kevin W. Lamborn

100318
CJD/rlc
049

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DORNBUSCH, MARY
Employee/Petitioner

Case# **15WC005956**

ILLINOIS STATE TOLL HIGHWAY AUTHORITY
Employer/Respondent

On 12/28/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.66% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1727 LAW OFFICES OF MARK N LEE LTD
1101 S SECOND ST
SPRINGFIELD, IL 62704

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

2461 NYHAN BAMBRICK KINZIE & LOWRY
ROBERT DELANEY
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

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

1024 IL STATE TOLL HIGHWAY AUTHY
2700 OGDEN AVENUE
WORKERS COMPENSATION DEPT
DOWNERS GROVE, IL 60515

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

DEC 28 2016

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

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

MARY DORNBUSCH,
Employee/Petitioner

Case # **15 WC 05956**

v.

Consolidated cases:

ILLINOIS STATE TOLL HIGHWAY AUTHORITY,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **GERALD GRANADA**, Arbitrator of the Commission, in the city of **WHEATON (ELGIN)**, on **12/2/2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **4/24/2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 $47,174.40; the average weekly wage was $907.20.

On the date of accident, Petitioner was 47 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 $3,459.66 under Section 8(j) of the Act.

ORDER

Petitioner failed to prove the issue of accident. Therefore no benefits are awarded.

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

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

Signature of Arbitrator

12/27/16

Date

DEC 28 2016

FINDINGS OF FACT

This claim involves a Petitioner alleging injuries due to a theory of repetitive trauma stemming from her employment activities on April 24, 2014. Respondent is disputing Petitioner's claims and the issues in dispute at trial are: 1) accident, 2) notice, 3) causation, 4) medical expenses, 5) TTD and 6) nature and extent.

Petitioner has worked for the Respondent for over 20 years. On April 24, 2014, Petitioner was working for Respondent as a property recovery analyst, whose overall responsibility was to set-up property damage claims for accidents. Her job tasks include some computer operation, mail processing, copying and faxing documents, and telephone calls. She is at work eight hours but has a one-hour lunch break. She described her job in great detail in Petitioner's Exhibit #2, which includes (but is not limited to) typing reports into a database, typing up correspondence, entering updated information, searching a database, using a mouse, handwriting labels, removing papers and paperclips and staples, writing invoice/year on closed file folder, using a three hole punch, filing, answering the phone, faxing, scanning documents, emailing, and handling mail.

Petitioner testified in great detail about her filing responsibilities. She testified that she experienced swelling and pain in her arms while grasping files. She reported this to her supervisor. She further testified that she spent 80% of her time putting files away. She described handling a couple hundred files concerning recovery for the Respondent and monitoring payments on those cases. She works at a u-shaped desk, which has drawers where her work files are stored. A majority of the files are thin and hold ten to twenty pieces of paper related to claim recovery. She would move files in and out of these drawers and place them on the desk to work on them. She also has to pull files from cabinets filled tightly with files, requiring her to use both hands when pulling the files out. She testified to spending more than 2.5 hours each day, grasping and pulling files. She felt tightness and pain while grasping the files. On cross examination, Petitioner estimated that it takes approximately 30 seconds to remove a file from the drawer and place it on her desk. Furthermore, the files ranged in size and thickness.

Jim Smith was called to testify on behalf of the Respondent. He has been Petitioner's supervisor for approximately 16 years. He also processes a large number of files and sees the Petitioner on a daily basis since he must walk past her work area a number of times every day. He has also performed Petitioner's job whenever she is out of the office. He described that it takes him less than 1 minute to pull 20 files from the drawers. He described most of the files contain only 10 to 15 pages, although there are some thicker files for monthly reports. He estimated that 30% of Petitioner's work day involves filing.

Petitioner testified that she sought treatment from Dr. Michael Vender, whose records and testimony indicate an initial treatment date of June 16, 2014. On April 14, 2015, Dr. Vender performed a right elbow arthroscopic lateral release surgery to address the diagnosis of right elbow lateral epicondylitis. Petitioner testified that her symptoms did not improve after the surgery, but she was able to return to work full duty four days post surgery. Petitioner also underwent physical therapy both before and following her surgery.

On February 22, 2016, Dr. Vender testified via evidence deposition. He testified that he did not believe Petitioner's repetitive work activities she described, such as using the keyboard, answering the phone, or writing could have caused Petitioner's condition of cubital tunnel syndrome. When asked about Petitioner's filing activities, Dr. Vender testified as follows:

> Do I think that that's going to cause lateral epicondylitis? No. Unless she was doing that all day, yeah, then it actually probably could cause lateral epicondylitis. But I don't suspect that's the case here.

> So then the issue is could something like that aggravate it? The answer is yes. If she's doing that for a significant time, that could potentially aggravate lateral epicondylitis. (PX. 3, Dr. Vender Deposition Transcript, p. 19)

Dr. Vender further testified that he did not believe that Petitioner's non-dominant hand would be involved because the grasping and "fighting" with the files typically involves the dominant side. Therefore he did not believe the non-dominant side would be an issue. (Id., p.20) Dr. Vender testified that Petitioner's diabetes could be a contributing factor to her condition, but did not believe that hyperthyroidism was a risk factor. On cross-examination, Dr. Vender testified that he was did not know and was not sure whether hypothyroidism could cause joint pain. Dr. Vender also testified that his records do not make any reference to a specific injury or cause or onset of Petitioner's symptoms, nor do they point to any time or place where the symptoms started. (PX. 3, p.23)

On April 19, 2016, Dr. Michael Bryan Neal testified via evidence deposition. Dr. Neal conducted an independent medical examination of Petitioner at the Respondent's request on February 19, 2015. Dr. Neal did not believe that the Petitioner had epicondylitis. Furthermore, Dr. Neal did not believe gripping and retrieving files would result in medial and lateral epicondylitis and could not recall ever seeing a patient with that medical condition from grabbing and lifting files (RX 1, p. 27). During Dr. Neal's examination the Petitioner never described grabbing or lifting files in regard to her injury (RX 1, p. 28). When the Petitioner told Dr. Neal about the injury on April 24, 2014, she complained of excessive office work and excessive mouse clicking (RX 1, p. 13). As part of his examination, Dr. Neal reviewed Petitioner's medical records and noted that none of the records mention the activity of filing as being a possible cause of Petitioner's condition.

Petitioner testified that she still has complaints of swelling, tightness and pain in her arms. She wears a brace and continues to see a chiropractor. She has tenderness on activities requiring grasping or pulling and now uses her left arm more when grabbing files. She does not believe she is at full capacity to bowl and she has difficulty with power washing.

CONCLUSIONS OF LAW

1. With regard to the issue of accident, the Arbitrator finds that the Petitioner has failed to meet her burden of proof. In support of that finding, the Arbitrator relies on the testimony at trial, the documentary evidence and the medical evidence. Essentially, the Petitioner is claiming that she sustained epicondylitis from doing filing at her job. Dr. Vender testified that if she did filing that required her to grasp and "fight" with the files by pulling them out of tight drawers for a significant amount of time, such activity could aggravate epicondylitis – but only in the dominant hand. He quantified such activity as being at two hours or more. The bulk of Petitioner's testimony was on the details regarding her filing activity. She clearly described how she would feel pain while grasping and pulling files for over two hours per day. From her description, it would appear that most of her job was just pulling and grasping files. However, the written job description Petitioner prepared for the doctors and the medical records belie Petitioner's claim. Petitioner's job description show that her duties are varied and involve being on the phone, typing on the computer, using a fax and copier machine, writing, handling mail, scanning documents, using a mouse, removing paper clips, and punching holes in paper. Of significant note is that in sharp contrast to the Petitioner's testimony, the treating medical records make no mention of the Petitioner complaining of pain while filing, nor did she describe as much to Dr. Neal during her IME. Petitioner's description of her job is further brought into question by the testimony of her supervisor, who

provided a credible account of Petitioner's job activities. The supervisor's account of taking approximately five seconds to pull a file out of a drawer is more credible than the Petitioner's account of taking 30 seconds to pull a file. The Arbitrator observed that while the Petitioner was very certain about the total length of time grasping files from her desk in the course of the day, she was equally uncertain and even defensive when questioned how to break down the time to processing a single file. After a close review of Dr. Vender's testimony, it is clear that the Petitioner's testimony was almost a close recitation of Dr. Vender's opinions with regard to forceful grasping of files for at least two hours – which seems to be an attempt to circumvent Dr. Vender's opinions that the Petitioner's other activities (e.g. typing, writing, faxing, etc.) were clearly not a causative factor of her condition. All of these facts make Petitioner's claims less than credible. Based on these facts, the Arbitrator concludes that the Petitioner failed to prove that she sustained an accident arising out of her employment on April 24, 2014.

2. Based on the Arbitrator's findings regarding the issue of accident, all other issues are rendered moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF McLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KEVIN FORD,

Petitioner,

vs. NO: 17 WC 28355

CONTECH ENGINEERED SOLUTIONS,

Respondent.

18IWCC0607

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

In ruling on accident, the Arbitrator noted Respondent entered into evidence a positive drug test which triggers a Section 11 intoxication analysis. Section 11 provides, in pertinent part:

> No compensation shall be payable if (i) the employee's intoxication is the proximate cause of the employee's accidental injury or (ii) at the time the employee incurred the accidental injury, the employee was so intoxicated that the intoxication constituted a departure from the employment. Admissible evidence of the concentration of (1) alcohol, (2) cannabis as defined in the Cannabis Control

18IWCC0607

> Act, (3) a controlled substance listed in the Illinois Controlled Substances Act, or (4) an intoxicating compound listed in the Use of Intoxicating Compounds Act in the employee's blood, breath, or urine at the time the employee incurred the accidental injury shall be considered in any hearing under this Act to determine whether the employee was intoxicated at the time the employee incurred the accidental injuries. If at the time of the accidental injuries...there is any evidence of impairment due to the unlawful or unauthorized use of (1) cannabis as defined in the Cannabis Control Act...then there shall be a rebuttable presumption that the employee was intoxicated and that the intoxication was the proximate cause of the employee's injury. *820 ILCS 305/11.*

The Commission observes, however, Respondent did not argue the Section 11 presumption of intoxication was applicable, nor did Respondent present evidence of impairment. Rather, Respondent relied on the positive drug test solely as an adverse credibility indicator. Therefore, the Commission strikes the paragraph discussing the rebuttable presumption of intoxication (the fourth full paragraph on page 6).

In addition, the Commission affirms the Arbitrator's finding that Mr. Allsup's testimony is more credible. We specifically note Mr. Allsup is an independent witness who testified pursuant to subpoena. Mr. Allsup testified he worked with Petitioner throughout the entire morning and repeatedly denied Petitioner had any trace of a limp prior to his fall. While Petitioner and Mr. Allsup had some interaction outside of work, the evidence does not support Respondent's contention that they were "clearly friends." Moreover, the Commission notes Mr. Allsup is still employed by Respondent, and he testified Respondent "saw potential in [him]" and transferred him to a more skilled position. We find Respondent's implication that Mr. Allsup perjured himself on behalf of his wife's hairstylist's husband, thereby risking a job where his skill is acknowledged and rewarded, is not persuasive.

Finally, the Commission makes a correction to the prospective medical award. The Arbitrator ordered Respondent to "authorize" the medical care as outlined by Dr. Osuji; the Commission strikes that language and instead, consistent with Section 8(a), orders Respondent to provide and pay for the treatment recommended by Dr. Osuji.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 9, 2018, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $633.33 per week for a period of 12 1/7 weeks, representing September 5, 2017 through November 28, 2017, 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.

18IWCC0607

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay reasonable and necessary medical expenses as set forth in Petitioner's Exhibit 5 as provided in §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide and pay for medical treatment as recommended by Dr. Osuji as provided in §8(a) of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $8,200.00. 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 9 - 2018

L. Elizabeth Coppoletti

Charles J. DeVriendt

Joshua D. Luskin

LEC/mck

O: 9/11/18

43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

FORD, KEVIN
Employee/Petitioner

Case# **17WC028355**

CONTECH ENGINEERED SOLUTIONS
Employer/Respondent

18IWCC0607

On 1/9/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.57% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5354 STEPHEN P KELLY LAW FIRM
MATT BREWER
2710 N KNOXVILLE AVE
PEORIA, IL 61604

2284 COZZI & GOGGIN-WARD
LARRY COZZI
27201 BELLA VISTA PKWY #410
WARRENVILLE, IL 60555

18IWCC0607

STATE OF ILLINOIS)
)SS.
COUNTY OF McLean)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Kevin Ford
Employee/Petitioner

v.

Contech Engineered Solutions
Employer/Respondent

Case # **17** WC **28355**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **Bloomington, Illinois**, on **11/28/17**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

18IWCC0607

On the date of accident, **9/5/17**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$49,400.00**; the average weekly wage was **$950.00**.

On the date of accident, Petitioner was **34** years of age, ***married*** with **3** dependent children.

Petitioner has not received all reasonable and necessary medical services.

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

ORDER

Respondent shall pay reasonable and necessary medical services, as set forth in Petitioner's Exhibit 5, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner the sum of $633.33/week for a further period of 12-1/7 weeks, commencing 9/5/17 through 11/28/17, as provided in Section 8(b) of the Act.

Respondent shall authorize the medical treatment as recommended by Dr. Osuji

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

1/2/18
Date

ICArbDec19(b)

JAN 9 - 2018

FINDINGS OF FACT:

On September 5, 2017, Petitioner was employed by Respondent, CONTECH ENGINEERED SOLUTIONS, as a culvert fitter and pipe fitter. Petitioner testified that his job duties included bending, stooping, and squatting. Petitioner was required to lift heavy pipes, lift sheets of metal, as well as bulkheads at the end of a pipe to be fitted. Petitioner also performed welding duties as a part of his job. Petitioner stated that he performed the described duties on-a-daily basis as a part of his work with Respondent.

Petitioner testified that his daily job routine included arriving at approximately 5:00 a.m. He would look at the day's blueprint and materials that had been delivered from the mill. Petitioner testified that on the alleged date of accident, he and his work partner, Brad Allsup, were working on the second "T" of a 96 inch manifold. Petitioner stated the pipe was eight (8) feet high and "we [were] up in the air a pretty good distance." Petitioner testified that he was on six-foot tall collapsible A-frame ladder.

Petitioner testified that his shift on the morning of the alleged accident started at approximately 5:00 a.m. Petitioner testified that he believed the accident occurred somewhere between 8:40 and 9:00 a.m. He had been working a few hours prior to alleged accident.

Petitioner testified that the morning of the accident he rode to work with Mr. Allsup. Petitioner testified that once he and Mr. Allsup arrived at the facility, they ultimately attended the mandatory shop meeting at approximately 7:00 a.m. Petitioner testified that he had been working on the same piece of pipe since his shift started on the morning of the accident. Petitioner confirmed that only he and Mr. Allsup were working on the pipe in question. Tesimony was elicited that other employees may have been in and out of the shop but no one else was really in the area where he and Mr. Allsup were working. Petitioner testified that he did not have any difficulty performing his task the morning of the incident.

Petitioner testified that on September 5, 2017, he was descending the ladder with a plasma cutter in my right hand and "...for some reason, at some point, my left foot slipped off the ladder and I landed on my right foot." Petitioner testified that he was descending the ladder to grab a level to check the squares where he was working. Petitioner testified this is necessary to check to see if the pipe was leaning one way or another. Petitioner stated they are constantly on and off the ladder while fitting the pipes. Petitioner testified that at the time he fell, he was approximately on the third rung of the ladder which would be approximately 36 inches off the ground. Petitioner provided that he was confident that his foot slipped when descending the ladder. He had been cutting giant slivers of steel off the pipes and his foot may have slipped on a piece of metal that accumulated on his ladder.

Petitioner testified that at the time of the accident he was wearing his metatarsal safety boots which are required for the type of work that he performs. Petitioner provided that boots are steel toed with a metatarsal safety toe which is essentially a flap that covers the front top part of the boot. Petitioner confirmed that Respondent's Exhibits 3, 4 and 5 were true and accurate pictures of the boots he was wearing at the time of the accident.

Petitioner testified that when he hit the ground, he noticed immediately severe pain in his right foot. Petitioner testified it felt like someone had shoved his foot through his shin. Petitioner testified that he took off his boot and noticed that there was swelling in his right foot. Petitioner testified that he attempted to keep working but was unable to do so due to the pain. Thereafter, he reported the accident to his department head and

shop supervisor, Jay Miller. Petitioner then contacted his wife and was seen at Proctor First Care for medical treatment.

Records submitted show Petitioner presented to Proctor First Care where he was seen by Dr. Michael Pace. The doctor noted Petitioner sustained a work injury to his right foot/ankle when he "stepped off ladder wrong." X-rays taken of the right foot were 1.) suggestive of a hairline fracture of the anterior tibial articular margin; 2.) old healed frature of the medial tibial malleolus, post surgical changes with plates in the distal shaft of the fibula; and 3.) mild degenerative changes of the tibiotalar joint. Dr. Pace diagnosed acute right ankle pain as well as right foot pain. Petitioner received crutches and ankle stirrup was applied. Petitioner was placed off work for three days. (PX 2, PX 3)

Petitioner followed-up with Dr. Pace's office on September 8, 2017. The previously taken x-rays was read for suggesting a hairline fracture of the right anterior tibial articular margin. Petitioner continued to complain of pain throughout the right ankle and was still unable to bear weight. Petitioner was ordered to remain off work until he was seen by an orthopedic surgeon. (PX 3)

Petitioner testified and records submitted show he was required to undergo a drug test following his accident. According to the records from National Diagnostics, Petitioner submitted a Urine Drug Screen specimen on September 5, 2017. The specimen with testing was completed on September 17, 2017 and was deemed Positive for Cannabinoid. (RX 1, PX 2) Petitioner testified that he was terminated as a result on September 18, 2017. Petitioner testified that he did not ingest any cannabis on the morning of the accident or the night before. Petitioner further testified that he was not using cannabis in or around the time of the accident at all.

Petitioner testified that at the direction of his attorney he presented for a second drug test which was performed at Quest Diagnostics. According to the records, Petitioner submitted a urine specimen on September 19, 2017. The results of the drug test were determined to be negative including no findings for cannabis. (PX 6)

On September 12, 2017, Petitioner presented to Midwest Orthopaedic Center where he saw Dr. Chukwunenye Osuji. Petitioner provided a consistent history of accident. Petitioner continued to complain of pain throughout the ankle. Dr. Osuji reviewed the x-rays which he indicated revealed a non-displaced fracture through a large osteophyte in the anterior distal tibia. The plan was to treat the right foot non-operatively. The doctor recommended immobilization in a cast and non-weight bearing to the right foot and ankle. Dr. Osuji also returned Petitioner to restricted sedentary work only. (PX 4)

Petitioner followed up with Dr. Osuji on October 24, 2017. It was noted Petitioner had been terminated from work at that time. Petitioner continued to experience stiffness in the right ankle. Petitioner as able to ambulate but did so with his ankle held in a stiff position. There was still mild swelling of the right foot and ankle noted by Dr. Osuji. Petitioner was discontinued for his immobilization cast at that time. Petitioner was provided a boot and it was indicated that he could wean out from the boot as tolerated. Physical therapy was ordered and Petitioner's sedentary duty only restriction was continued. (PX 4)

Petitioner testified that after the October 24, 2017 visit with Dr. Osuji he attempts to walk around on his foot. Petitioner testified that when he does this, his foot is very painful. Petitioner believes that he does not have a good range of motion and his leg feels very weak.

Petitioner testified that he did follow-up with Dr. Osuji just prior to trial on November 21, 2017. Petitioner stated he was referred to Dr. D'Souza whom he has an appointment with in late November 2017.

Petitioner testified that as of the time of trial he has not had any of the physical therapy recommended by Dr. Osuji. Petitioner testified that he cannot afford it and he has been trying to pay for his treatment out-of-pocket up to the point of trial. Petitioner stated he has not received any TTD benefits and none of his medical expenses has been paid by Respondent up through the time of trial. Petitioner testified that he has tried to work out a payment plan with some of his physicians so that he can continue with the recommended treatment.

Petitioner testified that as of trial his right foot and ankle are still very stiff, swollen and painful. He has a lot of difficulty with weight bearing on his right foot and ankle. He is unable to chase and play with his children.

Petitioner testified that prior to the accident he had no problems with pain, swelling, and was not having any issues ambulating. Petitioner testified that he was walking around normally just prior to the accident. Petitioner testified that approximately 15 years prior to the accident, he broke his right ankle in a trampoline accident. Petitioner testified that he underwent surgery and physical therapy for this accident. Petitioner testified that his right ankle had healed fine and he had not had any issues with it since. Petitioner testified that from the time he began working with Respondent in February of 2017 and leading up to the accident of September of 2017 he was not under any active medical care or seeking treatment for his right foot or ankle. Petitioner stated that he did not have any residual issues from the prior trampoline accident, including no issues with a limp, no issues with walking, no trouble walking and no trouble exercising. He had no issues performing any of his job duties including the required climbing, squatting, bending, stooping and lifting.

Petitioner testified that he was contacted by Respondent to return to work light duty on approximately September 7, 2017. Petitioner testified that he did not return to the light duty position at that time as Dr. Pace had taken him completely off work as of September 5, 2017 and he was to be off work for three days. He was later advised by the doctor to remain off work until he was seen by an orthopedic physician.

Brad Allsup was called as a witness at the time of trial. Mr. Allsup testified that he is currently employed by Respondent as a welder and a pipefitter. Mr. Allsup testified that he works first shift which begins at approximately 5:00 a.m. Mr. Allsup testified in September of 2017 he was working first shift. Mr. Allsup testified that he is familiar with Petitioner and testified that he met him a few years back as Mr. Allsup's wife gets his hair cut by Petitioner's wife.

Mr. Allsup testified that he worked with Petitioner on first shift through the Summer and Fall of 2017. Mr. Allsup testified that he would give Petitioner rides to work. Mr. Allsup testified that he gave the Petitioner a ride to work on the morning of September 5, 2017. He picked Petitioner up from his house at approximately 4:30 a.m. Mr. Allsup testified that when Petitioner walked out of his house on the morning of the accident, he did not observe Petitioner walking with a limp. Mr. Allsup testified that he and Petitioner had general small talk on the way to work the morning of the accident. Mr. Allsup testified Petitioner did not mention injuring his foot or ankle over the prior weekend.

Mr. Allsup testified when he and Petitioner arrived at work the morning of the accident they parked in the parking lot which was about 50 to 100 yards away from the building itself. Mr. Allsup again testified that he did not notice Petitioner walking with a limp as they walked into the building. Mr. Allsup testified that he worked close with Petitioner on the morning of the accident. Mr. Allsup testified that he attended the 7:00 a.m. shop meeting with Petitioner on the morning of the accident and he did not notice Petitioner limping around at any point.

Mr. Allsup testified that just prior to 9:00 a.m. on the morning of the accident he and Petitioner were working on the pipe in question that he noticed Petitioner grabbing his ankle indicating that he had hurt himself. Mr. Allsup testified that although he did not observe Petitioner fall off the ladder, Petitioner indicated that he had come down off his ladder and landed on his right ankle. Mr. Allsup stated they were working on the

opposite sides of the pipe. Mr. Alsup indicated he himself had climbed to the top of the pipe to check his level. He stated he could see over the pipe when he noticed Petitioner on the ground holding his ankle. Mr. Allsup testified Petitioner removed his boot and it was clearly swollen and appeared as if he did not have an ankle at that point.

Respondent called Ms. Shannon Hostetter testify in this matter. Ms. Hostetter has worked for Respondent for the last 13 months as a production planner. Ms. Hostetter has a Bachelor's Degree and is currently working on two Master's Degrees in supply chain and project management. Ms. Hostetter testified she is familiar with Petitioner and works in the same plant as he does. Ms. Hostetter testified that part of her job would involve taking injury reports and she in fact took the injury report from Petitioner. She took the details about the incident from Petitioner, and typed it in the presence of Petitioner. Ms. Hostetter provided that Petitioner told her that the metatarsal guard of his shoe got stuck on a wrung and he fell, landing on his right foot. She felt his description was "strange."

Ms. Hostetter testified that she saw Petitioner in the "Fab Department," at a distance of approximately 50 feet, at 7:00 a.m. on the morning of the claimed incident. Ms. Hostetter testified that she observed Petitioner hopping, jumping on one foot in a limping manner. She wrote same in the incident report, which she signed on September 12, 2017. (RX 6) Ms. Hostetter testified that the time she saw Petitioner limping, her eyes were only engaged on him for about 10 to 15 seconds. She did not see Petitioner walk from the Fab Department to where he ultimately worked on the pipe the morning of the accident. Ms. Hostetter testified that she did not take any other witness statements or statements from any other employees as it relates to Petitioner's accident; nor is she aware of anybody else claiming or reporting that Petitioner was limping before the alleged work accident.

With respect to **C.) DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT,** the Arbitrator finds as follows:

The Arbitrator finds that Petitioner has met his burden of proof that he sustained an accident that arose in out of and in the course of his employment with Respondent. Petitioner testified that he had no right foot or ankle issues leading up to the accident of September 5, 2017. Petitioner credibly testified that he was descending a ladder on the morning of the accident when he slipped and fell landing on his right foot, causing the injury in question.

Respondent has entered into evidence a positive drug test which creates a rebuttable presumption that Petitioner was not in the course and scope of his employment on September 5, 2017. The Arbitrator finds that Petitioner has successfully rebutted this presumption. Petitioner testified and records submitted show he was required to undergo a drug test following his accident. According to the records from National Diagnostics, Petitioner submitted a Urine Drug Screen specimen on September 5, 2017. The specimen with testing was completed on September 17, 2017 and was deemed Positive for Cannabinoid. At the direction of his attorney, Petitioner presented for a second drug test which was performed at Quest Diagnostic on September 19, 2017. According to the records, the results of the drug test were determined to be completely negative including no findings for cannabis. Petitioner testified that he did not ingest or consume any cannabis products the morning of or in the days prior to the accident in question. Petitioner testified that he was not impaired at the time of the accident. Mr. Brad Allsup, the only independent witness in the case, also testified that he drove Petitioner to work and was the only other employee working on the pipe in question with Petitioner. He credibly testified that at no time did he believe or notice that Petitioner was impaired the morning of the accident. Petitioner also attended a shop meeting to which there has been no evidence by anyone else that Petitioner was impaired.

The Arbitrator notes there is conflicting testimony from the two witnesses in this matter. Ms. Hostetter's testified that she noticed Petitioner hopping and limping for an approximate 10 to 15 second span during the

morning of the accident. Mr. Allsup, who testified in response to subpoena, indicated that he had been with Petitioner throughout the entire morning and did not notice Petitioner limping or having any issues as far as his right foot or ankle. Mr. Allsup testified that from the moment he picked Petitioner up, Petitioner did not show any evidence or signs of a right foot injury. Throughout the morning, including the time period when Petitioner and Mr. Allsup were in a mandatory shop meeting as well as working on the pipe prior to the accident, did Petitioner showed signs of any right foot or ankle injury according to Mr. Allsup. Mr. Allsup testified the first time he had an inclination Petitioner was complaining of an injury was just before 9:00 a.m. when Petitioner was on the ground after he fell off the ladder. The Arbitrator finds it suspicious that Petitioner had been at work for hours before the claimed injury, and there were no other witnesses claiming or reporting that Petitioner was limping before the alleged work accident. Furthermore, according to Ms. Hostetter, there was an "accident investigation" which did not reveal any corroborating evidence that Petitioner was limping before the alleged work accident. The Arbitrator finds the testimony of Mr. Allsup more persuasive.

Based on the above, the Arbitrator finds that Petitioner has met his burden of proof that he sustained an accident that arose out of and in the course of his employment with Respondent on September 5, 2017.

With respect to **(F.) IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY;** and **(J.) WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES** the Arbitrator finds as follows:

Respondent dispute regarding these issues centers around its belief that Petitioner failed to prove he sustained a compensable accident. Having reconciled in favor of Petitioner regarding accident, the chain of events and the facts presented, the Arbitrator finds that a causal relationship exists between Petitioner's right foot/ankle condition of ill-being and the accident sustained. The Arbitrator further awards the medical bills admitted into evidence as Petitioner's Exhibit 5.

With respect to **(K.) IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE,** the Arbitrator finds as follows:

Having found the requisite casual relationship, the Arbitrator finds that Respondent shall authorize the treatment as outline by Dr. Osuji, including but not limited to the physical therapy recommended as well as the referral to Dr. D'Souza.

With respect to **(L.) WHAT TEMPORARY BENEFITS (TTD) ARE IN DISPUTE,** the Arbitrator finds as follows:

On September 5, 2017, Petitioner presented to Dr. Pace at Proctor First Care. At that time, Petitioner was taken off work for a period of three days. When Petitioner presented again Dr. Pace's office on September 8, 2017, he was taken off work completely until seen by an orthopedic physician. Petitioner presented to Dr. Osuji's office at Midwest Orthopaedic Center on September 12, 2017, when he was provided sedentary restrictions. However, when Petitioner presented these restrictions to Respondent, he was notified that his employment with Respondent had been terminated because of the positive drug test. As a result, the light duty position was no longer on the table as Petitioner was no longer an employee of Respondent. Consistent with the holding in Interstate Scaffolding, Petitioner is entitled to TTD benefits commencing September 5, 2017 through November 28, 2017, the date of arbitration.

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

Melissa Lopez,
Petitioner,

vs.

NO: 13WC 34303

18IWCC0608

Durable Packing,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical, 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 8, 2017, is hereby affirmed and adopted.

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

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

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 10 2018
o092518
KWL/jrc
042

Kevin W. Lamborn

Michael J. Brennan

18IWCC0608

DISSENT

I believe that Petitioner's job as a packer, based on her credible description of her job duties and the job video submitted by Respondent, was sufficiently repetitive in nature to have been a contributing factor in the development of her subsequent neck and right shoulder symptoms on 7/11/13 and 8/6/13.

The record indicates that Petitioner suffers from proximal bicep tendinitis and right shoulder impingement. More importantly, the evidence shows that Petitioner's work activities exposed her to an increased risk of injury, both qualitatively and quantitatively, to just such an injury compared to members of the general public. There is also no evidence to suggest that Petitioner suffered from any cervical and/or right shoulder problems prior to the accidents in question.

As a result, I would find that Petitioner proved by a preponderance of the credible evidence that she sustained accidental, repetitive-trauma type injuries arising out of and in the course of her employment on 7/11/13 [13 WC 27810] and 8/6/13 [13 WC 34303], and that a causal relationship existed between those injuries and Petitioner's current condition of ill-being relative to her cervical spine and right shoulder based on the records and opinions of treaters Drs. Graber, Nam and Jaber. Along these lines, I found the opinion of Dr. Verma, the §12 examining physician hired by the insurance carrier, to be wholly unpersuasive.

For the foregoing reasons, I respectfully dissent from the majority opinion in both claims and would award compensation accordingly.

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LOPEZ, MELISSA
Employee/Petitioner

Case# **13WC034303**

13WC027810

DURABLE PACKING
Employer/Respondent

On 3/8/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.83% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0815 ACEVES & PEREZ PC
EMILIANO PEREZ JR
1931 N MILWAUKEE AVE
CHICAGO, IL 60647

0560 WIEDNER & McAULIFFE LTD
JASON T STELLMACH
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Melissa Lopez
Employee/Petitioner

v.

Durable Packing
Employer/Respondent

Case # 13 WC 034303

Consolidated cases: 13 WC 027810

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **January 30, 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. ☒ 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 6, 2013**, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner *did 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 **$18,753.28**; the average weekly wage was **$360.64**.

On the date of accident, Petitioner was **27** years of age, *married* with **1** dependent child.

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

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

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

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

ORDER

Claim for compensation denied. Petitioner failed to prove that she sustained accidental injuries arising out of and in the course of her employment by Respondent on August 6, 2013 and failed to prove a causal connection between her work activities for Respondent and her current condition of ill-being regarding her right shoulder.

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

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

Signature of Arbitrator

March 6, 2017
Date

MAR 8 - 2017

STATEMENT OF FACTS / PROCEDURAL BACKGROUND

This matter was tried with a consolidated case, No. 13 WC 027810, involving the claimed date of loss of July 11, 2013. A decision in Case No. 13 WC 027810 is being entered concurrently with this decision.

On August 6, 2013, Petitioner was employed by Respondent as a packer, packing aluminum foil boxes for shipping. She had worked for Respondent for about a year. In this job, Petitioner picks up 6 boxes of foil and puts them in a bigger box, packing 24 of the smaller boxes in the bigger box. She pulls the bigger box and pushes it down the line. She packs 15 of the big boxes per hour and packs 75 to 100 big boxes per day. She would perform a task for 4 hours and then shift to a different task location for the remainder of the day.

On July 11, 2013, Petitioner noted that her arm hurt. She told her shift leader, Mauro, that her arm hurt. She noticed a sharp pain in her neck and right shoulder. Petitioner sought no medical treatment. She continued to work her regular job, full duty, until August 6, 2013. On August 6, 2013, Petitioner experienced more pain and reported it to Mauro, who advised her to see her doctor, or to go to the emergency room.

Petitioner first sought medical treatment at the emergency room at Norwegian American Hospital, late the afternoon of August 6, 2013. She complained of right shoulder pain, radiating to the right arm. The pain started 3 weeks ago at work. It got better, but it was aggravated again yesterday at work. Limited range of motion was noted. Petitioner stated that her pain started at work because she does repetitive motion. She was given a break from that job and felt better. She went back to her regular job and her symptoms increased. There was no trauma except overuse. The impression was shoulder bursitis and the discharge diagnosis was shoulder strain. C-spine x-rays showed narrowing at C4-5 and C5-6, with a straightening of cervical lordosis. The discharge instructions stated that Petitioner's pain was from overuse. She was to avoid repetitive movements, use motrin, ice and a sling. (PX 1)

Petitioner next sought treatment at Ridgeland Family Chiropractic on August 10, 2013. Petitioner reported a sharp pain in the right neck and shoulder which she attributed to her work activities on July 11, 2013. The examining chiropractor, Dr. Jaber, rendered the following diagnoses: decrease in the cervical lordosis, tendinosis of the supraspinatus tendon without evidence of tear, AC joint arthrosis with a medial arch stenosis, and muscle spasms. Dr. Jaber recommended a treatment plan consisting of soft tissue manipulation, spinal manipulation, thermal modalities, neuro-electrical muscle stimulation, ultrasound, stretching, passive stretching, strengthening, and iontophoresis, to be completed three to four times per week. (PX 3)

On August 23, 2013, Petitioner underwent an MRI of the right shoulder at Midwest Imaging & Diagnostic Center. The interpreting radiologist found evidence of tendinosis of the supraspinatus tendon without evidence of tear and AC joint arthrosis with a medial arch stenosis. (PX 4)

Following eight chiropractic sessions with Dr. Jaber, Petitioner was evaluated by Dr. Ellis Nam, an orthopedic surgeon, on August 31, 2013. Petitioner reported that on July 11, 2013, she experienced right shoulder pain while working on an assembly line packing aluminum foil into boxes. Petitioner estimated that the boxes, when full, weighed approximately 25 to 30 pounds. Dr. Nam diagnosed right shoulder rotator cuff tear tendonitis with a component of cervical strain and recommended continued physical therapy. Dr. Nam also imposed restrictions in the form of no lifting greater than two pounds with the right arm and no overhead lifting or repetitive use of the right arm. (PX 2)

During a reevaluation with Dr. Nam on September 14, 2014, a cortisone injection was administered. Dr. Nam also restricted Petitioner from all work. (PX 2)

Petitioner was seen by Dr. Nikhil Verma for a §12 exam at the request of Respondent on October 9, 2013. Dr. Verma diagnosed Petitioner's condition as being atypical nonspecific subjective right shoulder complaints. Petitioner had atypical diffuse upper extremity pain complaints that do not conform to an anatomic diagnosis or imaging findings. Dr. Verma took a history from Petitioner regarding her work activities and reviewed a job video and a written job description (RX 1 and RX 2). Dr. Verma opined that Petitioner's condition was not work related. (RX 3)

On October 12, 2013, Dr. Nam administered a second cortisone injection. Dr. Nam also released petitioner to return to work with restrictions. During a follow up evaluation on October 19, 2013, Dr. Nam recommended "a few more weeks" of therapy. Dr. Nam also maintained the previously imposed work restrictions. A third cortisone injection was administered by Dr. Nam on November 2, 2013. (PX 2)

Petitioner also underwent an X-ray of the right shoulder at MRI Lincoln Imaging Center which showed no acute bony abnormality. (PX 5)

Dr. Nam released Petitioner to full work duty on a trial basis on December 7, 2013. On January 4, 2014, Dr. Nam released Petitioner from his medical care and recommended she continue working in a full duty capacity without restrictions. (PX 2)

Petitioner claimed TTD from August 23, 2013 to August 30, 2013 and from September 14, 2013 to October 14, 2013, a period of 5-2/7 weeks. She received no TTD or other benefits for this lost time. (ArbEX 1)

Submitted as Respondent's Group Exhibit No. 1 were two video clips of 53 seconds and 54 seconds, respectively. These videos were reviewed and referenced by Dr. Verma. The first video, which is 53 seconds in length, shows five employees placing foil onto a conveyor. Each slot on the conveyor belt is color coded. The employees on the video are seen placing 24 rolls of foil on the conveyor during the 53-second long video clip. (RX 1)

The second video, lasting 54 seconds in duration, shows two employees placing small boxes of foil into a larger box. Each box holds 24 individual rolls of aluminum foil. The employee seen in the forefront of the video packs two and a half boxes of foil in 54 seconds. (RX 1)

The job analysis form states that the employees frequently lift and carry under ten pounds. According to the job analysis form, employees frequently push and pull between 10 to 15 pounds. The employees perform no activities above shoulder height. (RX 2)

Petitioner testified that her work activities were performed five times faster than those shown on the videos.

Arminda Alicandro testified at the request of Respondent. Alicandro has worked for Respondent for 21 years. She is currently employed as a safety manager. She is familiar with the global carton machine that Petitioner worked on. The operation of the machine has been the same since 2001. There are four job classifications that work simultaneously on the global carton machine. The operator position requires special training. The stacking position is currently performed by all male employees. The two remaining positions are loader and packer which are the positions which Petitioner performed for the Respondent.

Alicandro testified that the aluminum foil rolls which the employees handle while operating the global carton machine each weigh less than one pound. The frequency with which the employees are shown working on the

job analysis video is representative of the speed with which the job is performed on a regular basis. The global carton machine processes 120 rolls of aluminum foil per minute. The employees each work eight hour shifts, with a 20-minute lunch break, and bathroom breaks as needed.

Petitioner has not sought any medical treatment for her right shoulder or neck since January 4, 2014. Petitioner is currently working in a mailing department which requires her to feed paper into a machine. Petitioner is not taking any prescription pain medication for her right shoulder or neck and, although she testified that she does use Tylenol, she did not have any with her on the day of trial.

CONCLUSIONS OF LAW

The Arbitrator adopts the above Statement of Facts in support of the Conclusions of Law set forth below.

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT AND WITH RESPECT TO ISSUE (F), IS PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that Petitioner failed to prove that she sustained accidental injuries which arose out of and in the course of her employment by Respondent on August 6, 2013 and has failed to prove a causal connection between her work activities and her condition of ill-being, if any, regarding her right shoulder and cervical spine.

The Arbitrator relies on the persuasive opinions of Dr. Verma, the job video and analysis and the medical records in making this finding on the issues of accident and causation. The Arbitrator finds the testimony of Alicandro regarding the accuracy of the job videos to be credible. Petitioner's testimony that the actual job activities are 5 times faster than those shown on the videos is not believed.

Petitioner experienced pain in her shoulder on July 11, 2013 and on August 6, 2013, while working as a packer on the global carton machine. It is academic that the experiencing of symptoms while performing an activity does not establish causation. Here, the job video and job analysis, as recognized by Dr. Verma, do not show activities which would lead to shoulder pathology. Further, Dr. Verma's diagnosis of atypical, non-specific, subjective right shoulder complaints is believed to be correct by the Arbitrator, leading to the conclusion that the diagnosed condition is atraumatic (i.e: neither from a specific event or overuse) and not work related.

Further, the ER physician appears to relate Petitioner's shoulder strain/bursitis condition to her work, but this is based upon the patient's history of "repetitive" work (which is not borne out by the proofs). Dr. Nam noted the history of a work related injury on July 11, 2013. "She works on the assembly line packing aluminum foil into boxes which involves the packing of aluminum foil, lifting, and pushing the boxes…She was doing this in a repetitive fashion on July 11, 2013 when she developed immediate pain in her right shoulder and right side of her neck." Dr. Jaber appears to endorse a history of a specific onset of neck and right shoulder pain while loading aluminum paper in a box and than (sic) pushing the box on July 11, 2013. She worked a different job for a few weeks and then went back to her old job and started developing more pain in the same location. Neither Dr. Nam, nor Dr. Jaber, viewed the job videos or job analysis. The medical records do not persuade the Arbitrator that Petitioner's neck and right shoulder complaints are related to her job as a packer on the global carton machine for Respondent.

The claim for compensation is, therefore, denied.

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

As the Arbitrator has found that Petitioner failed to prove that she sustained accidental injuries which arose out of and in the course of her employment by Respondent on August 6, 2013 and has failed to prove that there is a causal connection between her work activities and the condition of ill-being regarding her neck and right shoulder, if any, the Arbitrator needs not decide these issues.

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

Melissa Lopez,
Petitioner,

vs.

NO: 13WC 27810

18IWCC0609

Durable Packing,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical, 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 8, 2017, is hereby affirmed and adopted.

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

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

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 10 2018
o092518
KWL/jrc
042

Kevin W. Lamborn

Michael J. Brennan

18IWCC0609

DISSENT

I believe that Petitioner's job as a packer, based on her credible description of her job duties and the job video submitted by Respondent, was sufficiently repetitive in nature to have been a contributing factor in the development of her subsequent neck and right shoulder symptoms on 7/11/13 and 8/6/13.

The record indicates that Petitioner suffers from proximal bicep tendinitis and right shoulder impingement. More importantly, the evidence shows that Petitioner's work activities exposed her to an increased risk of injury, both qualitatively and quantitatively, to just such an injury compared to members of the general public. There is also no evidence to suggest that Petitioner suffered from any cervical and/or right shoulder problems prior to the accidents in question.

As a result, I would find that Petitioner proved by a preponderance of the credible evidence that she sustained accidental, repetitive-trauma type injuries arising out of and in the course of her employment on 7/11/13 [13 WC 27810] and 8/6/13 [13 WC 34303], and that a causal relationship existed between those injuries and Petitioner's current condition of ill-being relative to her cervical spine and right shoulder based on the records and opinions of treaters Drs. Graber, Nam and Jaber. Along these lines, I found the opinion of Dr. Verma, the §12 examining physician hired by the insurance carrier, to be wholly unpersuasive.

For the foregoing reasons, I respectfully dissent from the majority opinion in both claims and would award compensation accordingly.

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LOPEZ, MELISSA
Employee/Petitioner

Case# **13WC027810**

13WC034303

DURABLE PACKING
Employer/Respondent

On 3/8/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.83% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0815 ACEVES & PEREZ PC
EMILIANO PEREZ JR
1931 N MILWAUKEE AVE
CHICAGO, IL 60647

0560 WIEDNER & McAULIFFE LTD
JASON T STELLMACH
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Melissa Lopez
Employee/Petitioner

v.

Durable Packing
Employer/Respondent

Case # **13 WC 027810**

Consolidated cases: **13 WC 034303**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **January 30, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **July 11, 2013**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$18,753.28**; the average weekly wage was **$360.64.**

On the date of accident, Petitioner was **27** years of age, *married* with **1** dependent child.

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

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

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

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

ORDER

Claim for compensation denied. Petitioner failed to prove that she sustained accidental injuries which arose out of and in the course of her employment by Respondent on July 11, 2013 and failed to prove a causal connection between her work activities and any condition of ill-being regarding her right shoulder.

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

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

Signature of Arbitrator

March 6, 2017
Date

MAR 8 - 2017

STATEMENT OF FACTS / PROCEDURAL BACKGROUND

This matter was tried with a consolidated case, No. 13 WC 034303, involving the claimed date of loss of August 6, 2013. A decision in 13 WC 034303 is being entered concurrently with this Decision.

On July 11, 2013, Petitioner was employed by Respondent as a packer, packing aluminum foil boxes for shipping. She had worked for Respondent for about a year. In this job, Petitioner picks up 6 boxes of foil and puts them in a bigger box, packing 24 of the smaller boxes in the bigger box. She pulls the bigger box and pushes it down the line. She packs 15 of the big boxes per hour and packs 75 to 100 big boxes per day. She would perform a task for 4 hours and then shift to a different task location for the remainder of the day. On July 11, 2013, Petitioner noted that her arm hurt. She told her shift leader, Mauro, that her arm hurt. She noticed a sharp pain in her neck and right shoulder.

Petitioner sought no medical treatment. She continued to work her regular job, full duty, until August 6, 2013. On August 6, 2013, Petitioner experienced more pain and reported it to Mauro, who advised her to see her doctor, or to go to the emergency room. Petitioner then began a course of medical care which will be detailed in the Statement of Facts in the decision in Case No. 13 WC 34303. Petitioner denied any prior right shoulder, right arm or neck pain or treatment.

Petitioner was seen by Dr. Nikhil Verma for a §12 exam at the request of Respondent on October 9, 2013. Dr. Verma diagnosed Petitioner's condition as being atypical nonspecific subjective right shoulder complaints. Petitioner had atypical diffuse upper extremity pain complaints that do not conform to an anatomic diagnosis or imaging findings. Dr. Verma took a history from Petitioner regarding her work activities and reviewed a job video and a written job description (RX 1 and RX 2). Dr. Verma opined that Petitioner's condition was not work related. (RX 3)

CONCLUSIONS OF LAW

The Arbitrator adopts the above Statement of Facts in support of the Conclusions of Law set forth below.

To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim (O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980)), including that there is some causal relationship between his employment and his injury. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52, 63 (1989) To be compensable under the Act, an injury need only be a cause of an employee's condition of ill-being, not the sole or primary causative factor. Sisbro, Inc. v. Industrial Comm'n, 207 Ill.2d 193, 205 (2003) Decisions of an arbitrator shall be based exclusively on evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e)

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT AND WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that Petitioner failed to prove that she sustained accidental injuries, arising out of and in the course of her employment by Respondent on July 11, 2013 and finds that Petitioner failed to prove a causal connection between her work activities and her condition of ill-being, if any, regarding her right shoulder.

Petitioner's testimony was that she experienced sharp neck and right shoulder pain while working for Respondent on July 11, 2013. She did report her pain to her supervisor, Mauro. She sought no medical treatment and continued to work full duty for Respondent until she again experienced pain at work on August 6, 2013.

The Arbitrator relies upon the persuasive opinions of Dr. Verma and the fact that Petitioner continued to work at regular duty for Respondent for almost a month, without seeking medical care, until she developed pain on August 6, 2013 in making this finding.

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

As the Arbitrator has found that Petitioner failed to prove that she sustained accidental injuries which arose out of and in the course of her employment by Respondent on July 11, 2013 and has failed to prove a causal connection between Petitioner's work activities and her condition of ill-being, if any regarding her right shoulder, the Arbitrator needs not decide these issues.

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

Gayle J. Curran,
Petitioner,
vs.

NO: 12WC06333
18IWCC0610

Brookdale Senior Living,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, nature and extent, medical expenses, 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 July 7, 2017 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $30,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 10 2018
o100318
LEC/jrc
043

Charles J. DeVriendt

Joshua D. Luskin

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CURRAN, GAYLE J
Employee/Petitioner

Case# **12WC006333**

BROOKDALE SENIOR LIVING
Employer/Respondent

18IWCC0610

On 7/7/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0147 CULLEN HASKINS NICHOLSON
DAVID B MENCHETTI
10 S LASALLE ST SUITE 1250
CHICAGO, IL 60603

0075 POWER & CRONIN LTD
ANDREW M LUTHER
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

Gayle J. Curran
Employee/Petitioner

Case # 12WC006333

v.

Consolidated cases: None

Brookdale Senior Living
Employer/Respondent

18IWCC0610

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Gary Gale, Arbitrator of the Commission, in the city of Chicago, on July 8, 2016. After reviewing all of the evidence presented, the Arbitrator David Kane 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 **02/09/2012**, 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 $**42,822.52**; the average weekly wage was $**823.51**.

On the date of accident, Petitioner was **50** years of age, ***single*** with **1** dependent children.

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

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

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

ORDER

Respondent shall pay to the Petitioner temporary total disability benefits of $549.01 per week for 42 & 1/7 weeks, commencing February 10, 2012 through August 28, 2012 (28 & 4/7 weeks) and from July 30 2014 through November 6, 2014 (14 & 1/7 weeks), as provided in Section 8(b) of the Act. From these temporary total disability benefits, Respondent shall be granted a credit of $450 per week for the first period of 28 & 4/7 weeks or $12,856.50 total; and Respondent shall be granted a credit of $300 per week for the second period of 14 & 1/7 weeks or $4242.00 total.

Respondent shall pay to the Petitioner reasonable and necessary medical services pursuant to Section 8(a), Section 8.2, the medical fee schedule and the holding in Springfield Urban League, 2013 Il App (4th) 120219WC: Dr. Newman; Total Rehab; Dr. Koh; North Shore University HealthSystem. The Respondent shall be given credit for all related medical bills that have been paid through group health insurance for which credit may be allowed under Section 8(j) of the Act. Respondent shall hold petitioner harmless from any and all claims or liabilities that may be made against Petitioner by reason of such payment for which Respondent is receiving this credit as provided in Section 8(j) of the Act.

Respondent shall pay to the Petitioner permanent partial disability benefits of $494.11 per week for 50 weeks because the injuries sustained caused 10% loss of the whole person as provided in Section 8(d)2 of the Act and the holding in Will County Forest Preserve District.

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

July 7, 2017
Date

JUL 7 - 2017

Attachment to Arbitration Decision
Gayle Curran v. Brookdale Senior Living
12WC006333

FINDINGS

On February 9, 2012 the Petitioner Gayle Curran (Petitioner) was employed by the Respondent Brookdale Senior Living (Respondent) as a full-time resident transportation bus driver. That job entailed the Petitioner taking Respondent's residents to various doctor appointments and basically to provide any type of transportation that was needed for the residents. The Petitioner drove a 30 passenger bus. The Petitioner was required to take residents in wheel chairs and to put them on the bus. The Petitioner was required to push and pull the residents on and off the bus and secure their wheelchairs. The Petitioner was required to load and unload packages.

During that same period of time around February 9, 2012, the parties stipulated that the Petitioner was working concurrently for United Parcel Service. Petitioner was a shuttle driver for United Parcel Service. Petitioner was working part-time for United Parcel Service and her job with United Parcel Service did not require her to load or unload the vehicle.

The Parties stipulated that on February 9, 2012 the Petitioner sustained accidental injuries that arose out of and in the course of her employment. At that time, one of the residents had fallen in the bus and the

Petitioner lifted the resident. As Petitioner was lifting the resident, Petitioner experienced pain in her neck and right shoulder.

In the Associate Medical Treatment form and the Associate Injury form completed on February 10, 2012, the Petitioner noted that she had injured her head, right arm, right shoulder, and neck. (PX 8, pg. 3).

Petitioner sought medical treatment at what she called Alexian Brothers Corporate Health within a day or two after the incident. When Petitioner attempted to follow up at Alexian Brothers Corporate Health she was denied medical treatment because she had been terminated from her job with the Respondent within a couple of weeks after the incident. According to the review of the records done by the Respondent's evaluator, Dr. Zoellick, the Petitioner was seen at Alexian Brothers Hospital on February 13, 2012. (RX 6, pg. 3) According to Dr. Zoellick's review of the record from Alexian Brothers: Petitioner reported a date of injury of February 9, 2012; Petitioner was complaining of right shoulder pain at that time; Petitioner was placed on work restrictions; and Petitioner was to follow up at Alexian Brothers on February 16, 2012. (RX 6, pg 4).

Petitioner sought medical treatment from Dr. Daniel Newman on March 22, 2012. (PX 1, pg 1). Petitioner complained of right trapezius pain; Dr. Newman noted painful range of motion in the right shoulder. (PX 1, pg 2). X-ray of the right shoulder was normal. (PX 1, pg 2). Dr. Newman diagnosed injury to Petitioner's neck and recommended physical therapy. (PX 1, pg. 2).

Petitioner received physical therapy at Total Rehab on April 16, 2012. PX 6, pg. 1). Referring diagnosis at Total Rehab was cervical radiculopathy and right shoulder impingement. (PX 6, pg. 1). Treatment included electrical stimulation to the right shoulder to increase circulation and decrease pain. (PX 6, pg. 1).

Petitioner followed up with Dr. Newman on April 26, 2012 and Dr. Newman's impression was that Petitioner's symptoms were certainly consistent with an injury to the right shoulder. (PX 1, pg 3).

On May 5, 20012, the MRI of Petitioner's right shoulder showed that Petitioner had acute inflammation of the infraspinatus tendon, hypertrophic arthropathy of the acromioclavicular joint, and a possible tear of the superior labrum. (PX 1, pg. 10).

On May 10, 2012, the Petitioner followed up with Dr. Newman at which time, Dr. Newman recommended that Petitioner undergo surgery consisting of arthroscopic repair of the labrum acromioplasty and resection of the distal clavicle. (PX 1, pg. 4).

Petitioner continued to follow up with Dr. Newman for injections into her right shoulder: on April 8, 2013; June 9, 2013; October 1, 2013; December 3, 2013; and March 11, 2014. (PX 1).

On March 22, 2012, Dr. Newman reported that Petitioner was unable to return to her regular work duties. (PX 1, pg. 2). On May 10, 2012, Dr. Newman reported that Petitioner was unable to work. (PX 1, pg. 20). There

is no evidence that Respondent offered Petitioner any work at all after February 9, 2012.

During the time that the Petitioner was seeing Dr. Newman she was continuing to notice more limited use of her right arm and shoulder.

After February 9, 2012, the Petitioner continued to work in her part-time concurrent employment with United Parcel Service. (RX 10). The Petitioner did not injure or reinjure her right arm while working for United Parcel Service. There is no medical evidence that Petitioner injured or reinjured her right arm or shoulder between February 9, 2012 and November 12, 2013. On November 12, 2013, Petitioner injured her back while working for United Parcel Service and stopped working for United Parcel Service as a shuttle driver at that time. (RX 8). Petitioner testified that her part-time employment at United Parcel Service ordinarily did not require her to lift anything unless she was specifically instructed to do so by her supervisor.

Petitioner sought treatment from Dr. Jason Koh for her right shoulder on July 1, 2014; Petitioner opted to go through her private insurance to see Dr. Koh. (PX 4, pg. 56). Dr. Koh reported that Petitioner had a right shoulder injury at work and that Petitioner was suffering from right shoulder impingement. (PX 4, pg. 57).

Dr. Koh performed surgery on Petitioner's right shoulder on July 30, 2014 at Northshore University HealthSystem. Preoperative and postoperative diagnoses were the same: right shoulder impingement;

rotator cuff tearing; labral tearing and biceps tendinitis. (PX 4, pg. 17). Operative procedures consisted of: right shoulder arthroscopy; extensive debridement of anterior, superior and posterior labaral tearing and rotator cuff tearing; open biceps tenodesis; arthroscopic subacromial decompression; and extensive synovectomy of the shoulder. (PX 4, pg. 17).

After the surgery, Petitioner continued to follow up with Dr. Koh and on November 11, 2014, Dr. Koh reported that Petitioner had undergone physical therapy for her right shoulder but was still having some bicep pain and aching in the shoulder. (PX 4, pg. 44).

Before February 9, 2012, the Petitioner had never received any medical treatment for her right shoulder, had never experienced anything unusual regarding her right shoulder and was working at full-time, full-duty in her capacity as a driver for Respondent and as a part-time shuttle driver for United Parcel Service.

Petitioner continues to notice pain in her right shoulder and lack of strength in her right shoulder.

On March 14, 2016, Dr. Zoellick, Respondent's evaluator, noted that Petitioner had loss of range of motion in the right shoulder, compared to the left shoulder, in external rotation, internal rotation and extension. (RX 7, pg. 2). Dr. Zoellick gave an impairment rating to Petitioner pursuant to the American Medical Association Guides to the Evaluation of Permanent

Impairment, 6th Edition based on rotator cuff injury, partial thickness tear: 5% of the upper extremity or 3% whole person impairment. (RX 7, pg. 5).

Dr. Newman testified by evidence deposition. (PX 5). Dr. Newman is a board certified orthopedic surgeon. (pg. 6). On April 26, 2012, Dr. Newman felt that Petitioner's symptoms were consistent with an injury to the right shoulder. (pg. 13). On May 10, 2012, Dr. Newman recommended right shoulder surgery for the Petitioner on the basis that Petitioner had failed to respond to conservative management. (pg. 15). Dr. Newman diagnosed a right shoulder subacromial inflammation or shoulder impingement syndrome. (pg. 21). Dr. Newman opined that the symptoms the Petitioner complained of in her right shoulder and that he was treating were directly related to the accident of February 9, 2012. (pg. 22). Dr. Newman based hiss causal connection opinion on Petitioner's history of her injury and the subsequent findings of the examination and the mechanism of the injury. (pg. 23).

CONCLUSIONS

Causal Connection

The Arbitrator concludes that there is a causal connection between Petitioner's condition of ill-being of her right shoulder and of the accidental injuries of February 9, 2012. A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability is sufficient evidence to prove a causal nexus between

the accident and the employee's injury. Corn Belt Energy Corp. v. IWCC, 2016 IL App (3d) 150311WC; Par. 31.

Petitioner had never experienced any prior problems with her right shoulder before February 9, 2012. The parties stipulated that Petitioner sustained accidental injuries that arose out of and in the course of her employment on February 9, 2012. The Petitioner contemporaneously reported right shoulder and arm pain related to those accidental injuries as early as the next day in the report to her employer. According to Respondent's evaluator Petitioner reported right arm and shoulder pain in her initial treatment at Alexian Brothers. Petitioner reported right arm and shoulder pain to Dr. Newman on within approximately 40 days of the stipulated accidental injuries. Within 3 weeks after that, and within approximately 90 days of the stipulated accidental injuries, Dr. Newman was recommending that the Petitioner undergo surgery on right shoulder. Finally, Dr. Newman testified explicitly that there was a causal connection between the Petitioner's condition of ill-being of her right shoulder and the stipulated accidental injuries of February 9, 2012.

Although Petitioner continued to work in her concurrent part-time employment with United Parcel Service after February 9, 2012, there is no evinced or medical evidence to show that Petitioner sustained any type of intervening injury that would sever the causal connection between the Petitioner's condition of ill-being of her right shoulder and the stipulated accidental injuries of February 9, 2012. The surgery performed by Dr. Koh on July 30, 2014 to Petitioner's right shoulder was the same or substantially similar to the surgery recommended by Dr. Newman on May 10, 2012.

Temporary Total Disability

The Arbitrator concludes that Petitioner is entitled to temporary total disability benefits for 42 1/7 weeks in the amount of $549.01 per week for the periods: commencing February 10, 2012 through August 28, 2012 (28 4/7 weeks); and commencing July 30, 2014 through November 6, 2014 (14 1/7 weeks). The Arbitrator bases this conclusion on the conclusion relating to causal connection above and on the following.

February 10, 2012 is the date after the stipulated accidental injuries. Respondent's own evaluator Dr. Zoellick noted that Petitioner was released to return to work with restriction by Alexian Brothers on February 13, 2012. There is no evidence that respondent ever offered Petitioner work within those restrictions. On March 22, 2012, Dr. Newman took Petitioner off work with Respondent altogether. August 28, 2012 is the date of the notice to Petitioner of the Respondent's Section 12 exam with Dr. Karlsson. For this period, the Arbitrator concludes that Respondent is entitled to receive a credit of $450.00 a week for 28 4/7 weeks or $12,856.50 because this is the stipulated amount that Petitioner was continuing to earn in her part-time concurrent employment with United Parcel Service.

July 30, 2014 is the date of surgery by Dr. Koh. November 6, 2014 is the last recorded date of treatment with Dr. Koh. For this period, the Arbitrator concludes that Respondent is entitled to receive a credit of $300.00 per week (2/3 of $450 per week) for 14 1/7 weeks or $4242.00 total because the Petitioner was getting temporary total disability from

accidental injuries sustained from her part-time concurrent employment with United Parcel Service.

Medical Expenses

The Arbitrator concludes that the following treatment rendered to Petitioner for right shoulder were reasonable, necessary and related to the accidental injuries of February 9, 2012: Dr. Newman; Total Rehab; Dr. Koh; and North Shore University HealthSytem. The Arbitrator bases this conclusion on the conclusion relating to causal connection above. The Arbitrator notes that there was no utilization review presented into evidence.

Permanent Partial Disability

Because the accidental injuries occurred after September 1, 2011, the Arbitrator applies Section 8.1b to the determination of permanent partial disability in this case. Based on application of Section 8.1b below, the Arbitrator concludes that the Petitioner sustained 10% loss of use of the whole person pursuant to the holding in Will County Forest Preserve District.

(i) Dr. Zoellick gave the Petitioner an impairment rating of 5% loss of the upper extremity or 3% whole person impairment. The Arbitrator notes that impairment is not the equivalent of the permanent partial disability. The Arbitrator notes that Dr. Zoellick did not

specifically rate the Petitioner based on loss of range of motion. The Arbitrator assigns the impairment rating some weight.

(ii) Petitioner's occupation as a resident transportation bus driver required Petitioner to push and pull residents in wheelchairs and to lift objects. The Arbitrator gives this factor some weight.

(iii) Petitioner was 50 years old at the time of the injury. The Arbitrator gives this factor some weight.

(iv) There was no evidence regarding Petitioner's future earning capacity. The Arbitrator gives this factor no weight.

(v) The evidence of disability as corroborated by the treating medical records shows that Petitioner sustained a subacromial inflammation or impingement syndrome, among other diagnoses relating to her right shoulder. Based on the treating medical records, Petitioner testified credibly to ongoing complaints involving pain in her right shoulder. The Arbitrator gives this factor significant weight.

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

Armando Martinez,
Petitioner,

18IWCC0611

vs.

NO: 13 WC 2089

City of Chicago Dept of Transportation,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 2, 2018, is hereby affirmed and adopted.

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

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

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 10 2018
O9/20/18
DLS/rm
046

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

18IWCC0611

MARTINEZ, ARMANDO
Employee/Petitioner

Case# **13WC002089**
14WC029515

CITY OF CHICAGO DEPT OF TRANSPORTATION
Employer/Respondent

On 4/2/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.89% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0010 CITY OF CHICAGO DEPT OF LAW
D TAYLOR CHITTICK
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

18IWCC0611

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

Armando Martinez
Employee/Petitioner

v.

City of Chicago, Dept of Transportation
Employer/Respondent

Case # **13 WC 02089**

Consolidated cases: **14 WC 29515**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Frank Soto**, Arbitrator of the Commission, in the city of **Chicago**, on **2/15/2018**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On 5/10/2012, 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 **$68,952.52** ; the average weekly wage was **$1,326.01**.

On the date of accident, Petitioner was **61** 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 **$29,299.94** for TTD, **$-0-** for TPD, **$-0-** for maintenance, and **$-0-** for other benefits, for a total credit of **$29,299.94**.

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

ORDER

- Respondent shall pay the further sum of $4,590.48 for necessary medical services as provided in Section 8(a) of the Act for payment of the medical bill of Dr. Heller and/or Midland Orthopedics. The medical bill is awarded subject to payment pursuant to Section 8(a) and the Medical Fee Schedule. The payment shall be sent directly to the provider pursuant to the agreement of the parties. Respondent shall provide proof of payment to Petitioner's attorney's office.
- Respondent shall pay Petitioner the sum of $695.78/week for a further period of 60 weeks, as provided in Section 8(d)2 of the Act because the injuries sustained to the right arm caused a 12% loss of use of the person as a whole.
- Respondent shall pay Petitioner the compensation accrued from 5/10/2012 through 2/15/2018 and shall pay the remainder of the award, if any in weekly payments.
- See Rider attached hereto and made a part of hereof.

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

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

Signature of Arbitrator — Date: 3/28/2018

Arbitrator Decision Paragraphs

APR 2 - 2018

PROCEDURAL HISTORY

Case number 13 WC 02089 was consolidated with case number 14 WC 29515. Both cases were tried before Arbitrator Frank J. Soto on February 15, 2018. Testimony and exhibits were submitted in connection with both claims. The Arbitrator will consider the testimony and exhibits in connection with both cases and will issue separate decisions as it relates to both cases.

FINDINGS OF FACT

Armando Martinez (hereinafter referred to as "Petitioner" testified that he is 67 years old and had been employed as a sign painter for the City of Chicago's Department of Transportation (hereinafter refer to as "Respondent") twenty years. He was a member of Painters District Counsel Number 14, Local 830, the Sign, Display and Wood Finishers Union for 37 years. Petitioner last worked for Respondent on June 30, 2016. Petitioner retired on June 30, 2016.

Petitioner testified regarding his job duties for Respondent. Petitioner mainly performed work inside. Petitioner made custom signs, including traffic signs and oversized street signs. The signs varied in size from 18 inches by 48 inches to 24 inches by 72 inches. The larger signs weighed between ten (10) and fifteen (15) pound and the smaller signs weighed between five (5) to seven (7) pounds. Petitioner also unrolled vinyl. The rolls of vinyl weighed between fifty (50) and sixty (60) pounds. Petitioner lifted and carried plates and rolls of vinyl. Petitioner lifted the vinyl from ground level to three (3) to four (4) feet. Petitioner also removed items from an overhead shelf. Petitioner prepared plates by placing vinyl over the metal plate. Petitioner cut the vinyl to fit the plate. Petitioner prepared the name of the street on a computer and cut it out. Petitioner placed the lettering and numbering on the vinyl and secured it in place with glue. The plate and sign were then placed in an applicator to apply the numbers and letters to the vinyl. Petitioner then removed the transfer tape from the sign. Petitioner testified that it is difficult to remove the transfer tape since it is very sticky. Petitioner used rulers, knives and rollers.

Prior to working for Respondent, Petitioner worked as a union sign painter for commercial contractors. Petitioner placed large pictures on walls. The pictures were over forty (40) feet high and could be up to 100 feet. Petitioner worked on ladders and used stage scaffolding and performed overhead work. Petitioner lifted and carried over fifty (50) pounds.

Petitioner testified that Prior to May 10, 2012 he had not sustained any accidents or injuries involving his right upper extremity nor had Petitioner had received any medical treatment for his right shoulder prior to May 10, 2012.

On May 10, 2012 Petitioner was attempting to pull one of the large plates for parking signs off a shelf which was at eye level. The sign was 18 inches by 18 inches. Both of Petitioner's hands were in front of him and at shoulder level. Petitioner pulled the sign towards him and the entire stack of signs came towards him. The stack contained approximately thirty (30) to forty (40) signs and weighed more than fifty (50) pounds. When the signs fell, they struck Petitioner's right hand and pushed his right arm back. Petitioner twisted his right shoulder and wrist.

Petitioner reported the incident to his supervisor and an accident report was completed and admitted into evidence. (PX 1). The accident report stated that when Petitioner was taking an eighteen by eighteen sign off the shelf, the sign fell forward onto the right hand. (PX 1). When Petitioner was pulling away, the sign hit Petitioner in the back. (PX 1).

After the incident, Petitioner received medical treatment at MercyWorks. (PX 2). On May 15, 2012, Petitioner returned to MercyWorks complaining of right shoulder, rib and low backpain. On May 22, 2012, physical therapy was proscribed. On June 19, 2012, Petitioner returned to MercyWorks and that time a right shoulder MRI was ordered. Petitioner underwent the MRI study on June 25, 2012 at Mercy Hospital. The MRI study showed a small distal supraspinatus tear with probable tiny full-thickness component with additional tendinopathy and degenerative changes including subchondral cysts in the humeral head and mild spurring at the AC joint and acromial tip. (PX 7). Petitioner was referred to Dr. Heller. (PX 2).

On June 29, 2012, Petitioner was examined by Dr. Heller who recommended injections. On July 13, 2012, after receiving the injections, Petitioner returned to Dr. Heller who noted that Petitioner's conduct was worsening. Dr. Heller recommended additional conservative care with the possibility of surgery in the event the conservative care fails. On August 17, 2012, Petitioner returned to Dr. Heller who recommended surgery. (PX 3).

On September 19, 2012, Petitioner underwent surgery at Mercy Hospital. Dr. Heller performed an arthroscopic repair of the rotator cuff, subacromial decompression and glenohumeral joint arthroscopy with extensive debridement. Petitioner's post-operative diagnosis was right shoulder rotator cuff tear. (PX 4). Petitioner remained under the post-operative care of Dr. Heller. Post-operative care included activity modification, follow up appointments with Dr. Heller and physical

therapy. (PX 3). Petitioner participated in physical therapy at Midland Orthopedics. (PX 8). On January 18, 2013, Dr. Heller recommended a manipulation to improve the rotation of the shoulder and that Petitioner should remain off work. (PX 3).

Petitioner decided to be examined by a physician of his own choice. On January 25, 2013, Petitioner was examined by Dr. Wolin who recommended that Petitioner undergo a parascapular release and that Petitioner should remain off work. (PX 5).

On February 6, 2013, Petitioner underwent the manipulation procedure which was performed by Dr. Heller at Mercy Hospital. Petitioner's post-operative diagnosis was right shoulder post-surgery adhesive capsulitis. (PX 6).

Petitioner remained under the post-operative care of Dr. Heller. On April 1, 2013, Petitioner returned to Dr. Heller. At that visit, Dr. Heller noted that Petitioner had slight limitation with range of motion and he released Petitioner to return to work without restrictions. (PX 3).

Petitioner testified that he returned to work for Respondent on April 2, 2013. Upon returning to work, Petitioner performed his full duties until June 10, 2014. Petitioner testified that while he was able to return to work, his right shoulder was not 100%. Petitioner testified that he was not able to pull transfer tape off signs because he lacked the strength in his right arm. Petitioner testified that because of the problems he was experiencing with his right arm, he began using his left arm for everything.

At the request of his attorney, Petitioner was examined by Dr. Coe on September 20, 2016. (PX 9, PX 17). Dr. Coe noted Petitioner's right shoulder complaints, right shoulder stiffness and crepitus with range of motion. Dr. Coe also noted that Petitioner was experiencing pain in the top and front of his right shoulder. Dr. Coe's examination showed tenderness over the right anterior glenohumeral joint and acromioclavicular joint, decrease range of motion with abduction of 150 degrees and forward elevation of 160 degrees, and mild impingement signs on the right side. Dr. Coe also noted that Petitioner had decreased strength with forward elevation and isolated supraspinatus. (PX 9).

Dr. Coe opined that Petitioner sustained injuries to his right hand, back and right shoulder on May 10, 2012. The injury to the right shoulder caused a right shoulder rotator cuff tear and biceps tendon inflammation and aggravated pre-existing, asymptotic, right shoulder acromioclavicular and glenohumeral joint arthritis. As a result, Petitioner developed chronic right shoulder pain and

stiffness. Dr. Coe opined that there was a causal relationship between the right shoulder injury and Petitioner's work-related accident of May 10, 2013. (PX 9).

Petitioner testified that he has difficulty sleeping. He experiences pain when he sleeps directly on his right or left shoulder. Petitioner also has difficulty working the backyards, sweeping, raking leaves or shoveling snow. Petitioner continues to experiences difficulties with his shoulders nad he takes counter medication a couple of times per week.

The medical bill from Midland Orthopedics was admitted into evidence showing an outstanding balance of $4,590.58. (PX 18). A history of payments made by Respondent was also admitted into evidence. (RX 1).

The Arbitrator finds the Petitioner's testimony to be credible.

CONCLUSIONS OF LAW

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

To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment. *Baggett v. Industrial Comm'n*, 201 Ill.2d. 187, 266 Ill. Dec. 836, 775 N.E.2d 908 (2002). The "arising out of" component is primarily concerned with causal connection. To satisfy this requirement it must be shown that the injury had its origin in some risk connected with or incidental to the employment to create a causal connection between the employment and the accidental injury. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d, 52, 133 Ill. Dec. 454, 541 N.E.2d 665 (1989). Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Rock Road Construction Co. v. Industrial Comm'n*, 37 Ill.2d. 123, 227 N.E.2d 65 (1967).

In support of the Arbitrator's decision relating to "F," whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator makes the following conclusions:

To recover under the Act, an employee must show that there is a causal connection between the claimant's employment and the injury. In *Sisbro, Inc. v. Industrial Commission*, 207 Ill.2d 193, 797 N.E.2d 665 (2003), the Illinois Supreme Court held that "even though an employee has a preexisting condition which may make him more vulnerable to injury, recovery for an accidental

injury will not be denied as long as it can be shown that the employment was also a causative factor." *Id.* The accident "need not be the sole causative factor, nor even the primary causative factor, as long as it was *a* causative factor in the resulting condition of ill-being." *Id.* (emphasis in original).

The Arbitrator finds that Petitioner's right shoulder condition of ill-being including the right shoulder rotator cuff tear, biceps tendon inflammation, aggravated pre-existing asymptotic right shoulder acromioclavicular and glenohumeral joint arthritis was causally connected to Petitioner's work-related accident of May 10, 2012 as more fully set forth below.

The Arbitrator finds the opinions of Dr. Coe to be persuasive. The Arbitrator notes that Respondent did not submit evidence disputing that Petitioner's current condition of ill-being was causally related to his work accident of May 10, 2012.

Dr. Coe set forth that the injury to the right shoulder caused a right shoulder rotator cuff tear and biceps tendon inflammation and aggravated pre-existing, asymptotic, right shoulder acromioclavicular and glenohumeral joint arthritis. Dr. Coe opined that there was a causal relationship between the right shoulder injury and the work-related accident of May 10, 2013.

The Arbitrator further concludes that Petitioner has also established that the current condition of ill-being as it relates to his right shoulder was causally connected to the work-related accident of April 6, 2010 through the "chain of events" analysis. Proof of prior good health and change immediately following and continuing after an injury may establish that the impaired condition was due to injury. *Ill. Power Co. v. Indus. Comm'n*, 176 Ill.App.3d 317, 530 N.E.2d 617 (4th Dist. 1988).

In the instant case, Petitioner testified that prior May 10, 2012, he had not sustained any accidents or injuries involving his right shoulder. However, immediately following the work-related accident, Petitioner underwent medical treatment including two surgeries, physical therapy and office visits. Since May 10, 2012, Petitioner has not sustained any new accidents or injuries involving his right shoulder. Accordingly, the Arbitrator finds that the current condition of current condition of ill-being as it related to his right shoulder was causally connected to the work-related accident of May 10, 2012 through the "chain of events" analysis.

In support of the Arbitrator's decision relating to "J," whether the medical services were reasonable and necessary and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator makes the following conclusions:

The Arbitrator concludes that the medical services provided to Petitioner by Midland Orthopedic were reasonable and necessary and that Respondent is liable for payment of the medical bill from Midland Orthopedic in the amount of $4,590.58. The Arbitrator relies on the medical records of Dr. Heller and the medical opinions of Dr. Coe in support of the decision. Respondent did not submit any evidence disputing the reasonableness or necessity of the medical bill.

The Arbitrator finds that the medical bills are subject to adjustments consistent with the provisions of the Medical Fee Schedule. 820 ILCS 305/8.2. The Arbitrator orders Respondent to calculate the exact amount of benefits owed to the medical provider pursuant to Section 8.2. Any further disputes relating to the adjustment of the bill may be addressed at further proceedings, consistent with this decision. Pursuant to the agreement of the parties, Respondent shall pay the medical bill directly to the provider.

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

The Arbitrator concludes that as a result of the work-related accident of May 10, 2012 Petitioner sustained permanent partial disability to the extent of 12% loss of use of the person of whole pursuant to Section 8(d)2 since Petitioner sustained a serious injury to his right shoulder. In support of the finding, the Arbitrator relies on Petitioner's credible and unrebutted testimony, the medical records and operative report and the medical opinions of Dr. Coe.

The Arbitrator's finding is consistent with the factors and criteria set forth in Section 8.1(b) of the Act. Pursuant to Section 8.1(b) of the Act, the Arbitrator must consider certain factors and criteria in assessing permanent partial disability, including, the level of impairment under the AMA Guides, the occupation of the injured worker, the age of the injured worker, the future earning capacity of the injured worker and evidence of disability corroborated by the treating medical records. The Act provides that no single enumerated factor shall be the sole determinant of disability. After considering the factors, the Arbitrator finds that Petitioner is permanently partially disabled to the extent of 15% loss of use of the person as a whole due to the injury he sustained to his right shoulder. With respect to the factors, the Arbitrator finds the following:

A. Level of Impairment under the AMA Guides

No impairment rating report was submitted into evidence. In *Corn Belt Energy v. Illinois Workers' Compensation Commission*, 2016 IL App (3d) 150311WC (3d Dist. 2016), the court held that an AMA Impairment Rating is not required for the Arbitrator to award permanent partial disability benefits. Accordingly, the Arbitrator gives this factor no weight as it relates to the nature and extent of the injury.

B. Occupation of Petitioner

At the time of the work-related accident, Petitioner was employed as a union sign painter. Petitioner's job duties included lifting and carrying up to sixty (60) pounds, climbing, pulling and pushing and performing physical activities. Accordingly, the Arbitrator finds that Petitioner's job duties were physically demanding. The Arbitrator's finding is supported by the reports of Mr. Grzesik, Petitioner's vocational rehabilitation counselor.

Petitioner testified that he returned to his pre-injury job duties. Petitioner testified that he performed his job duties differently than he did prior to the work-related accident of May 10, 2012. Petitioner used his left arm for work. He pulled the transfer tape with his left arm instead of his right arm. He also experienced pain in his right arm while working. The Arbitrator accords great weight to the heavy physical demand of Petitioner's pre-injury employment.

C. Age of Petitioner

At the time of the accident, Petitioner was 61. At the time of the hearing, Petitioner was 67 years old. No evidence was presented as to how Petitioner's age affected his disability. However, the Arbitrator notes that Petitioner is an older individual who was working in a physically demanding occupation. Petitioner's age could favor a greater degree of disability. *See Flexible Staffing Services v. Illinois Workers' Compensation Commission*, 2016 IL App (1st) 151300WC (1st Dist. 2016) (holding that the Commission can make reasonable inferences from the medical evidence as it relates to how the claimant's age affects his disability). In this case, the Arbitrator finds that Petitioner's age increases his disability. The Arbitrator accords great weight to the fact that Petitioner's age increases his disability.

D. Future Earning Capacity

The Arbitrator finds that Petitioner's earning capacity was impacted by his work-related accident of May 10, 2010. In support of his finding, the Arbitrator relies on the testimony of Petitioner, the medical records, the medical opinions of Dr. Coe and the vocational opinions of

Mr. Grzesik. The Arbitrator notes that as a result of the injury, Petitioner worked slower and was not able to perform all of his pre-injury job duties. Mr. Grzesik noted that this would affect Petitioner's employability. Accordingly, the Arbitrator accords this factor great weight.

E. Evidence of Disability Corroborated by the Treating Medical Records

The medical records of Dr. Heller and the opinions of Dr. Coe establish that Petitioner sustained right shoulder rotator cuff tear and biceps tendon inflammation and aggravated pre-existing, asymptotic, right shoulder acromioclavicular and glenohumeral joint arthritis, which required surgical repair. The diagnosis was corroborated by the diagnostic studies, operative reports, medical records and objective evidence.

Petitioner testified that he experienced subjective complaints, including pain and stiffness in his right shoulder. Petitioner performed his job duties differently than he did prior to May 10, 2012. He performed his job duties slower and uses his left arm. On April 1, 2013, Dr. Heller set forth that Petitioner had slight limitation with range of motion. Dr. Coe documented the subjective complaints of right shoulder stiffness and crepitus with range of motion. Petitioner also experienced pain in the top and front of his right shoulder.

Petitioner also had objective deficits. Dr. Coe performed a physical examination of the right shoulder. Petitioner had tenderness over the right anterior glenohumeral joint and acromioclavicular joint. With regard to the right shoulder, Petitioner had range of motion with abduction of 150 degrees, normal being 180 and forward elevation of 160 degrees, with normal being 180. Petitioner had mild impingement signs on the right side. Petitioner also had decreased strength with forward elevation and isolated supraspinatus. The objective findings were confirmed by the medical records of Dr. Heller.

The Arbitrator accords this factor great weight. The Arbitrator finds it significant that Petitioner's subjective complaints are consistent with the objective findings. Further, the Arbitrator finds it significant that Petitioner has objective loss of range of motion and ongoing subjective complaints.

Accordingly, based on the medical evidence and considering the above factors, the Arbitrator finds that Petitioner sustained the permanent partial disability to the extent of 12% loss of use of the person as a whole since he experienced permanent partial disability to the right shoulder.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ARMANDO MARTINEZ,

18IWCC0612

Petitioner,

vs. NO: 14 WC 29515

CITY OF CHICAGO, DEPARTMENT OF TRANSPORTATION,

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 issue of the nature and extent of Petitioner's permanent disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Findings of Fact and Conclusions of Law

1. Petitioner worked as a sign painter for Respondent for 17 years before retiring on June 30, 2016. In this position, he was a member of the Painters District Council Number 14 and Local 830 union. Petitioner's job of making custom traffic signs required him to lift and carry, sometimes overhead, different sized signs weighing up to 15 pounds and vinyl rolls weighing up to 60 pounds. It further required him to use great physical force to pull transfer tape off the signs. On June 12, 2014, Petitioner sustained a left shoulder rotator cuff tear while pulling transfer tape from a sign. The only issue now before the Commission is the nature and extent of Petitioner's permanent disability.

2. Petitioner underwent an arthroscopic rotator cuff repair and tenotomy with debridement on October 6, 2014. Postoperative physical therapy and work conditioning followed. On

18IWCC0612

April 17, 2015, a functional capacity evaluation placed Petitioner's capabilities at the light to medium physical demand level and classified his position at the medium demand level based on its job description or heavy demand level based on Petitioner's self-description. On April 28, 2015, Dr. Preston Wolin placed Petitioner on light to medium duty restrictions pursuant to the functional capacity evaluation. Petitioner was subsequently placed at maximum medical improvement and released from care on October 20, 2015.

3. Petitioner returned to his same union sign painter position on May 5, 2015 and continued working pursuant to Dr. Wolin's restrictions until his retirement on June 30, 2016. When he returned to work, Respondent allowed Petitioner to work at a slower self-set pace and get assistance from coworkers. Petitioner was 63 years old at the time of the accident and spent two more years in the workforce before retiring at 65 years old. Petitioner was not directed to retire by a doctor and was eligible for his pension at the time of his retirement.

4. Thomas Grzesik, a certified rehabilitation counselor, produced a vocational report for Petitioner on February 20, 2017. Mr. Grzesik opined that Petitioner would suffer a loss of earning capacity if he was unable to continue working in his capacity for Respondent. He further opined that Petitioner would be unable to transfer his specific skills as a sign painter to meet the demands of other skilled or semi-skilled occupations. Nevertheless, Petitioner testified to earning the same wages from Respondent up until his retirement.

5. At hearing, Petitioner testified to ongoing left shoulder pain and difficulty with sleeping and completing backyard work, such as sweeping, raking leaves and shoveling. He takes over-the-counter medication a couple times a week to manage the pain. Petitioner's testimony is corroborated by Dr. Jeffrey Coe's September 20, 2016 report, which found Petitioner's accident caused permanent disability to the upper left extremity. Petitioner has not treated for his left shoulder since October 20, 2015.

6. No AMA Impairment rating was provided in consideration of Petitioner's permanent disability.

7. Upon consideration of the five enumerated criteria set forth by §8.1(b) of the Illinois Workers' Compensation Act, the Arbitrator awarded Petitioner 25% loss of use of the person as a whole. The Arbitrator placed great weight on Petitioner's physically demanding employment, permanent restrictions and advanced age. The Arbitrator further found Petitioner had suffered decreased future earning capacity and the loss of a reasonable stable labor market due to his restrictions.

Following a careful review of the record, the Commission respectfully disagrees with the Arbitrator's award of 25% MAW based on the §8.1(b) statutory factors. Although Petitioner had light to medium capabilities and his job was physically demanding, Respondent accommodated his restrictions and allowed him to work at a self-set pace. In the vocational report, Mr. Grzesik opined that Petitioner would suffer a loss of earning capacity ***if*** he was unable to continue working in this capacity for Respondent. However, Respondent continued to accommodate Petitioner at the same wages up until his retirement, at which point he became eligible for his pension. Therefore, no actual loss of earnings occurred.

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Moreover, Petitioner was never directed by a doctor to retire. Instead, he made the voluntary decision to leave the workforce where his restrictions were being accommodated. Although Mr. Grzesik opined that Petitioner would be unable to transfer his skills to meet the demands of other skilled or semi-skilled occupations, Petitioner never testified that he looked for other employment, nor did he have a need to as he was continuously accommodated by Respondent. There was additionally no testimony suggesting Petitioner sought to rejoin the workforce after his retirement.

The Commission recognizes that Petitioner suffers from ongoing pain and decreased functional abilities that have resulted in permanent restrictions. Although Petitioner has these objective impairments, the Commission nevertheless finds a decrease in the PPD award is appropriate as Petitioner was accommodated at his job, suffered no actual loss of earnings and voluntarily removed himself from the workforce after only two years. It is also noted that Petitioner requires only over-the-counter medication for pain management. As such, the Commission finds an award of 17.5% loss of use of the person as a whole is appropriate. The Commission modifies the Decision of the Arbitrator accordingly.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $721.66 per week for a period of 87.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused a 17.5% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $4,352.79 for medical expenses under §8(a) of the Act pursuant to the applicable medical fee schedule.

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

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

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

DATED: OCT 10 2018

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

DLS/met
o: 9/20/18
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION 18IWCC0612

MARTINEZ, ARMANDO
Employee/Petitioner

Case# **14WC029515**
13WC002089

CITY OF CHICAGO DEPT OF TRANSPORTATION
Employer/Respondent

On 4/2/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.89% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0010 CITY OF CHICAGO DEPT OF LAW
D TAYLOR CHITTICK
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Armando Martinez
Employee/Petitioner

v.

City of Chicago, Dept of Transportation
Employer/Respondent

Case # **14 WC 29515**

Consolidated cases: **13 WC 02089**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Frank Soto**, Arbitrator of the Commission, in the city of **Chicago**, on **2/15/2018**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On 6/12/2014, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$72,561.84** ; the average weekly wage was **$1,395.42.**

On the date of accident, Petitioner was **63** 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 **$38,542.24** for TTD, **$-0-** for TPD, **$-0-** for maintenance, and **$-0-** for other benefits, for a total credit of **$38,542.24.**

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

ORDER

- Respondent shall pay the further sum of $4,352.79 for necessary medical services as provided in Section 8(a) of the Act for payment of the medical bill of Dr. Wolin ($3,967) and ATI Physical Therapy ($385.79). The medical bill is awarded subject to payment pursuant to Section 8(a) and the Medical Fee Schedule. The payment shall be sent directly to the medical provider pursuant to the agreement of the parties. Respondent shall provide proof of payment to Petitioner's attorney's office.
- Respondent shall pay Petitioner the sum of $721.66/week for a further period of 125 weeks, as provided in Section 8(d)2 of the Act because the injuries sustained to the left arm caused a 25% loss of use of the person as a whole.
- Respondent shall pay Petitioner the compensation accrued from 6/12/2014 through 2/15/2018 and shall pay the remainder of the award, if any in weekly payments.
- See Rider attached hereto and made a part of hereof.

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

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

Signature of Arbitrator

3/23/2018
Date

Arbitrator Decision Paragraphs

APR 2 - 2018

PROCEDURAL HISTORY

Case number 14 WC 2951513 was consolidated with case number WC 02089. Both cases were tried before Arbitrator Frank J. Soto on February 15, 2018. Testimony and exhibits were submitted in connection with both claims. The Arbitrator will consider the testimony and exhibits in connection with both cases and will issue separate decisions as it relates to both cases.

FINDINGS OF FACT

Petitioner testified before the Arbitrator on February 15, 2018. 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.

Armando Martinez (hereinafter referred to as "Petitioner" testified that he is 67 years old and had been employed as a sign painter for the City of Chicago's Department of Transportation (hereinafter refer to as "Respondent") twenty years. He was a member of Painters District Counsel Number 14, Local 830, the Sign, Display and Wood Finishers Union for 37 years. Petitioner last worked for Respondent on June 30, 2016. Petitioner retired on June 30, 2016.

Petitioner testified regarding his job duties for Respondent. Petitioner mainly performed work inside. Petitioner made custom signs, including traffic signs and oversized street signs. The signs varied in size from 18 inches by 48 inches to 24 inches by 72 inches. The larger signs weighed between ten (10) and fifteen (15) pound and the smaller signs weighed between five (5) to seven (7) pounds. Petitioner also unrolled vinyl. The rolls of vinyl weighed between fifty (50) and sixty (60) pounds. Petitioner lifted and carried plates and rolls of vinyl. Petitioner lifted the vinyl from ground level to three (3) to four (4) feet. Petitioner also removed items from an overhead shelf. Petitioner prepared plates by placing vinyl over the metal plate. Petitioner cut the vinyl to fit the plate. Petitioner prepared the name of the street on a computer and cut it out. Petitioner placed the lettering and numbering on the vinyl and secured it in place with glue. The plate and sign were then placed in an applicator to apply the numbers and letters to the vinyl. Petitioner then removed the transfer tape from the sign. Petitioner testified that it is difficult to remove the transfer tape since it is very sticky. Petitioner used rulers, knives and rollers.

Prior to working for Respondent, Petitioner worked as a union sign painter for commercial contractors. Petitioner placed large pictures on walls. The pictures were over forty (40) feet high

and could be up to 100 feet. Petitioner worked on ladders and used stage scaffolding and performed overhead work. Petitioner lifted and carried over fifty (50) pounds.

Petitioner testified that Prior to June 12, 2014, he had not sustained any accidents or injuries involving his right upper extremity nor had Petitioner had received any medical treatment for his left shoulder prior to June 12, 2014.

Petitioner testified that on June 12, 2014, he was making an oversized sign. He was pulling transfer paper off the sign using his left arm. As he was pulling the transfer paper, which required the use of significant force, Petitioner lost control of his arm and it flew backwards. Immediately after his arm went backwards, Petitioner felt a sharp pain in his right shoulder. Petitioner testified he was required to use a great deal of force to remove the transfer because it is very sticky. Petitioner reported the accident to the supervisor.

After the incident, Petitioner was treated at MercyWorks. Physical therapy was recommended and X-rays were ordered. Petitioner was allowed to return to work with restrictions. Petitioner returned to MercyWorks on June 22, 2014. At that time, an MRI was ordered. (PX 10). The MRI showed a near full-thickness distal supraspinatus undersurface tendon tear, moderate AC joint degeneration and increase fluid in the biceps tendon. (PX 11).

On August 5, 2014, Petitioner was examined by Dr. Wolin who recommended surgery for the left shoulder. (PX 12). Dr. Wolin performed the surgery on October 6, 2014 at Weiss Memorial Hospital. Petitioner underwent a rotator cuff repair and debridement and the post-operative diagnosis was rotator cuff tear and biceps tendon tear. (PX 13).

Petitioner remained under the post-operative care of Dr. Wolin. (PX 12). Post-operative care included physical therapy, activity modification and follow up appointments with Dr. Wolin. (PX 12). Petitioner participated in physical therapy at ATI Physical Therapy. (PX 14).

On March 10, 2015, Dr. Wolin recommended that Petitioner undergo a FCE. (PX 12). Petitioner underwent the FCE at ATI on April 17, 2015. (PX 15). The FCE determined that Petitioner was capable of performing at the light-medium physical demand level. (PX 15).

Petitioner was examined by Dr. Wolin on April 28, 2015 who released Petitioner to return to work within the restrictions of the FCE. (PX 12). Petitioner returned to work for Respondent on May 5, 2015.

Petitioner was last examined by Dr. Wolin on October 20, 2015. Dr. Wolin noted that that Petitioner had returned to work. Dr. Wolin diagnosed a complete rupture of the rotator cuff and that Petitioner reached maximum medical improvement and could continue work. (PX 12).

Although Petitioner returned to work on May 5, 2015 as a sign painter, Petitioner testified that when was slower and he was unable to work the same way he had worked prior to his injury. Petitioner testified that he was also required assistance to perform his job duties. Specifically, an assistant helped Petitioner with lifting rolls of vinyl and plates. Petitioner testified that he experiences pain in both of his shoulders while working and pain with lifting and pulling. Petitioner testified that he had not sustained any new accidents or injuries involving either shoulder.

At the request of his attorney, Petitioner was examined by Dr. Coe on September 20, 2016 for his left shoulder condition. (PX 9, PX 17). Dr. Coe noted Petitioner's complaints of pain in the left arm with reaching above shoulder height, left shoulder weakness and stiffness. Petitioner had a decrease range of motion with abduction of 160 degrees on the left, forward elevation of 160 on the left, and with internal rotation of 30 degrees on the left. Petitioner also had impingement signs on the left. (PX 17).

Dr. Coe opined that as a result of the work-related accident of June 12, 2014, Petitioner sustained internal derangement of the left shoulder with a rotator cuff tear, subacromial impingement and bicipital tendinitis. Dr. Coe further opined that Petitioner's current condition of ill-being of the left shoulder was causally connected to the work-related accident of June 12, 2014. (PX 17).

Petitioner testified that he has difficulty sleeping. He experiences pain when he sleeps directly on his right or left shoulder. Petitioner also has difficulty working the backyards, sweeping, raking leaves or shoveling snow. Petitioner experiences difficulty with both shoulders and he takes over the counter medication a couple of times per week.

At the request of Petitioner's attorney, Petitioner was interviewed by Thomas Grzesik, a vocational rehabilitation counselor. Mr. Grzesik interviewed Petitioner on January 9, 2017. Mr. Grzesik opined that when Petitioner returned to work for Respondent in April 2015 and Respondent accommodated Petitioner's limitations. Petitioner was allowed to work at a slower pace and he was also provided assistance moving and lifting materials. Mr. Grzesik opined that the manner which Petitioner performed his job duties, when he returned to work, did not exist in a

reasonably stable labor market. Mr. Grzesik further opined that Petitioner experienced a loss of occupation. Mr. Grzesik set forth that based on Petitioner's vocational profile Petitioner sustained a loss of earning capacity and that Petitioner was unable to perform his full duties of his pre-injury occupation. Mr. Grzesik opined that Petitioner could earn between $8.75 and $11.02 per hour in alternative employment. (PX 16).

The medical bills from Dr. Wolin and ATI were admitted into evidence. Dr. Wolin's bills show an outstanding balance $3,967. (PX 18). The ATI bills show an outstanding balance of $358.79. (PX 18). A history of payments made by Respondent was admitted into evidence. (RX 1).

The Arbitrator finds the Petitioner's testimony to be credible.

CONCLUSIONS OF LAW

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

To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment. *Baggett v. Industrial Comm'n*, 201 Ill.2d. 187, 266 Ill. Dec. 836, 775 N.E.2d 908 (2002). The "arising out of" component is primarily concerned with causal connection. To satisfy this requirement it must be shown that the injury had its origin in some risk connected with or incidental to the employment to create a causal connection between the employment and the accidental injury. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d, 52, 133 Ill. Dec. 454, 541 N.E.2d 665 (1989). Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Rock Road Construction Co. v. Industrial Comm'n*, 37 Ill.2d. 123, 227 N.E.2d 65 (1967).

In support of the Arbitrator's decision relating to "F," whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator makes the following conclusions:

injury will not be denied as long as it can be shown that the employment was also a causative factor." *Id.* The accident "need not be the sole causative factor, nor even the primary causative factor, as long as it was *a* causative factor in the resulting condition of ill-being." *Id.* (emphasis in original).

The Arbitrator concludes that Petitioner's current left shoulder condition of ill-being including the internal derangement of the left shoulder with a rotator cuff tear, subacromial impingement and bicipital tendinitis, was causally connected to the work-related accident of June 12, 2014 as set forth more fully below.

The Arbitrator finds the opinions of Dr. Coe to be persuasive. The Arbitrator notes that Respondent did not submit any evidence disputing that Petitioner's current condition of ill-being was causally related to his work accident of June 12, 2012. Dr. Coe opined that as a result of the work-related accident of June 12, 2014, Petitioner sustained internal derangement of the left shoulder with a rotator cuff tear, subacromial impingement and bicipital tendinitis. Dr. Coe further opined that the current condition of ill-being of the left shoulder was causally connected to the work-related accident of June 12, 2014.

The Arbitrator further concludes that Petitioner has also established that the current condition of ill-being as it relates to his left shoulder was causally connected to the work-related accident of June 12, 2014 through the "chain of events" analysis. Proof of prior good health and change immediately following and continuing after an injury may establish that the impaired condition was due to injury. *Ill. Power Co. v. Indus. Comm'n*, 176 Ill.App.3d 317, 530 N.E.2d 617 (4th Dist. 1988).

In the instant case, Petitioner testified that prior June 12, 2014, he had not sustained any accidents or injuries involving his left shoulder. However, immediately following the work-related accident, Petitioner underwent medical treatment including surgery, physical therapy and office visits. Since June 12, 2014, Petitioner has not sustained any new accidents or injuries involving his left shoulder. Accordingly, the Arbitrator finds that the current condition of current condition of ill-being as it related to his left shoulder was causally connected to the work-related accident of June 12, 2014 through the "chain of events" analysis.

In support of the Arbitrator's decision relating to "J," whether the medical services were reasonable and necessary and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator makes the following conclusions:

The Arbitrator concludes that the medical services provided to Petitioner by Dr. Wolin and ATI Physical Therapy were reasonable and necessary and that Respondent is liable for payment of the medical bill from Dr. Wolin in the amount of $3,950 and the medical bill from ATI in the

amount of $358.79. The total amount of the bills outstanding was $4,308.79. The Arbitrator relies on the medical records of Dr. Wolin, the physical therapy and the medical opinions of Dr. Coe in support of the decision. Respondent did not submit any evidence disputing the reasonableness or necessity of the medical bill.

The Arbitrator finds that the medical bills are subject to adjustments consistent with the provisions of the Medical Fee Schedule. 820 ILCS 305/8.2. The Arbitrator orders Respondent to calculate the exact amount of benefits owed to the medical provider pursuant to Section 8.2. Any further disputes relating to the adjustment of the bill may be addressed at further proceedings, consistent with this decision. Pursuant to the agreement of the parties, Respondent shall pay the medical bill directly to the provider.

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

The Arbitrator concludes that as a result of the work-related accident of June 12, 2014 Petitioner sustained permanent partial disability to the extent of 25% loss of use of the person of whole pursuant to Section 8(d)2 since Petitioner sustained a serious injury to his left shoulder resulting in permanent work restrictions. In support of the finding, the Arbitrator relies on Petitioner's credible and unrebutted testimony, the medical records and operative report and the medical opinions of Dr. Coe.

The Arbitrator's finding is consistent with the factors and criteria set forth in Section 8.1(b) of the Act. Pursuant to Section 8.1(b) of the Act, the Arbitrator must consider certain factors and criteria in assessing permanent partial disability, including, the level of impairment under the AMA Guides, the occupation of the injured worker, the age of the injured worker, the future earning capacity of the injured worker and evidence of disability corroborated by the treating medical records. The Act provides that no single enumerated factor shall be the sole determinant of disability. After considering the factors, the Arbitrator finds that Petitioner is permanently partially disabled to the extent of 25% loss of use of the person as a whole due to the injury he sustained to his left shoulder. With respect to the factors, the Arbitrator finds the following:

A. Level of Impairment under the AMA Guides

No impairment rating report was submitted into evidence. In *Corn Belt Energy v. Illinois Workers' Compensation Commission*, 2016 IL App (3d) 150311WC (3d Dist. 2016), the court

held that an AMA Impairment Rating is not required for the Arbitrator to award permanent partial disability benefits. Accordingly, the Arbitrator will not consider this factor as it relates to the nature and extent of the injury.

B. Occupation of Petitioner

At the time of the work-related accident, Petitioner was employed as a union sign painter. Petitioner's job duties included lifting and carrying up to sixty (60) pounds, climbing, pulling and pushing and performing physical activities. Accordingly, the Arbitrator finds that Petitioner's job duties were physically demanding. The Arbitrator's finding is supported by the reports of Mr. Grzesik, Petitioner's vocational rehabilitation counselor.

Petitioner underwent a FCE on April 17, 2015. The FCE was valid. Petitioner was capable of performing at the light-medium physical demand level. Dr. Wolin released Petitioner to return to work within the restrictions of the FCE.

Petitioner returned to work for Respondent as a sign painter. However, he was provided an assistant for heavy lifting and performed his work slower than he did prior to the work-related accident of June 12, 2014. Mr. Grzesik opined that the manner in which Petitioner performed his job duties when he returned to work for Respondent did not exist in a reasonably stable labor market. Accordingly, Mr. Grzesik opined that Petitioner experienced a loss of occupation.

The Arbitrator accords great weight to the heavy physical demand of Petitioner's pre-injury employment. The Arbitrator also finds it significant that due to the work-related accident, Petitioner has permanent restrictions which prevent him from returning to his pre-injury employment without accommodation.

C. Age of Petitioner

At the time of the accident, Petitioner was 63. At the time of the hearing, Petitioner was 67 years old. No evidence was presented as to how Petitioner's age affected his disability. However, the Arbitrator notes that Petitioner is an older individual who was working in a physically demanding occupation. Petitioner's age could favor a greater degree of disability. *See Flexible Staffing Services v. Illinois Workers' Compensation Commission*, 2016 IL App (1st) 151300WC (1st Dist. 2016) (holding that the Commission can make reasonable inferences from the medical evidence as it relates to how the claimant's age affects his disability). In this case, the Arbitrator finds that Petitioner's age increases his disability. The Arbitrator accords great weight to the fact that Petitioner's age increases his disability.

D. Future Earning Capacity

The Arbitrator finds that Petitioner's earning capacity was impacted by his work-related accident of May 10, 2010. In support of his finding, the Arbitrator relies on the testimony of Petitioner, the medical records, the medical opinions of Dr. Coe and the vocational opinions of Mr. Grzesik. The Arbitrator notes that as a result of the injury, Petitioner worked slower and was not able to perform all of his pre-injury job duties. Mr. Grzesik noted that this would affect Petitioner's employability.

Specifically, Mr. Grzesik stated that the manner in which Petitioner performed his job duties when he returned to work for Respondent did not exist in a reasonably stable labor market. Accordingly, Mr. Grzesik opined that Petitioner experienced a loss of occupation. Mr. Grzesik set forth that based on Petitioner's vocational profile Petitioner sustained a loss of earning capacity. Mr. Grzesik set forth that Petitioner could earn between $8.75 and $11.02 per hour in alternative employment if Petitioner was not provided accommodated work by Respondent.

Based on the opinions of Mr. Grzesik and the FCE, the Arbitrator accords this factor great weight. The Arbitrator finds that Petitioner's future earning capacity has decreased and without the accommodated position provided by Respondent there was not a reasonable stable labor market for Petitioner due to his restrictions.

E. Evidence of Disability Corroborated by the Treating Medical Records

The medical records of Dr. Wolin and the opinions of Dr. Coe establish that Petitioner sustained internal derangement of the left shoulder with a rotator cuff tear, subacromial impingement and bicipital tendinitis, which required surgical repair. The diagnosis was corroborated by the diagnostic studies, operative report, medical records and objective evidence.

Petitioner testified that he experienced subjective complaints, including pain and stiffness in his left shoulder. Petitioner performed his job duties differently than he did prior to June 12, 2014. He performed his job duties slower and was provided an assistant for heavy lifting. Dr. Coe documented the subjective complaints of Petitioner. He set forth that Petitioner experienced pain in his left arm with reaching above shoulder height. Petitioner complained of left shoulder weakness and stiffness. The subjective complaints were consistent with the medical records of Dr. Wolin.

Petitioner also experienced objective deficits with regard to his left shoulder condition. Dr. Coe performed a physical examination of Petitioner's left shoulder. With regard to the range of

motion, with abduction, Petitioner has 160 degrees on the left, normal being 180; forward elevation of 160 on the left, normal being 180; and with internal rotation, 30 degrees on the left, with normal being 35. Petitioner had impingement signs on the left.

Further, Petitioner underwent an FCE. The FCE was valid. Petitioner was capable of performing at the light-medium physical demand level. Dr. Wolin released Petitioner to return to work within the restrictions of the FCE. The Arbitrator finds it significant that Petitioner had objective and permanent work restrictions as a result of the work-related accident of June 12, 2014.

The Arbitrator accords this factor great weight. The Arbitrator finds it significant that Petitioner's subjective complaints are consistent with the objective findings. Further, the Arbitrator finds it significant that Petitioner has objective loss of range of motion, ongoing subjective complaints and permanent work restrictions.

Accordingly, based on the medical evidence and considering the above factors, the Arbitrator finds that Petitioner sustained the permanent partial disability to the extent of 25% loss of use of the person as a whole since he experienced permanent partial disability to the left shoulder, including permanent work restrictions.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jose M. Villalobos,
Petitioner

NO: 12 WC 29307

Femco, Incorporated,
Respondent.

18IWCC0613

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 March 7, 2018, is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $33,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 18 2018
o092018
DLG/mw
045

David L. Gore

Stephen Mathis

DISSENT

I respectfully dissent from the Decision of the majority. Petitioner sustained an injury to his right foot on January 24, 2012 when he fell 12 feet from a ladder while fixing a second-floor

18IWCC0613

window. Petitioner subsequently underwent four separate operations to his right foot and returned to regular full duty work after each operation. The first surgery was an open reduction internal fixation on January 28, 2012. He returned to full duty work on May 15, 2012 and continued working until his hardware removal surgery on July 24, 2012. After his second surgery, Petitioner returned to full duty work on August 20, 2012 and continued working until his December 10, 2013 fusion surgery. Petitioner again returned to full duty work on February 24, 2014 and continued working until his final surgery to remove a screw from his right foot on May 26, 2015. Petitioner then returned to full duty work on June 1, 2015 and was still working full duty for Respondent at the time of hearing. Petitioner was placed at maximum medical improvement and released from Dr. Theodore Suchy's care with no restrictions on July 26, 2016.

At the time of hearing, Petitioner was employed by Respondent as a service technician, a position that requires him to complete plumbing, electrical, carpentry and painting work. Petitioner testified he spends 90% of his workday on his feet and presently earns more than he did at the time of his accident. Petitioner further testified to experiencing ongoing right foot pain and a burning sensation when the weather changes and when he walks longer than 15 to 20 minutes. Petitioner takes over-the-counter medication, specifically Tylenol or Advil, two times a month to manage his ongoing pain.

After considering the Section 8.1(b) statutory factors, I accord great weight to Petitioner's ability to return to full duty work after each surgery. Petitioner continues to work without restrictions in a job that requires him to be predominantly on his feet and has experienced an increase in earnings since his accident. As such, the accident has not affected Petitioner's ability to work nor his earning capacity. Additionally, Petitioner has not sought medical treatment for his right foot for almost a year at the time of hearing and requires only over-the-counter medication twice a month to manage pain. In analyzing these factors, as well as the record in its entirety, I would have found Petitioner established permanent partial disability of 30% loss of use of the right foot and modified the award accordingly. For the reasons stated above, I respectfully dissent from the Decision of the majority.

DLS/met
46

Deborah L. Simpson

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

VILLALOBOS, JOSE M
Employee/Petitioner

Case# **12WC029307**

FEMCO INC
Employer/Respondent

18IWCC0613

On 3/7/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.83% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2333 WOODRUFF JOHNSON & EVANS
RUSSELL HAUGEN
4234 MERIDIAN PKWY SUITE 134
AURORA, IL 60504

2837 LAW OFFICES JOSEPH MARCINIAK
NICOLE McNAIR
200 W MADISON ST SUITE 501
CHICAGO, IL 60606

STATE OF ILLINOIS)

)SS.

COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

Jose M. Villalobos
Employee/Petitioner
v.

Case # **12 WC 29307**

Consolidated cases: _____

Femco, Inc.
Employer/Respondent

18IWCC0613

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matted, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **May 31, 2017**. By stipulation, the parties agree:

On the date of accident **January 24, 2012**, 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 **$43,396.08**, and the average weekly wage was **$834.54**.

At the time of injury, Petitioner was **40** years of age, ***single*** with **2** dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

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

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner the sum of **$500.72**/week for a further period of **66.8** weeks, as provided in §8(e)(11) of the Act, because the injuries sustained caused loss of use of **40% of the right foot**.

Respondent shall pay Petitioner compensation that has accrued from **January 24, 2012** through **May 31, 2017**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

March 6, 2018
Date

MAR 7 - 2018

18IWCC0613

INTRODUCTION

This matter proceeded to hearing before Arbitrator Steven Fruth. The only issue in dispute was the nature and extent of Petitioner's injury.

FINDINGS OF FACT

Petitioner sustained an undisputed work accident while employed for Respondent on January 24, 2012. At the time of the accident, Petitioner was on a ladder fixing a second-floor window. Petitioner lost his balance and fell approximately 12 feet to the ground. He testified that he landed with most of his weight on his right foot. He had immediate pain in his right foot after the fall.

Petitioner was evaluated by Dr. William Weaver at Occupational Health Centers of Illinois on January 24, 2012 (PX #1). At that time, Petitioner reported that he lost his balance and fell off a ladder injuring his right foot earlier in the day. Petitioner complained of significant pain and swelling in his right foot. An x-ray of his right foot revealed a fracture of the first cuneiform and a dislocation at the tarsal/MT joints (first through fourth, possibly fifth). Petitioner was placed on modified duty and was referred to Dr. Suchy.

Petitioner was evaluated by orthopedic surgeon Dr. Theodore Suchy at Advanced Medical Specialists on January 24, 2012 (PX #2). Petitioner gave a history of a recent fall off a ladder in which he injured his right foot. Dr. Suchy reviewed the x-ray which revealed a fracture/subluxation of the Lisfranc joint of the right foot. Dr. Suchy's impression was an acute fracture/subluxation of the Lisfranc joint in the right foot. Dr. Suchy recommended a closed reduction, possibly open reduction, and fixation of the midfoot Lisfranc joint. On January 28, 2012, Dr. Suchy performed an open reduction and internal fixation of the right Lisfranc joint fracture/dislocation and a fasciectomy of the right foot was also performed (PX #6).

Petitioner was seen by Dr. Suchy for post-operative evaluations on January 31, February 14, and March 6, 2012. Petitioner was improving during those visits. Dr. Suchy instructed Petitioner to begin a course of physical therapy and kept Petitioner off work (PX 2).

Petitioner underwent a course of physical therapy at Advanced Medical Specialists from March 14, 2012 through May 15, 2012 (PX #2). Petitioner completed 19

sessions of physical therapy. At the time of his discharge, Petitioner was complaining that the screws in his right foot were hurting him.

Petitioner was re-evaluated by Dr. Suchy June 26, 2012 (PX #2). Petitioner complained of irritation secondary to screw heads and also reported swelling of his foot after a long day at work. On examination, the screw heads were palpable in the fifth metatarsal area of Petitioner's right foot. Dr. Suchy diagnosed symptomatic hardware in Petitioner's right foot. Dr. Suchy recommended removal of the fixation screws.

On July 24, 2012, Dr. Suchy performed a removal of deep hardware of the four screws in Petitioner's right foot (PX #6). Pre-operative and post-operative diagnoses were symptomatic hardware in the right foot status-post Lisfranc fracture/dislocation. Petitioner was instructed to remain off work and to follow-up in one week for evaluation.

Petitioner returned to Dr. Suchy on July 31, 2012 (PX #2). Petitioner reported minimal pain and discomfort. Dr. Suchy removed the stitches and kept Petitioner off work. Petitioner was instructed to follow-up in two weeks. On August 14, 2012, Petitioner returned to Dr. Suchy, complaining of ongoing swelling. On examination, there was swelling over the midfoot. Dr. Suchy advised Petitioner he could return to regular work the following Monday. Petitioner was instructed to follow-up in 4-6 weeks after returning to regular work.

On September 11, 2012, Petitioner was re-evaluated by Dr. Suchy (PX #2). Petitioner continued to complain of pain and discomfort in his midfoot. He reported that when standing for long periods of time he has swelling but that he has been able to do his regular work. Dr. Suchy referred Petitioner to podiatry for an orthotic fitting and instructed Petitioner to return in one month after getting the orthotics.

On October 4, 2012, Petitioner was evaluated by Dr. Scott Newcomb, DPM, on referral of Dr. Suchy (PX #5). Petitioner gave a history of the January 24, 2012 work injury and ongoing pain in the right foot when standing or walking for any significant period of time. Dr. Newcomb's assessment was status-post ORIF of navicular fracture in the right foot with mild-to-moderate degenerative changes in the right mid tarsus and mild neuritis with post-operative scarring. Dr. Newcomb agreed with Dr. Suchy's recommendation for custom orthotics. Dr. Newcomb thought it would be reasonable and necessary to get custom orthotics for both feet in order to maintain appropriate height and balance of the foot structure. Dr. Newcomb also recommended a topical cream for Petitioner's pain and inflammation.

Petitioner returned to Dr. Newcomb office on January 3, 2013 (PX #5). He was fitted new molded orthotic devices. Petitioner was instructed to use the orthotics in all shoes while weightbearing. Petitioner returned to Dr. Newcomb's office on February 7, 2013. Petitioner reported use of the custom orthotics and felt some improvement with his overall pain level. Petitioner further reported that he feels more supported and well balanced but that he still gets pain towards the end of the day with increased activities. Dr. Newcomb opined that Petitioner will need new orthotics on an annual basis depending on wear, tear, and usage of the device. Petitioner was instructed to continue to follow-up with Dr. Suchy.

Petitioner returned to Dr. Suchy February 5, 2013 (PX #4). Petitioner reported that his orthotics had helped but that he still has persistent pain especially with cold weather. Examination of the right foot revealed slight swelling in the midfoot with good range of motion of the toes and ankle. Dr. Suchy's impression was status-post open reduction and internal fixation of Lisfranc fracture and dislocation. Dr. Suchy informed Petitioner that he will have ongoing pain and discomfort in the cold weather season and that there is a possibility of developing midfoot arthritis, which is very common after this type of injury. Dr. Suchy released Petitioner at MMI but indicated that Petitioner could return for consideration of a fusion if his symptoms persisted.

On June 18, 2013, Petitioner was re-evaluated by Dr. Suchy (PX #4). Petitioner reported that his right foot bothered him when he puts a lot of weight on it. On examination, Petitioner had slight swelling about the midfoot and pain to palpation over the midfoot. X-rays revealed post-traumatic degenerative changes in midfoot at the Lisfranc joint. Dr. Suchy opined that this is a natural progression of an intra-articular fracture of this sort. Dr. Suchy indicated that Petitioner had developed post-traumatic arthritis which is painful when he walks. Dr. Suchy indicated that Petitioner may require a midfoot fusion if the symptoms persist. Petitioner returned to Dr. Suchy on July 23, 2013. Petitioner reported ongoing pain and discomfort which was causing him to limp. Dr. Suchy believed that Petitioner was a candidate for fusion of the 1st and 2nd tarsometatarsal joints. Dr. Suchy recommended Petitioner to obtain a second opinion with Dr. Bryniczka. Petitioner was instructed to return after his evaluation with Dr. Bryniczka.

On August 28, 2013, Petitioner was evaluated by Dr. Gregory Bryniczka, DPM, on referral of Dr. Suchy (PX #4). Petitioner gave a history of his January 2012 right foot work injury. On examination, Petitioner had paresthesia in the first interspace consistent with a positive peroneal injury and/or entrapment to the deep peroneal nerve. Petitioner also had sciatic type pain along the posterior aspect of the right lower leg and general achiness in the upper thigh. Dr. Bryniczka's diagnosis was post Lisfranc dislocation of the right foot with degenerative joint changes and possible deep peroneal

entrapment causing secondary sciatica. Dr. Bryniczka agreed with Dr. Suchy's assessment regarding the fusion. Dr. Bryniczka further opined that Petitioner's paresthesia of the deep peroneal nerve and sciatica would hopefully improve from the fusion.

On December 10, 2013, Petitioner proceeded with the third surgery on his right foot with Dr. Suchy (PX #3 & PX #6). At that time, Dr. Suchy performed a neurolysis of dorsocutaneous nerve; arthrodesis of 1st cuneiform and 1st metatarsal phalangeal joint; arthrodesis of 2nd cuneiform and 2nd metatarsal; and arthrodesis of 1st and 2nd cuneiforms. Post-operative x-rays were performed which showed appropriate positioning of the hardware and fusion in Petitioner's right foot.

Petitioner returned to Dr. Suchy for post-operative evaluations on December 17, 2013, January 7, 2014, January 28, 2014, and February 18, 2014 (PX #3). During these visits, Petitioner was reporting improvement with minimal pain and discomfort. Dr. Suchy advised Petitioner that he could return to full-duty work as of February 24, 2014.

On June 3, 2014, Petitioner was re-evaluated by Dr. Suchy (PX #4). Petitioner reported that he was able to do his activities without significant restrictions but that his foot was bothersome on occasion. Dr. Suchy noted that Petitioner was at MMI and would re-evaluate Petitioner in the future if needed. Dr. Suchy referred Petitioner back to Dr. Newcomb to assist in getting a new orthotic.

Petitioner saw Dr. Newcomb again June 10, 2014 (PX #6). Petitioner reported that his old orthotics were wearing out and were in poor condition. He further reported that his foot had progressively become more painful since the orthotics were wearing down. On examination, significant arthritic bone formation with moderate pain of the midfoot area was noted. Dr. Newcomb's assessment was post-traumatic arthritis of the right midfoot. Dr. Newcomb opined that Petitioner should continue using custom orthotics to support the injured right foot. Dr. Newcomb further opined that Petitioner required both a right and left foot custom orthotic to maintain proper height and balance. Dr. Newcomb also noted that Petitioner would need a pair of functional custom orthotics on an annual basis as long as necessary.

Petitioner returned to Dr. Newcomb on September 23, 2014 (PX 7). On examination of Petitioner's right foot, it was noted that Petitioner had mild sensory deficit at the area of the surgical site and that it was notably thickened due to scar tissue and hypertrophic bony growth. Dr. Newcomb again recommended Petitioner to continue use of the custom functional orthotics. Dr. Newcomb further opined that Petitioner will require replacement of orthotics on an annual basis indefinitely.

On April 22, 2015, Petitioner returned to Dr. Suchy. Petitioner reported that one of the screws in his foot was backing out and causing irritation. On examination and review of radiographs, Dr. Suchy recommended removal of the surgical hardware (PX #8). Dr. Suchy performed a removal of deep hardware screw in Petitioner's right foot on May 26, 2015 (PX #9). Petitioner returned to Dr. Suchy June 2, 2015. Petitioner was released back to regular work and instructed to return as-needed.

Petitioner was re-evaluated by Dr. Suchy July 26, 2016 (PX #8). Petitioner reported that he has been doing a lot of walking which does not cause him much pain, but that the changes in weather cause him pain and discomfort. On examination, Petitioner had some slight midfoot swelling with no pain or tenderness to palpation. Dr. Suchy opined that Petitioner had reached MMI and that he could continue doing his regular activities without restrictions. Dr. Suchy further opined that Petitioner will always have some pain and discomfort that is associated with post-traumatic arthritis in the midfoot and weather changes.

Petitioner testified that he experiences a burning sensation in his right foot with weather changes and when he is on his feet for more than 20 minutes. Petitioner also has numbness in his foot at the end of a long work day. Petitioner has difficulty playing and helping his kids in sports due to his right foot pain. He is no longer able to dance with his wife more than 10 minutes due to pain in his right foot. Petitioner also has pain in his foot when walking over uneven surfaces. Petitioner treats his pain with soaks at the end of a long day. He also uses over-the-counter pain medications approximately two times per month.

CONCLUSIONS OF LAW

The Arbitrator assessed Petitioner's permanent partial disability in accord with §8.1b(b) of the Act:

(i) No AMA impairment rating was admitted in evidence. Therefore, the Arbitrator could not give any weight to this factor.

(ii) Petitioner is employed as a service technician. He performs a wide variety of jobs including plumbing, carpentry, painting, etc. Petitioner testified that he is on his feet 90% of the work day. The Arbitrator gives great weight to this factor.

(iii) Petitioner was age 40 at the time of his work-related injury. Petitioner had a statistical life expectancy of 41 years. The Arbitrator further notes that Petitioner had a statistical work-life expectancy of 17 years. Petitioner's ongoing complaints and limitations are likely to trouble him for the

remainder of his life and, further, adversely affect his employment. The Arbitrator gives great weight to this factor.

(iv) Petitioner returned to the job he worked at the time of the accident. His earnings are the same, if not more, as his earnings at the time of the injury. In light of the lack of evidence that Petitioner's earning capacity has been affected by his injury, the Arbitrator gives no weight to this factor.

(v) Petitioner sustained fractures to right foot which required open reduction surgery with internal fixation. Due to continuing complaints and limitations Petitioner required additional surgical interventions, including fusing bones in the foot and removal of painful hardware. Petitioner has developed post-traumatic arthritis due to his injury, which particularly causes pain with activity and changes in weather. He has continuing complaints and limitations, which affect his daily activities such as walking, as well as playing with his children and dancing with his wife. He must use an orthotic for stability of the foot. The Arbitrator gives great weight to this factor.

Accordingly, in consideration of all the evidence, including the five factors above, the Arbitrator finds that Petitioner suffered 40% loss of use of the right foot, 66.8 weeks, as provided in §8(e) of the Act.

Steven J. Fruth, Arbitrator

March 6, 2018
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CALVIN GOOCH,

Petitioner,

vs.

NO: 11 WC 42689

CHICAGO PUBLIC SCHOOLS,

Respondent.

18IWCC0614

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability (TTD), the nature and extent of Petitioner's injuries, and Petitioner's Petition for penalties and attorney's fees, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

So that the record is clear, and there is no mistake as to the intentions or actions of the Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. The Commission has considered all the testimony, exhibits, pleadings, and arguments submitted by the parties. Our Supreme Court has long held that it is the Commission's province "to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *City of Springfield v. Indus. Comm'n*, 291 Ill. App. 3d 734, 740 (4th Dist. 1997) (citing *Kirkwood v. Indus. Comm'n*, 84 Ill. 2d 14, 20 (1981)).

The Commission writes to address two issues that occurred post-arbitration of this claim. Following the September 12, 2017 arbitration, Petitioner's attorney filed a penalty petition on January 10, 2018 concerning the termination of Petitioner's maintenance benefits. On February 2, 2018, Commissioner Michael J. Brennan continued Petitioner's petition to the disposition of this claim. In consideration of the parties' arguments and the evidence in the record, the Commission

finds that a legitimate dispute existed as to the nature and extent of Petitioner's disability in this claim, and hereby denies Petitioner's petition for penalties and attorney's fees.

The Commission additionally notes that by its Statement of Exceptions on Review and on Oral Argument, Respondent cited to Federal Rule of Evidence 609(b)(1) in support of admissibility of certain evidence related to Petitioner's prior felony conviction. That conviction occurred more than a decade prior to the arbitration of this matter. Pursuant to Illinois Rule of Evidence 609(b), evidence of a conviction is not admissible if a period of more than 10 years has elapsed since the date of conviction or of the release of the witness from confinement, whichever is the later date. Ill. R. Evid. 609. Here, both conditions would be met.

Most importantly, except when the Act provides otherwise, the Illinois Rules of Evidence, and not the Federal Rules of Evidence, govern proceedings before the Commission or an arbitrator. 50 Ill. Adm. Code 9030.70; *see also Nat'l Wrecking Co. v. Indus. Comm'n*, 352 Ill. App. 3d 561, 566 (1st Dist. 2004). Additionally, it appears that Respondent was attempting to argue that the Petitioner was precluded from employment in his chosen profession, as an educator, due to his felony conviction. However, Respondent offered no evidence or legal citation, that would lead the Commission to such a conclusion.

With that said, the Commission does not feel compelled to award penalties against Respondent, as there is sufficient basis in the record to justify certain of the disputes, the least of which is whether Petitioner is permanently and totally disabled. Ultimately, the Commission is of the belief that the Arbitrator correctly decided the issues in this matter.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed on December 5, 2017, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner permanent and total disability benefits of $1,261.41/week for life, commencing 9/12/17, as provided in Section 8(f) of the Act.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that the Petitioner's Petition for Penalties pursuant to Section 19(k) and Section 16, as was filed on January 10, 2018 is hereby denied.

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.

18IWCC0614

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

DATED: OCT 19 2018

MJB/pm
O: 09-25-18
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GOOCH, CALVIN
Employee/Petitioner

Case# **11WC042689**

CHICAGO PUBLIC SCHOOLS
Employer/Respondent

18IWCC0614

On 12/5/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.45% 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:

2356 FOHRMAN, DONALD W & ASSOCS
ADAM J SCHOLL
101 W GRAND AVE SUITE 500
CHICAGO, IL 60654

1886 LEAHY EISENBERG & FRAENKEL
SANDY ECHEVESTE
33 W MONROE ST SUITE 1000
CHICAGO, IL 60603

C. Gooch v. CPS, 11 WC 042689

18IWCC0614

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Calvin Gooch
Employee/Petitioner
v
Chicago Public Schools
Employer/Respondent

Case # 11 WC 042689

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **9/12/17**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

18IWCC0614

FINDINGS

On **10/27/11**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $102,116.04; the average weekly wage was $1,963.77.

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 of **$348,802.96** for TTD and maintenance **$0** for TPD, and **$0** for other benefits, for a total credit of **$348,802.96**.

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

ORDER

Permanent Total Disability
Respondent shall pay Petitioner **permanent and total disability benefits of $1,261.41/week for life, commencing 9/12/17, as provided in Section 8(f) of the Act.**

Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund*, as provided in Section 8(g) of the Act.**

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

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

Signature of Arbitrator

December 5, 2017
Date

ICArbDec p. 2

DEC 5 - 2017

PROCEDURAL BACKGROUND

This matter was previously tried on February 19, 2014, pursuant to Section 19(b) of the Act. Respondent stipulated that Petitioner sustained accidental injuries which arose out of and in the course of his employment by Respondent on October 27, 2011. The issues in dispute were: causal connection, temporary total disability and prospective vocational rehabilitation. A Decision was entered by Arbitrator Deborah Simpson on April 11, 2014, in which she found that Petitioner's condition of ill-being at the time of trial was causally related to the claimed work injury, he was entitled to temporary total disability benefits from October 28, 2011 through December 22, 2011 and from January 9, 2012 to February 19, 2014, and vocational rehabilitation and maintenance benefits pursuant to Section 8(a) of the Act. Arbitrator Simpson found that the work injury aggravated and worsened Petitioner's preexisting degenerative left knee osteoarthritis condition. As a result of Petitioner's OA condition, he can no longer perform the extensive walking and stair climbing required of his job as assistant principal. The Decision further provided that Respondent would not accommodate Petitioner's work restrictions. Petitioner was unable to secure employment. His efforts to find a job failed. Petitioner would benefit from vocational rehabilitation. Accordingly, Respondent was ordered to provide necessary vocational services and to pay ongoing maintenance. (PX2)

Respondent filed a Petition for Review and dismissed the review on January 21, 2015.

The issues in dispute at the September 12, 2017 hearing were: did Petitioner sustain accidental injuries which arose out of and in the course of his employment by Respondent on October 27, 2011?; causal connection; Respondent claimed a §8(j) credit of $7,319.46 for medical bills paid, Petitioner claimed that all bills were paid; TTD, with Petitioner claiming that he was paid up to date ($348,802.96, 276-4/7 weeks) and Respondent claiming that TTD was only owed to December 18, 2011 (alleging an overpayment of 268-4/7 weeks) and the nature and extent of the injuries, with Petitioner claiming to be entitled to a PTD award, pursuant to §8(f) of the Act.

FINDINGS OF FACT

Petitioner testified that his current age is 65. He has a Doctorate in Education, an Education Specialist Degree and a Superintendent Endorsement. He also has a Masters in Education and a Bachelor of Arts in Psychology. (PX1) His recent work history consists of working as an assistant principal, principal, and teacher.

He also worked 10-12 year at AT&T as a production supervisor, plant manager and did human resources work. Petitioner was convicted of felony theft involving his employment at AT&T.

After the Decision of Arbitrator Simpson, in which he was awarded vocational rehabilitation services and maintenance, Respondent arranged a meeting with Patrick Conway of Sedgwick on May 16, 2014. At that meeting, Petitioner discussed with Mr. Conway his education, past work experience and his career interests. Petitioner stated that Mr. Conway did not provide any job seeking advice, job leads or assistance with his resume at the meeting. A vocational report was prepared by Mr. Conway dated May 21, 2014. The report contained an overview of Petitioner's socioeconomic status, vocational history, educational background, his physical capabilities, and an overall summary. Mr. Conway's conclusions were that there were numerous potentially transferable sedentary to light occupations. (PX3)

After that meeting, Petitioner never received any further communications from Mr. Conway or any type of vocational services from Respondent. Petitioner testified that he engaged his own self-directed job search and had begun those efforts in May of 2013, prior to the first hearing. Petitioner testified that he primarily sought jobs online using various search engines that included the unemployment office, the Veteran's Administration, ZipRecruiter, Indeed, Monster, Facebook, LinkedIn, and Career Builders. Petitioner described that he entered the type of job he was interested and his educational background and submitted that information to a website. He would then receive a list of jobs and go through them and apply to the jobs identified.

Petitioner stated that the jobs that he sought were jobs in education, industry, business, Federal jobs, City jobs, university positions, plant manager jobs, production jobs and so forth. He submitted over 122 applications to Respondent for posted positions and did not receive one positive response. He applied for principal, assistant principal, coordinator, director and teacher positions.

In the submission of his applications or resumes, petitioner was able to obtain in most cases some sort of documentation to prove his efforts. Petitioner identified emails, responses and printouts obtained from the search engines that evidenced his job search activities. (PX4) Petitioner stated that the exhibit did not reflect the time he expended on the computer searching for jobs, phone calls or follow-up communications. Petitioner estimated that he applied for over 500 positions between May of 2013 and September of 2017. From the numerous applications submitted, he received only two telephone interviews that did not result in any job offer.

Petitioner testified that in 2012, he provided cash and credit to a trucking company named Adotie. His son and brother-in-law operated the company. Petitioner was listed as the owner but he denied taking part in any of the operations of the building. Petitioner stated that he never received any wages and never derived any income from his investment. Petitioners lost money from his investment and had to file bankruptcy in 2013.

On Cross Examination, Petitioner confirmed that he worked 5 years for Respondent as an assistant principal at Hay Elementary School and Delano Elementary School. He confirmed he was honorably terminated, but could not attest to the date of October 6, 2012 which Respondent's attorney cited.

Petitioner stated that he hurt his knee on October 27, 2011 when he was doing rounds at the school and slipped and fell on spilled milk on the floor. Petitioner stated that he received a recommendation for a knee replacement from his treating physician but due to concerns of deep vein thrombosis (DVT) and pulmonary embolism, he could not undergo the procedure.

Petitioner testified that he did personally visit some prospective places of employment, seeking work. He did not have a record of those jobs, as they usually did not give him documentation in return.

Petitioner testified that he currently receives Social Security retirement benefits and Medicare as of his 65th birthday.

Petitioner was questioned as to his profile on Facebook and stated that if it showd that he was the president of a trucking company from April 2010 to the present, that would be a mistake. Petitioner denied that Adotie was an active company and that the last inspection was in July of 2017 and employed 4 drivers.

Petitioner acknowledged that he was convicted for financial fraud when he worked at AT&T and served three years in prison. He denied that he did not disclose his conviction to respondent when he was hired.

Petitioner denied that Adotie was still in business. The business was contained in his personal bankruptcy in 2013. Petitioner stated that he does have a Facebook account and uses it to keep in contact with high school friends and other acquaintances. He states that he does not post on Facebook. He recalled filling out some kind of profile when he first opened his account but that was years earlier and not within the last three years. He also has a LinkedIn account which he filled out a profile, but never completed.

Petitioner stated that he served prison time between 1997 and 1999. His first job after his release was with respondent as a teacher.

Respondent submitted a labor market survey regarding Petitioner that was dated January 20, 2015 into evidence. The document was not provided to Petitioner or his attorney prior to the September 12, 2017 trial. (RX11)

CONCLUSIONS OF LAW

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

To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim (O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980)),

including that there is some causal relationship between his employment and his injury. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52, 63 (1989)

Decisions of an arbitrator shall be based exclusively on evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e)

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 the following:

Under the law-of-the-case doctrine, once an issue is litigated and decided, that ends the matter and the unreversed decision of a question of law or fact made during the course of the litigation settles that question for all subsequent stages of the litigation. The doctrine is based on sound policy that after an issue has been litigated and decided, the finding or ruling should be the end of the disputed issue. Irizarry v. Industrial Comm'n, 337 Ill. App. 3d 598, 606 (2003)

The law-of-the-case doctrine controls and Respondent is barred from relitigating the issue of accident. Petitioner sustained accidental injuries which arose out of and in the course of his employment by Respondent on October 27, 2011.

In support of the Arbitrator's Decision relating to *(F) Is Petitioner' current condition of ill-being causally related to the injury*, the Arbitrator finds the following:

Arbitrator Simpson considered the testimony and medical evidence submitted at the first trial and found that Petitioner's condition as of February 19, 2014 was causally related to the work accident. It was her finding that the work injury aggravated and worsened Petitioner's preexisting degenerative left knee arthritis. As a result of the worsened arthritis, Petitioner could no longer perform the extensive walking and stair climbing of his job as an assistant principal for Respondent. (PX2) The only treatment at the time that was recommended by Petitioner's physician was pain medication for his arthritis.

Petitioner testified that the extent of the medical care he currently receives is pain medication prescribed by his primary care physician, Dr. Malkani, or from the Veterans Hospital. There is no evidence of any change with regard to Petitioner's medical condition between the 19(b) trial and the present. Neither party submitted any medical records that reflected any changes in Petitioner's medical condition or any intervening injuries. As such, the Arbitrator finds that Petitioner's present condition of ill-being is causally related to the work accident of October 27, 2011.

In support of the Arbitrator's Decision relating to *(J), Medical Expenses,* the Arbitrator finds the following:

Respondent claimed a §8(j) credit for $7,319.76 in medical expenses paid. Petitioner claimed that all bills were paid. There was no proof submitted of any §8(j) payments. Respondent's claim for a §8(j) credit is denied.

In support of the Arbitrator's Decision relating to *(K) What temporary benefits are due*, the Arbitrator finds the following:

Petitioner claims he was paid all of his entitled TTD and maintenance benefits and thus makes no claim for owed benefits. Respondent claims no TTD is owed after December 18, 2011 a credit of 268-4/7 weeks for the time period of December 19, 2011 through September 12, 2017.

The law-of-the-case is that Petitioner is entitled to TTD benefits from 10/28/2001 through 12/22/2011 and from 1/9/2012 through 2/19/2014. Arbitrator Simpson also awarded prospective vocational rehabilitation services and ongoing maintenance.

Respondent failed to provide Petitioner with any meaningful vocational assistance and Petitioner continued on a self-directed job search while Respondent continued to pay maintenance benefits. Respondent cannot shirk the award of vocational services and then contest the maintenance benefits associated with Petitioner's job seeking efforts. There was no evidence that Petitioner earned wages from any source after the prior trial. Accordingly, Petitioner is entitled to maintenance benefits from February 20, 2014 to September 11, 2017. In addition to the prior award for TTD and maintenance, this amounts to 276-47 weeks, the amount of compensation paid by Respondent, per the stipulation of the Parties.

In support of the Arbitrator's Decision relating to *(L) What is the nature and extent of the injury*, the Arbitrator finds the following:

Petitioner is seeking an award of total permanent disability pursuant to §8(f) of the Act. An employee is totally and permanently disabled when he is unable to make some contribution to industry sufficient to justify payment of wages to him. A.M.T.C. of Illinois v. Industrial Comm'n, 77 Ill.2d 482, 487 (1979) However, the employee need not be reduced to total physical incapacity before a permanent total disability award may be granted. Ceco Corp. v. Industrial Comm'n, 95 Ill.2d 278, 286–87 (1983) Rather, the employee must show that he is unable to perform services except those that are so limited in quantity, dependability, or quality that there is no reasonably stable market for them. *Alano v. Industrial Comm'n,* 282 Ill.App.3d 531, 534 (1996). If the claimant's disability is limited in nature so that he is not obviously unemployable, or if there is no medical

evidence to support a claim of total disability, the burden is upon the claimant to prove by a preponderance of the evidence that he fits into the "odd-lot" category-one who, though not altogether incapacitated to work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market. Valley Mould & Iron Co. v. Industrial Comm'n, 84 Ill.2d 538, 546–47, (1981); Alexander v. Industrial Comm'n, 314 Ill.App.3d 909 (2000) The claimant ordinarily satisfies his burden of proving that he falls into the odd-lot category in one of two ways: (1) by showing diligent but unsuccessful attempts to find work, or (2) by showing that because of his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor market. Alano, 282 Ill.App.3d at 534–35. Once the claimant establishes that he falls into the "odd-lot" category, the burden shifts to the employer to prove that the claimant is employable in a stable labor market and that such a market exists. *Waldorf Corp. v. Industrial Comm'n*, 303 Ill.App.3d 477, 484 (1999)

Petitioner is currently 65 years of age. He is limited in physical activities such as walking, climbing and standing due to his degenerative knee OA condition. He requires ongoing treatment for his knee and would benefit from a total knee replacement that he cannot undergo due to a history of DVTs and pulmonary embolisms. In the prior Decision, Arbitrator Simpson considered Petitioner's age at the time of 61 years, his physical limitations and his unsuccessful efforts in finding a job and found that Petitioner would benefit from vocational rehabilitation. As part of her order she directed Respondent to provide the necessary vocational services to assist Petitioner in finding a job. The only action taken by Respondent following the decision was one vocational assessment performed on May 16, 2014 and a labor market survey of questionable value that was never given to Petitioner or his attorney. The Arbitrator deems these efforts by Respondent to be unsatisfactory compliance with the Decision of Arbitrator Simpson and with the spirit of §8(a) of the Act. Respondent provided Petitioner zero guidance, direction and assistance in his efforts to find gainful employment.

Despite Respondent's lack of assistance, Petitioner proactively engaged in an extended job search between May of 2013 and September of 2017. In that time, he estimated that he submitted over 500 applications for employment in the areas of education, industry and business. Petitioner presented credible documentation supporting his efforts. (PX4) In that time, he generated only two phone interviews that did not result in any job offers. Petitioner applied for 120 + jobs at Respondent, without success. Respondent cannot shirk its §8(a) vocational rehabilitation responsibilities and its responsibility to comply with Arbitrator Simpson's order herein and then claim that Petitioner's self-directed vocational efforts have not been diligent enough.

Based on Petitioner's testimony and the evidence of his extensive job search activities, the Arbitrator finds that Petitioner provided sufficient evidence to support that he falls within the odd-lot category. Besides Petitioner's unsuccessful job search activities, the Arbitrator acknowledges that Petitioner has additional barriers

to employment that include his advanced age of 65 years, his physical limitations, a fraud conviction and the fact that he has been out of the workforce now for almost seven years.

Once a claimant establishes he is an odd-lot, the burden then shifts to the employer to prove that the claimant is employable in a stable labor market and that such a market exists. See: Waldorf. Respondent provided no testimony or cross-examination that contradicted Petitioner's testimony or the evidence of his job search. The only evidence submitted by the Respondent was a labor market survey produced by Sedgwick on January 20, 2015. Petitioner's attorney stated at trial that it was the first time the labor market survey had been seen by him. Respondent's counsel did not disagree. The report states that the survey was conducted to identify positions consistent with Petitioner's skills and physical capabilities as understood through file documentation. (RX11) Sedgwick identified the following occupations suitable for petitioner: Security Guard, Surveillance System Monitor, Inventory Clerk, Assemblers/Electronic Testers, Front Desk Clerk, Mentoring Programs Coordinator, Parent/Educator Resource Coordinator, Youth Employment Coordinator, and Human Resource Generalist/Coordinator. (Id.) The survey then goes on to list eight job positions, the wage for the position, and the job description. (Id.) The survey does not indicate that Sedgwick provided the various employers any information pertaining to Petitioner or whether he might be a candidate for the job positions identified. It is unknown whether any of these employers were made aware of Petitioner's physical limitations, his age, and his criminal conviction when the survey was taken. Lastly, there is no mention in the report of whether any of the "potential" employers viewed Petitioner as a viable candidate for the listed job position.

The Arbitrator believes that given Petitioner's education and experience, successful placement in appropriate employment would have been likely, had Respondent followed Arbitrator Simpson's direction to provide vocational services and complied with the Act. Respondent chose not to do so.

Based on the foregoing, the Arbitrator finds that Respondent failed to establish that Petitioner is employable in a stable market and that such a market exists. Consequently, the Arbitrator finds that Petitioner is totally and permanently disabled, pursuant to §8(f) of the Act. Accordingly, Respondent shall pay Petitioner permanent and total disability benefits of $1,261.41/week, beginning September 12, 2017, for the remainder of Petitioner's life.

STATE OF ILLINOIS)
) SS.
COUNTY OF CHAMPAIGN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Metz,

Petitioner,

vs. NO: 17WC 23953

Thrift Trucking,

Respondent.

18IWCC0615

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b-1) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary disability, causal connection, medical expenses, prospective medical care, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 5, 2018 is hereby affirmed and adopted.

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

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

No bond is required for the removal of this cause to the Circuit Court. 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 2018
SJM/sj
o-10/10/18
44

Stephen J. Mathis

David L. Gore

Deborah L. Simpson

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

METZ, JOHN
Employee/Petitioner

Case# **17WC023953**

17WC023954

THRIFT TRUCKING
Employer/Respondent

18IWCC0615

On 6/5/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

2) Certifies that he or she has paid the court reporter $ 536.00 for the final cost of the arbitration transcript and attaches a copy of the check to the Petition; and

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

If the Commission reviews this award, interest of 2.07% 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:

0874 FREDERICK & HAGLE
JEFFREY FREDERICK
129 W MAIN ST
URBANA, IL 61801

0264 HEYL ROYSTER VOELKER & ALLEN
JESSICA BELL
PO BOX 6199
PEORIA, IL 61601-6199

STATE OF ILLINOIS)
)SS. 18IWCC0615
COUNTY OF CHAMPAIGN)

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

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

JOHN METZ,
Employee/Petitioner
v.
THRIFT TRUCKING,
Employer/Respondent

Case # **17** WC **23953**

Consolidated cases: **17 WC 23954**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. Petitioner filed a *Petition for an Immediate Hearing Under Section 19(b-1) of the Act* on **4/17/18**. Respondent filed a *Response* on **4/27/18**. The Honorable **Maureen Pulia**, Arbitrator of the Commission, held a pretrial conference on **5/8/18**, and a trial on **5/9/18**, in the city of **Urbana**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **6/22/17**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$35,171.76**; the average weekly wage was **$676.38**.

On the date of accident, Petitioner was **71** 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 **$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 arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that his current condition of ill-being as it relates to his right knee is causally related to the injury he sustained to his right knee on 6/22/17. Based on this finding the petitioner's claims for medical expenses, temporary benefits, and prospective medical expenses are denied.

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

RULES REGARDING APPEALS Unless a party 1) files a *Petition for Review* within 30 days after receipt of this decision; and 2) certifies that he or she has paid the court reporter **$536.00** or the ***final*** cost of the arbitration transcript and attaches a copy of the check to the *Petition*; and 3) perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

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

Signature of Arbitrator

5/22/18
Date

ICArbDec19(b-1) p. 2

JUN 5 – 2018

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 71 year old truck driver, sustained an accidental injury to his right knee that arose out of and in the course of his employment by respondent on 6/22/17. This case was consolidated with case 17 WC 23954 for hearing. A separate decision has been issued for case 17 WC 23954.

Petitioner was hired by respondent in 2012 as a truck driver. Petitioner is a semi truck driver out of the depot in Champaign, IL. Petitioner's routes are usually short haul routes from which he returns each day. Prior to working with respondent petitioner worked for other trucking companies. When petitioner was working for RGS Distributing in 2005 he sustained an injury to his right leg. Petitioner fractured his tibia and fibula, and underwent surgery to repair the same. Following surgery and postop treatment petitioner returned to his regular duty job. Petitioner testified that prior to his injury on 6/22/17 he had pain in his right knee on and off when he kneeled. He testified that the pain was not always in the same spot on the right knee. He also testified that the pain did not prevent him from doing his job for respondent.

Petitioner's duties with respondent include dropping off trailers and picking up loaded trailers. On 6/22/17 petitioner sustained an accident while performing this job. On 6/22/17 petitioner injured his right knee while using the crank to get the dolly legs up. Petitioner was standing besides the trailer performing this duty. Petitioner testified that the crank handle lock was worn and he had difficulty cranking. While he attempted to perform this duty the lock on the cranking handle broke loose and petitioner went down hard on pea gravel that was on top of concrete. Petitioner claims he injured his right knee, right hip, right elbow and right shoulder. He denied that he ever had pain like this before the injury. Petitioner got up on his own and got into his cab and called the office and spoke with Travis Shumate. He gave a consistent history of the accident. Petitioner returned to the truck depot in Champaign, IL. Petitioner did not seek any treatment because he was concerned he could lose his job with respondent, since it had happened to others who worked there who were unable to drive a truck after they were injured. He testified that he tried to walk it off.

Petitioner continued working his regular job for respondent. He testified that he was able to kneel. He testified that he would take some Tylenol and Advil for his pain. He also took prescription medication that was prescribed for his preexisiting arthritis. He stated that these medications would relieve his pain. Petitioner testified that his pain level depended on how often he climbed in and out of the truck and trailer, and how much walking he had to do. Petitioner testified that the pain in his right knee decreased between 6/22/17 and his subsequent alleged injury on 7/18/17. Between 6/22/17 and 7/18/17 petitioner sought no treatment for his right knee.

On 7/18/17 petitioner alleges he sustained another injury to his right knee that arose out of and in the course of his employment by respondent. (17 WC 23954) On this day, petitioner picked up his trailer and went to a warehouse in Chicago, IL. He had no trouble getting there. When petitioner got to the warehouse rail yard he backed into an assigned door. Petitioner then got out of his truck to slide the tandems all the way to the back. While doing this petitioner had difficulty releasing the air switch which was a push/pull switch. Petitioner testified that he was on his right knee trying to reach the air switch. Petitioner used normal pressure and two fingers to release the air switch. Petitioner then released the tandems. Petitioner testified that he had pain in his right knee at the time he was on his right knee trying to get the air switch to release. He rated his pain at a 5/10. After releasing the air switch petitioner got up off his right knee and walked about 43 feet to the cab of the truck. Petitioner got in the cab and waited until the truck was unloaded. He was the given some paperwork and pulled out about 10 feet from the dock. Petitioner got out of the cab and closed the back doors. He then had to slide the tandems forward. To do this petitioner walked to the front of the trailer tandems and again got on his right knee to pull out the air switch. After he did this he stood up. He testified that he had some pain in his right knee. Petitioner then turned to walk back to the cab. He testified that after taking 2 steps, or going five feet, he heard a pop in his right knee and leaned against the trailer on his right shoulder. He testified that he never experienced pain like this before. Petitioner stated that he then limped back to the cab which was 40 feet away.

After petitioner got in the cab he called Travis Shumate and reported the injury. He testified that he did not seek treatment right away because he wanted to finish his run. Petitioner then drove to Waukegan to complete his daily run. After he completed his tasks in Waukegan he returned to the depot in Champaign, IL. He testified that once there a co-worker got him his pickup and he drove home. Once home his wife took him to Carle Urgent Care.

On 7/18/17 petitioner presented to Carle Urgent Care at 2:40 pm for a right knee injury. Petitioner gave a history of being in Chicago that morning and was walking on a flat surface and felt/heard a pop in his right knee which took him to the ground. He stated that he managed to drive himself home in the large truck, but since then has had extreme difficulty bearing weight and has felt a constant throbbing/aching to the lateral right knee with occasional knife-like pains. Petitioner noted that he fell during work about a month ago as he was cranking a trailer, and then the crank gave way causing him to fall on his knees, right knee injured greater than left. He stated that he did file an accident report at that time, but did not need to see a doctor, and ultimately felt as though it got better. He stated that he had not taken any over the counter medications for relief, but takes nabumetone daily for "arthritic pain". Petitioner was examined and assessed with acute pain of the right knee. Petitioner was released to modified work as of 7/19/17. He was referred to Occupational Medicine on 7/20/17.

On 7/18/17 petitioner underwent an x-ray of his right knee. He gave a history that he felt a right lateroanterior knee pop that day while working as a truck driver when walking outside his cab. He noted that there was no fall. He also noted that he fell at work a month ago and had pain in his anterior knee. The images revealed a partially included IM rod in the tibia with proximal locking screw; suprapatellar bursal fluid of increased density, possibly indicative of soft tissue injury; and mild degenerative changes in the knee.

After being seen at Carle Urgent Care he completed his Form 45. Petitioner alleged an injury to his right knee at 7:30 am on 7/18/17. He reported that he was walking from the rear of the trailer to the cab of the truck. He reported that that accident occurred while he was just walking on smooth surface and felt a pop in his right knee. He indicated that he was treated at urgent care.

On 7/20/17 petitioner presented to Carle Occupational Med and was seen by Dr. Desalvio, D.O. He gave a history that he just dropped off a load in Chicago on 7/18/17, and he was walking next to his truck when his right knee suddenly popped, causing him to experience extreme pain, and almost causing him to fall to the ground. The petitioner stated that the surface he was walking on was smooth, and there was nothing that he was walking on that caused him to trip or fall. He reported that he managed to get back into his truck and return to this area. Petitioner also reported the injury on 6/22/17. It was noted that he did have a fall and scuffed up both his knees. He did not seek treatment and felt that he had recovered fairly well from that fall. Dr. DeSalvio was unclear how the injury on 6/22/17 tied into the injury on 7/18/17 at that time, but was of the opinion it could have contributed to the incident on 7/18/17. He was examined and assessed with internal derangement of the right knee. An MRI of the right knee was ordered. Dr. Desalvio took petitioner off work.

On 7/26/17 petitioner gave a recorded statement to Melissa Williams. The conversation was recorded and another person transcribed it. Williams asked petitioner about the injury on 7/18/17. Petitioner reported that he was a truck driver who takes full tractor trailers to commercial locations and the haul is unloaded for him. Petitioner stated that when he goes to the yard each day he gets the tractor hooked up to the trailer, cranks the legs up and does his pretrip inspection, and the whole nine yards. Petitioner reported that he got to the location and checked in, backed into dock, got unloaded, and pulled out of the dock to close the doors, and backed in because the trailer was too close. Petitioner stated that he closed the doors and had to slide his tandems. He stated that he had a switch in front of him on the driver's side tandems on the frame, and he had to kind of kneel down to get the air switch, which was low. Petitioner reported that he popped the switch and got back up and started to walk. He noted that the trailer was 53 feet. He stated that he got about halfway up the trailer, heard a pop, and about went down. He stated that he was talking about his right knee. He reported that when he kneeled down to get to the air switch, he kneeled on his right knee. He later stated that he started on his left knee and then his right knee and when he got about halfway to the cab he heard a pop and leaned against the trailer. He stated that he thought what

the hell am I going to do next, because he still had 250 miles to drive. He stated that he was at I-55 and I-294 in Chicago.

Petitioner stated that when he got to Waukegan and got out of the cab and started to move he did not think he was going to make it into the office where he had to check in. He stated that he took 5 minutes to walk 30 feet. He stated that it was hurting bad, and swelled up a bit, but not much. Petitioner stated that he had a 5th wheel puller that he kind of used as a cane. Petitioner reported that when he got in the office to check-in he told the guy that normally he is there 30-40 times. He stated that they put him down on a dock that is about 300 feet from the door. He stated that he could not walk back up here, so he got down there and backed into the dock and they loaded him. Petitioner then told her he went back to the office and they handed him the paperwork. After that he reported that he still had to get out of the truck and walk/hobble to the back end of the trailer. He stated that that was at about 10:00 am and he got back to Champaign around 1:00 pm. After that he went to Urgent Care. Petitioner reported that he called Travis when he was in Hosgrove. He stated that he told him he could go to the ER or hospital there, but it was not that bad. Petitioner reported that when he knelt down he did not feel any pain. Then he stated that there is always a little pain when he kneels. He stated that he has tried not to kneel very much, and does not even kneel in church because where the rod comes to his knee, it hooks on the bone. He stated that it's all grown over and everything now, but it just doesn't feel right. He stated that it does not feel right cause it hurts. He stated that he has tried not kneel, but he has to kneel on his right knee when he does the air switch. He stated that he kneeled on asphalt. He rated his pain at a 6-7/10. Petitioner then proceeded to give a history of his treatment to date.

On 8/1/17 Melissa Williams, SCLA, Branch Claims Representative, Auto-Owners Insurance, drafted a letter to petitioner regarding his injury on 7/18/17. In the letter Williams stated that she had reviewed the facts surrounding the incident on 7/18/17 and found that her investigation supported that the accident and injuries did not arise out of his employment with respondent. She informed petitioner that he was not eligible for benefits pursuant to the Illinois Worker's Compensation Act.

On 8/2/17 petitioner presented to Christie Clinic for his right knee pain. He gave a history of a fall 6 weeks ago. He reported "he fell at work if he was working on some equipment suddenly equaling gave out and patient fell to the right side especially on knee and the shoulder and elbow. At that time he did notify the employer but he seemed okay. Subsequently while walking he had a sudden pop in the left knee and now has increased fluid in this area." Petitioner was examined and assessed with a subsequent right knee injury. An MRI of the right knee was again ordered.

On 8/17/17 petitioner filed his Application of Adjustment of Claim for case 17 WC 23953. He alleged an injury on 6/22/17 to his right knee and leg, right elbow, right hip, arm and shoulder. That same day petitioner filed his Application for Adjustment of Claim for case 17 WC 23954. He alleged an injury on 7/18/17 to his right leg and knee.

On 8/23/17 presented to Christie Clinic for his right knee pain. Petitioner was unable to walk and was using crutches when out. Petitioner stated that his pain varies, with most days being bad. Petitioner reported that he wanted to see Dr. Li. Petitioner was examined and assessed with a subsequent encounter of a right knee injury. An MRI was ordered and he was referred to orthopedics. He was given home exercises.

On 8/31/17 petitioner presented to Dr. Li. Petitioner gave a history of an injury to his right knee on 6/22/17 while cranking up trailer dolly legs and the cranking handle slipped out of lock position. This caused petitioner to fall on his right side landing on his right hip, knee, elbow, and shoulder. He reported that he had ongoing pain in his right knee but was still able to work until 7/18/17 when he was getting up from having worked on something on the outside of his truck and twisted his right knee. He told Dr. Li that he felt a pop and then could not walk. Dr. Li noted that x-rays showed mild narrowing of the medial and patellofemoral joint of the right knee. Dr. Li assessed a right knee medial meniscus tear from a twisting injury that occurred at work. He opined that the two injuries he suffered on 6/22/17 and 7/18/17 are the cause of his current knee condition and need for treatment. Dr. Li recommended an MRI of the right knee.

On 9/1/17 petitioner underwent an MRI of the right knee. The results were radial tear/partial maceration of the posterior horn and posterior root ligament of the medial meniscus with developing medial extrusion of the body; multifocal tear of a discoid lateral meniscus; degenerative joint disease with high-grade chondral loss along the medial femoral condyle in the medial compartment; and mild to moderate subchondral bone marrow edema in the medial femoral condyle.

On 9/1/17 petitioner returned to Dr. Li. Dr. Li noted a Clinical Change from Last Visit. He noted that petitioner was a truck driver who had two dates of injuries. He noted that petitioner had an injury originally on 6/22/17 when he was cranking up trailer dolly legs and the cranking handle slipped out of a locked position. He noted that petitioner fell on his right side landing on his right hip, knee, elbow, and shoulder. He noted that petitioner had continued pain in his right knee but was still able to work, but then on 7/18/17 while petitioner was getting up from having worked on something on the outside of his truck he twisted his right knee. He noted that petitioner then felt a pop and then could not walk. Dr. Li examined petitioner, reviewed the MRI, and assessed a right knee posterior horn medial meniscus tear and horizontal tear of the lateral meniscus. Dr. Li recommended a right arthroscopic knee surgery. He released petitioner to sedentary work.

On 9/29/17 petitioner returned to Dr. Li for follow-up of his right knee. Dr. Li updated petitioner's prior history. He noted that between 6/22/17 and 7/18/17 petitioner had continued pain in his right knee, iced his knee, and took ibuprofen hoping it would improve. He also noted that petitioner told him that he took it easy in regards to his right knee, and the severity of the pain in his right knee had decreased, but was not gone. Dr. Li also updated petitioner's history of the alleged injury on 7/22/17. He noted that petitioner told him he had been kneeling on his right knee to assess the air buttons to slide the tandems back forward, after which he got up, took a few steps and then had severe pain in his right knee and could not walk. He noted that petitioner has had severe pain since then that has been unrelenting. Petitioner reported that his pain was worse than at his last visit. Dr. Li assessed right knee medial and lateral meniscus tears from a work injury on 6/22/17. He opined that petitioner tore his medial and lateral meniscus on 6/22/17 due to his pain ever since 6/22/17. He was of the opinion that when petitioner got up to walk on 7/18/17 after kneeling on his right knee, that is when the pain became much worse, although the knee pain was not as severe as around 7/18/17 as it was around 6/22/17. He was of the opinion that when petitioner started to walk a few steps on 7/18/17, after kneeling on his right knee, that is when his pain became much worse. He opined that since petitioner had continued pain since 6/22/17, some days better than others, and never had a day without any pain, that the original injury on 6/22/17, is the cause of his current knee condition and need for treatment.

On 10/27/17 Dr. Li restricted petitioner to limit lifting, pushing and pulling to 10 pounds.

On 11/27/17 petitioner underwent a Section 12 examination performed by Dr. John Krause, an orthopedic surgeon, at the request of the respondent. Petitioner gave a history of working as a truck driver for respondent on 6/22/17 and had just dropped off one load and hooked up another. Petitioner then went to crank the handle of the trailer and the crank was broken. As he pushed hard on the crank facing the back part of the truck, the crank gave way and he fell forward onto the concrete and hit his right knee, right elbow, and right shoulder. He stated that he suffered an abrasion to his right leg and shin and had some bleeding. Petitioner reported that he was able to ambulate, reported his injury, and was able to keep working. He stated that he took Advil for pain. Petitioner also gave a history of a second injury on 7/18/17. He reported that he backed his truck into unload the trailer. He noted that he was kneeling down on his right knee to push the release. Then he got up from the kneeling position, and as he turned and walked he felt a pop in his right knee. He stated that he had difficulty ambulating, but was able to get in his truck and drive back to Champaign from Chicago. Petitioner stated that he was seen later that day complaining of right knee pain at Convenient Care in Champaign where both injuries were documented, but the 2nd injury was reported as petitioner was walking on a flat surface and heard a pop in his knee. Dr. Krause noted that the record included no mention of petitioner kneeling down to finger a release, or a stand and pivot. Dr. Krause also noted that when petitioner saw Dr. Desalvio on 7/20/17 he described that petitioner was walking next

to his truck when he felt a sudden pop in his knee. Dr. Krause noted that Dr. Desalvio did not describe a kneeling to finger the release. Dr. Krause noted that Dr. Desalvio noted diffuse swelling and effusion in the right knee with medial and lateral joint line tenderness. Dr. Krause also reviewed the records of Dr. Schuchart and Dr. Li. Dr. Krause noted that the accident history in Dr. Li's records date 8/31/17 regarding the injury on 7/18/17 was the most consistent with the history petitioner provided him.

Dr. Krause examined petitioner and performed a record review which included petitioner's x-rays and MRI of the right knee. Following his examination and record review, Dr. Krause assessed a right knee contusion dated 6/22/17, resolved; right knee sprain with likely medial meniscus tear dated 7/18/17; right knee degenerative joint disease, preexisting; and discoid right lateral meniscus, cannot rule out tear. Despite the inconsistencies in the medical record, based on petitioner's history and records, Dr. Krause opined that petitioner's current right knee symptoms and need for treatment are causally related to the injury dated 7/18/17. He opined that petitioner's current right knee symptoms are not causally related to the injury dated 6/22/17. Dr. Krause noted that he disagreed with Dr. Li regarding which injury caused his current symptoms. Dr. Krause was of the opinion that standing from a squatting position and turning is much more likely to cause a meniscal tear than the contusion from 6/22/17. He opined that the injury on 7/18/17 is the prevailing factor in the petitioner's current right medial meniscus tear and need for surgery. Dr. Krause opined that petitioner's treatment to date was reasonable, and the surgery recommended was not unreasonable based on the clinical findings and MRI findings. He stated that if he was treating petitioner he would consider a corticosteroid injection prior to surgery, since this could make his symptoms significantly better. Dr. Krause was of the opinion that the treatment provided petitioner is causally related to the injury on 7/18/17, and that the injury dated 7/18/17 is causally related to the need for the surgery recommended by Dr. Li. Dr. Krause saw no symptom magnification, but noted that there are inconsistencies in the records describing the second injury. He noted that the records from Convenient Care, Dr. Desalvio, and Dr. Schuchart did not describe the squatting underneath the truck to use his fingers to release the structure, or the getting up from a squatting position and turning in which the petitioner had pain. The records only contained a history of walking straight forward and having pain. Dr. Krause was of the opinion that these were the main inconsistencies in the medical records. Dr. Krause was of the opinion that petitioner could perform sedentary work with intermittent standing of 30 minutes per hour, without climbing or heavy lifting. He related these restrictions to the injury on 7/18/17.

On 2/18/18 Dr. Li drafted a letter to "To Whom it May Concern". Dr. Li opined that petitioner needed surgery for his medial lateral meniscus tear due to his accident on 6/22/17 primarily, and 7/18/17. Dr. Li gave petitioner restrictions of lifting, pushing and pulling of 10 pounds.

Petitioner testified that the current pain level in his right knee is 5-9/10, depending on the weather. He testified that he takes Tylenol, and arthritis medicine that he had taken before the injuries. Petitioner stated that he only took the pain meds Dr. Li prescribed for 4 months because he does not like to take pain meds.

On cross examination petitioner testified that he always had right knee pain prior to the injury on 6/22/17, but the degree of pain varied. Petitioner testified that he was concerned about having an injury while working for respondent because if he loses his CDL due to medical reasons he would become ineligible to work for respondent. Petitioner testified that he is currently working for respondent even though he cannot drive a truck. Petitioner testified that he always has pain when kneeling on his right knee. Petitioner testified that on 7/18/17 he stood up from releasing the air switch, walked 2 steps and then heard a pop in his right leg. He stated that he had normal pain in his knee when he got up, and it was not until after he walked 2 steps, that he felt pain in his right knee. He agreed that there were no potholes, snow, ice, rain or defect in the asphalt where his right knee popped. He also testified that he was not carrying anything, or rushing.

On redirect examination petitioner testified that he did fill out some forms at the Clinic. He stated that he did not type the reports, nor was he asked to review them. Petitioner testified that prior to the injuries he always had pain in his knee below the knee cap. He further testified that after the accident on 6/22/17 he still had that same pain, and pain to the left and right of the middle of the knee cap. He testified that after the injury on 7/18/17 he had the same pain.

On recross examination petitioner testified that the pain on 7/18/17 was in the exact same spot as it was on 6/22/17.

Travis Schumate, Terminal Manager for respondent, was called as a witness on behalf of respondent. Schumate testified that he has been with respondent in this position for 5 years. He testified that his duties included work place injuries. Schumate stated that he had supervisory authority over petitioner. He also testified that he had a friendly relationship with petitioner that included going by each other's families, and going to a few NASCAR races together. Schumate testified that he saw petitioner 4 days a week. Schumate testified that petitioner called him on 6/22/17 and provided a consistent history of the accident and reported a little knee pain. He stated that petitioner told him he did not want to see a doctor. Schumate also stated that petitioner called him on 7/18/17 and told him while he was walking his right knee popped out. Schumate testified that between 6/22/17 and 7/18/17 he saw petitioner walking, and petitioner never complained of right knee pain or asked for any treatment. Schumate testified that prior to 6/22/17 petitioner walked with a little limp, and he noticed no difference in petitioner's walking between 6/22/17 and 7/18/17. Schumate testified that petitioner never lost time between 6/22/17 and 7/18/17. He further stated that respondent is currently accommodating petitioner's

restrictions. Schumate testified that he has flipped the air switch before and he would bend over to flip the switch, but not kneel.

On cross examination Schumate testified that although he did not recall petitioner telling him his right knee hurt between 6/22/17 and 7/18/17 he could state with absolute certainty that he didn't, but he does not recall such a conversation. Schumate testified that he finds petitioner to be truthful. Schumate testified that he does not find flipping switches awkward, but he is in his 30s.

Melissa Williams, Claim Adjustor with Auto Owners Insurance, was called as a witness on behalf of respondent. Williams handles work comp claims, investigates claims, talks to employers and injured workers, gets medical records, and makes decisions on compensability and treatment. Williams got petitioner's claim for the 7/18/17 injury on 7/26/17 and performed the investigation. Williams got a claim history from petitioner. Williams testified that she took a recorded statement from respondent because of the fall and what was on the Form 45 for the injury on 7/18/17. Williams testified that she listened to the recording of the recorded statement and reviewed the written statement and found the transcript consistent with her recollection of the recording.

On cross examination Williams testified that she compared the transcript to the audio recording and it was not 100% verbatim due to interruption time. She further testified that she found it accurate as to the accident description of what happened on 7/18/17. She testified that she never asked petitioner how he felt everyday between 6/22/17 through 7/18/17.

The respondent offered into evidence the audio tape of the recorded statement that Williams took of petitioner on 7/26/17. The audio tape is consistent with the recorded statement. During his recorded statement, 4 days after the injury petitioner made the following statements:

> "I was got to the location got checked in, backed into the dock. Got unloaded pulled out of the dock. Had to pull out of the dock to close the doors and to back in to because the trailers too close. Just have to do that and closed the doors and I had to slide my tandems and had a switch which is in front of the driver's side tandems on the frame I had to kinda kneel down to get the switch cause its low. I popped the switch and got back up and started to walk. It's a 53 foot trailer so I got about half way up the trailer and I heard a pop and about went down."
>
> "Once I got up. There's always a little pain when I kneel. I mean it's just; I've tried not to kneel very much. I don't even kneel in church because where that rod comes to my knee hooks on the bone it's all grown over and everything now but it just feels. I doesn't feel right cause it hurts. I've tried not to kneel but I have to kneel on that when I do the air switch."

Petitioner sustained an accidental injury to his right leg on 1/20/05. This case was filed with the Illinois Worker's Compensation Commission and given case number 06 WC 54853. An Arbitration Hearing was had on 9/24/14. For this injury petitioner sustained a diaphyseal fracture of the right tibia. Dr. Packard, an orthopedic

surgeon underwent a surgery consisting of open reduction and internal fixation of the tibial fracture with an intramedullary nail. Postoperatively petitioner underwent physical therapy. On 8/16/15 Dr. Dols, an orthopedic surgeon, associated with Dr. Packard, saw petitioner. Petitioner reported that he had refrained from jumping down from the cab; avoided kneeling; and stated that he could no longer run or squat. Dr. Dols was of the opinion that petitioner had to curb some of his normal activities, but that over time, petitioner might be able to ease back into them. Dr. Dols was of the opinion that whether or not petitioner would be able to resume all his normal activities remained to be seen. The arbitrator awarded petitioner 35% loss of use of the right leg. The Arbitrator's Decision dated 10/24/14 was not appealed.

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

It is unrebutted that on 6/22/17 petitioner sustained an accidental injury to his right knee. Petitioner presented a consistent history of this accident. He reported that he injured his right knee while using the crank to get the dolly legs up. Petitioner testified that the crank handle lock was worn and he had difficulty cranking it. While he was trying to crank it, the lock on the cranking handle broke loose and he went down hard on pea gravel that was on top of concrete. He claimed he injured his right knee, right hip, right elbow and right shoulder. Petitioner testified that he did not seek treatment because he was concerned he would lose his job with respondent, because he had seen others lose their job if they were unable to return to truck driving after their injury.

Petitioner did not seek any treatment and worked his regular duty job without incident until 7/18/17. Schumate testified that he asked petitioner if he wanted to see a doctor and he said no. Petitioner did not seek any medical treatment between 6/22/17 and 7/18/17. Schumate testified that between these two dates petitioner never complained of any right knee pain and never asked for any treatment. Schumate also testified that prior to 6/22/17 petitioner walked with a limp, and he noticed no difference in petitioner's walking between 6/2217 and 7/18/17. Schumate testified that petitioner never lost any time from work between 6/22/17 and 7/18/17.

On 1/20/05 petitioner sustained an injury to his right leg that resulted in a diaphyseal fracture of the right tibia. For this, petitioner underwent a surgery consisting of an open reduction and internal fixation of the tibial fracture with an intramedullary nail. Following this injury, but prior to 6/22/17, petitioner reported pain on and off in his right knee when he would kneel, but it was not always in the same spot on the right knee. Then on cross-examination he testified that he always had right knee pain prior to the injury on 6/22/17, but the degree of pain varied. Then when he was under redirect examination, petitioner again stated that prior to 6/22/17 he always had pain in his right knee below the knee cap. Even in his recorded statement to Williams, he stated that "there's always a little pain when I kneel. I mean it's just; I've tried not to kneel very much. I don't even kneel in church because where the rod comes to my knee hooks on the bone it's all grown over and everything now but it just feels. I doesn't feel right cause it hurts. I've tried not to kneel but I have to kneel on that when I do the air switch."

Petitioner testified that between 6/22/17 and 7/18/17 he was able to kneel, and would take Tylenol, or medicine he had for his arthritis, for his pain. Petitioner testified that the pain in his right knee decreased between 6/22/17 and 7/18/17. Petitioner also reported to Carle Clinic on 7/18/17 that between 6/22/17 and 7/18/17 he ultimately felt that his right knee had gotten better. On 7/20/17 petitioner reported to Dr. Desalvio that when he fell on 6/22/17 he scuffed up both his knees. He also reported that he sought no treatment and felt that he had recovered fairly well after that fall. On 8/2/17 petitioner reported to Christie Clinic that after the fall on 6/22/17 he reported the injury to his employer, but felt okay.

After 8/2/17 the petitioner secured legal counsel and filed his Application for Adjustment of Claim for both accidents on 8/14/17. Then when petitioner presented to Dr. Li on 8/31/17 he reported that after the injury to his right knee on 6/22/17 he had ongoing pain in his right knee but was able to work until 7/18/17. Based on this history and his history of twisting his knee on 7/18/17, Dr. Li opined that petitioner's injuries on 6/22/17 and 7/18/17 were the cause of his current knee condition and his need for treatment. Dr. Li noted that petitioner's pain after 6/22/17 was worse than it had ever been. However, the arbitrator finds this statement is not consistent with the credible record, since after the injury on 7/18/17 petitioner testified that the pain he experienced on 7/18/17 was the worst pain he ever had. On 9/29/17 petitioner told Dr. Li that after the injury on 6/22/17 he iced his right knee and took ibuprofen for his right knee hoping it would improve. The arbitrator notes that what petitioner did not tell Dr. Li was all the things he told Schumate and the healthcare providers that he saw before 8/17/17, which was that between 6/22/17 and 7/18/17 he ultimately felt that his right knee had gotten better and that he had recovered fairly well after the injury without any treatment. The arbitrator also finds it significant that petitioner failed to tell Dr. Li about the ongoing pain in his right knee prior to 6/22/17 due to the rod that was placed in his right leg in 2005. Based on his understanding that petitioner had continued pain every day since 6/22/17 through 7/18/17, Dr. Li opined that the injury on 6/22/17 was the cause of petitioner's current knee condition. Given that the arbitrator finds this history upon which Dr. Li is relying to formulate his causal connection opinion is not consistent with the credible evidence, and therefore, the arbitrator gives no weight to Dr. Li's causal connection opinion.

On 11/27/17 petitioner was examined by Dr. Krause. Petitioner provided a history of falling on his right knee on 6/22/17 and suffering an abrasion to his right leg and shin with some bleeding. Petitioner also reported that he was able to ambulate, reported the injury, and was able to keep working. He stated that he only took Advil for his pain. Dr. Krause assessed a right knee contusion dated 6/22/17, that had resolved. He also noted that petitioner had preexisting right knee degenerative disease, and that he sustained a right knee sprain with likely medial meniscus tear on 7/18/17, based on petitioner's history that he injured his right knee when he twisted it on 7/18/17. Dr. Krause related all of petitioner's current right knee problems and treatment to his injury on 7/18/17.

He specifically opined that petitioner's current right knee symptoms were not causally related to the injury on 6/22/17.

When petitioner was cross examined at trial on 5/9/18 he specifically stated that he always had right knee pain prior to his injury on 6/22/17, but the degree of pain varied. He also testified that he always has pain when kneeling on his right knee. Petitioner told Williams that since his injury to his right leg in 2005 where a rod was placed in his right shin that comes up to his right knee and hooks on the bone, his right knee does not fell right because it hurts. He also told Williams that there is always a little pain when he kneels since the rod was put in, and he tries not to kneel very much. He even stated that he does not kneel in church because it hurts.

Based on the above, as well as the credible evidence the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that his current condition of ill-being as it relates to his knee is causally related to the injury he sustained on 6/22/17. The arbitrator bases this opinion on the fact that petitioner had pain in his knee prior to 6/22/17 due to the rod in his right leg that hooked to his knee and caused him pain whenever he kneeled; that between 6/22/17 and 7/18/17 petitioner credibly stated that he ultimately felt that his right knee had gotten better and that he had recovered fairly well after the injury without any treatment; that Schumate testified that prior to 6/22/17 had a limp that was unchanged after 6/22/17 and before 7/18/17; and that Dr. Krause opined that as a result of the accident on 6/22/17 petitioner had right knee contusion that had resolved prior to the injury on 7/18/17.

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?

Having found the petitioner has failed to prove by a preponderance of the credible evidence that his current condition of ill-being as it relates to his knee is causally related to the injury he sustained on 6/22/17, the arbitrator finds these remaining issues moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF CHAMPAIGN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Metz,

Petitioner,

vs. NO: 17 WC 23954

Thrift Trucking,

18IWCC0616

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b-1) 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, prospective medical care, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 5, 2018 is hereby affirmed and adopted.

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

No bond is required for the removal of this cause to the Circuit Court. 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 2018
SJM/sj
o-10/10/18
44

Stephen J. Mathis

David L. Gore

Deborah L. Simpson

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

METZ, JOHN
Employee/Petitioner

Case# **17WC023954**

17WC023953

THRIFT TRUCKING
Employer/Respondent

18IWCC0616

On 6/5/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

2) Certifies that he or she has paid the court reporter $ 536.00 for the final cost of the arbitration transcript and attaches a copy of the check to the Petition; and
3) Perfects a review in accordance with the Act and Rules.

If the Commission reviews this award, interest of 2.07% 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:

0874 FREDERICK & HAGLE
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URBANA, IL 61801

0264 HEYL ROYSTER VOELKER & ALLEN
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PO BOX 6199
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18IWCC0616

STATE OF ILLINOIS)SS.

COUNTY OF CHAMPAIGN)

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

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

JOHN METZ,
Employee/Petitioner

v.

THRIFT TRUCKING,
Employer/Respondent

Case # **17** WC **23954**

Consolidated cases: **17 WC 23953**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. Petitioner filed a *Petition for an Immediate Hearing Under Section 19(b-1) of the Act* on **4/17/18**. Respondent filed a *Response* on **4/27/18**. The Honorable **Maureen Pulia**, Arbitrator of the Commission, held a pretrial conference on **5/8/18**, and a trial on **5/9/18**, in the city of **Urbana**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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

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

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

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

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

G. [ ] What were Petitioner's earnings?

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

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

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

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

L. [x] What temporary benefits are in dispute?
[x] TPD [ ] Maintenance [ ] TTD

M. [ ] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [ ] Other _____

FINDINGS

On the date of accident, **7/18/17**, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 **$35,171.76**; the average weekly wage was **$676.38**.

On the date of accident, Petitioner was **71** 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 **$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 arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his right knee that arose out of and in the course of his employment by respondent on 7/18/17. The petitioner's claim for compensation is denied.

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

RULES REGARDING APPEALS Unless a party 1) files a *Petition for Review* within 30 days after receipt of this decision; and 2) certifies that he or she has paid the court reporter **$536.00** or the ***final*** cost of the arbitration transcript and attaches a copy of the check to the *Petition*; and 3) perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

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

Signature of Arbitrator

5/22/18
Date

ICArbDec19(b-1) p. 2

JUN 5 - 2018

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 71 year old truck driver, alleges he sustained an accidental injury to his right knee that arose out of and in the course of his employment by respondent on 7/18/17. This case was consolidated with case 17 WC 23953 for hearing. A separate decision has been issued for case 17 WC 23953.

Petitioner was hired by respondent in 2012 as a truck driver. Petitioner is a semi truck driver out of the depot in Champaign, IL. Petitioner's routes are usually short haul routes from which he returns each day. Prior to working with respondent petitioner worked for other trucking companies. When petitioner was working for RGS Distributing in 2005 he sustained an injury to his right leg. Petitioner fractured his tibia and fibula, and underwent surgery to repair the same. Following surgery and postop treatment petitioner returned to his regular duty job. Petitioner testified that prior to his injury on 6/22/17 he had pain in his right knee on and off when he kneeled. He testified that the pain was not always in the same spot on the right knee. He also testified that the pain did not prevent him from doing his job for respondent.

Petitioner's duties with respondent include dropping off trailers and picking up loaded trailers. On 6/22/17 petitioner sustained an accident while performing this job. (17 WC 23953) On 6/22/17 petitioner injured his right knee while using the crank to get the dolly legs up. Petitioner was standing besides the trailer performing this duty. Petitioner testified that the crank handle lock was worn and he had difficulty cranking. While he attempted to perform this duty the lock on the cranking handle broke loose and petitioner went down hard on pea gravel that was on top of concrete. Petitioner claims he injured his right knee, right hip, right elbow and right shoulder. He denied that he ever had pain like this before the injury. Petitioner got up on his own and got into his cab and called the office and spoke with Travis Shumate. He gave a consistent history of the accident. Petitioner returned to the truck depot in Champaign, IL. Petitioner did not seek any treatment because he was concerned he could lose his job with respondent, since it had happened to others who worked there who were unable to drive a truck after they were injured. He testified that he tried to walk it off.

Petitioner continued working his regular job for respondent. He testified that he was able to kneel. He testified that he would take some Tylenol and Advil for his pain. He also took prescription medication that was prescribed for his preexisiting arthritis. He stated that these medications would relieve his pain. Petitioner testified that his pain level depended on how often he climbed in and out of the truck and trailer, and how much walking he had to do. Petitioner testified that the pain in his right knee decreased between 6/22/17 and his subsequent alleged injury on 7/18/17. Between 6/22/17 and 7/18/17 petitioner sought no treatment for his right knee.

On 7/18/17 petitioner alleges he sustained another injury to his right knee that arose out of and in the course of his employment by respondent. On this day, petitioner picked up his trailer and went to a warehouse in Chicago, IL. He had no trouble getting there. When petitioner got to the warehouse rail yard he backed into an assigned door. Petitioner then got out of his truck to slide the tandems all the way to the back. While doing this petitioner had difficulty releasing the air switch which was a push/pull switch. Petitioner testified that he was on his right knee trying to reach the air switch. Petitioner used normal pressure and two fingers to release the air switch. Petitioner then released the tandems. Petitioner testified that he had pain in his right knee at the time he was on his right knee trying to get the air switch to release. He rated his pain at a 5/10. After releasing the air switch petitioner got up off his right knee and walked about 43 feet to the cab of the truck. Petitioner got in the cab and waited until the truck was unloaded. He was the given some paperwork and pulled out about 10 feet from the dock. Petitioner got out of the cab and closed the back doors. He then had to slide the tandems forward. To do this petitioner walked to the front of the trailer tandems and again got on his right knee to pull out the air switch. After he did this he stood up. He testified that he had some pain in his right knee. Petitioner then turned to walk back to the cab. He testified that after taking 2 steps, or going five feet, he heard a pop in his right knee and leaned against the trailer on his right shoulder. He testified that he never experienced pain like this before. Petitioner stated that he then limped back to the cab which was 40 feet away.

After petitioner got in the cab he called Travis Shumate and reported the injury. He testified that he did not seek treatment right away because he wanted to finish his run. Petitioner then drove to Waukegan to complete his daily run. After he completed his tasks in Waukegan he returned to the depot in Champaign, IL. He testified that once there a co-worker got him his pickup and he drove home. Once home his wife took him to Carle Urgent Care.

On 7/18/17 petitioner presented to Carle Urgent Care at 2:40 pm for a right knee injury. Petitioner gave a history of being in Chicago that morning and was walking on a flat surface and felt/heard a pop in his right knee which took him to the ground. He stated that he managed to drive himself home in the large truck, but since then has had extreme difficulty bearing weight and has felt a constant throbbing/aching to the lateral right knee with occasional knife-like pains. Petitioner noted that he fell during work about a month ago as he was cranking a trailer, and then the crank gave way causing him to fall on his knees, right knee injured greater than left. He stated that he did file an accident report at that time, but did not need to see a doctor, and ultimately felt as though it got better. He stated that he had not taken any over the counter medications for relief, but takes nabumetone daily for "arthritic pain". Petitioner was examined and assessed with acute pain of the right knee. Petitioner was released to modified work as of 7/19/17. He was referred to Occupational Medicine on 7/20/17.

On 7/18/17 petitioner underwent an x-ray of his right knee. He gave a history that he felt a right lateroanterior knee pop that day while working as a truck driver when walking outside his cab. He noted that there was no fall. He also noted that he fell at work a month ago and had pain in his anterior knee. The images revealed a partially included IM rod in the tibia with proximal locking screw; suprapatellar bursal fluid of increased density, possibly indicative of soft tissue injury; and mild degenerative changes in the knee.

After being seen at Carle Urgent Care he completed his Form 45. Petitioner alleged an injury to his right knee at 7:30 am on 7/18/17. He reported that he was walking from the rear of the trailer to the cab of the truck. He reported that that accident occurred while he was just walking on smooth surface and felt a pop in his right knee. He indicated that he was treated at urgent care.

On 7/20/17 petitioner presented to Carle Occupational Med and was seen by Dr. Desalvio, D.O. He gave a history that he just dropped off a load in Chicago on 7/18/17, and he was walking next to his truck when his right knee suddenly popped, causing him to experience extreme pain, and almost causing him to fall to the ground. The petitioner stated that the surface he was walking on was smooth, and there was nothing that he was walking on that caused him to trip or fall. He reported that he managed to get back into his truck and return to this area. Petitioner also reported the injury on 6/22/17. It was noted that he did have a fall and scuffed up both his knees. He did not seek treatment and felt that he had recovered fairly well from that fall. Dr. DeSalvio was unclear how the injury on 6/22/17 tied into the injury on 7/18/17 at that time, but was of the opinion it could have contributed to the incident on 7/18/17. He was examined and assessed with internal derangement of the right knee. An MRI of the right knee was ordered. Dr. Desalvio took petitioner off work.

On 7/26/17 petitioner gave a recorded statement to Melissa Williams. The conversation was recorded and another person transcribed it. Williams asked petitioner about the injury on 7/18/17. Petitioner reported that he was a truck driver who takes full tractor trailers to commercial locations and the haul is unloaded for him. Petitioner stated that when he goes to the yard each day he gets the tractor hooked up to the trailer, cranks the legs up and does his pretrip inspection, and the whole nine yards. Petitioner reported that he got to the location and checked in, backed into dock, got unloaded, and pulled out of the dock to close the doors, and backed in because the trailer was too close. Petitioner stated that he closed the doors and had to slide his tandems. He stated that he had a switch in front of him on the driver's side tandems on the frame, and he had to kind of kneel down to get the air switch, which was low. Petitioner reported that he popped the switch and got back up and started to walk. He noted that the trailer was 53 feet. He stated that he got about halfway up the trailer, heard a pop, and about went down. He stated that he was talking about his right knee. He reported that when he kneeled down to get to the air switch, he kneeled on his right knee. He later stated that he started on his left knee and then his right knee and when he got about halfway to the cab he heard a pop and leaned against the trailer. He stated that he thought what

the hell am I going to do next, because he still had 250 miles to drive. He stated that he was at I-55 and I-294 in Chicago.

Petitioner stated that when he got to Waukegan and got out of the cab and started to move he did not think he was going to make it into the office where he had to check in. He stated that he took 5 minutes to walk 30 feet. He stated that it was hurting bad, and swelled up a bit, but not much. Petitioner stated that he had a 5th wheel puller that he kind of used as a cane. Petitioner reported that when he got in the office to check-in he told the guy that normally he is there 30-40 times. He stated that they put him down on a dock that is about 300 feet from the door. He stated that he could not walk back up here, so he got down there and backed into the dock and they loaded him. Petitioner then told her he went back to the office and they handed him the paperwork. After that he reported that he still had to get out of the truck and walk/hobble to the back end of the trailer. He stated that that was at about 10:00 am and he got back to Champaign around 1:00 pm. After that he went to Urgent Care. Petitioner reported that he called Travis when he was in Hosgrove. He stated that he told him he could go to the ER or hospital there, but it was not that bad. Petitioner reported that when he knelt down he did not feel any pain. Then he stated that there is always a little pain when he kneels. He stated that he has tried not to kneel very much, and does not even kneel in church because where the rod comes to his knee, it hooks on the bone. He stated that it's all grown over and everything now, but it just doesn't feel right. He stated that it does not feel right cause it hurts. He stated that he has tried not kneel, but he has to kneel on his right knee when he does the air switch. He stated that he kneeled on asphalt. He rated his pain at a 6-7/10. Petitioner then proceeded to give a history of his treatment to date.

On 8/1/17 Melissa Williams, SCLA, Branch Claims Representative, Auto-Owners Insurance, drafted a letter to petitioner regarding his injury on 7/18/17. In the letter Williams stated that she had reviewed the facts surrounding the incident on 7/18/17 and found that her investigation supported that the accident and injuries did not arise out of his employment with respondent. She informed petitioner that he was not eligible for benefits pursuant to the Illinois Worker's Compensation Act.

On 8/2/17 petitioner presented to Christie Clinic for his right knee pain. He gave a history of a fall 6 weeks ago. He reported "he fell at work if he was working on some equipment suddenly equaling gave out and patient fell to the right side especially on knee and the shoulder and elbow. At that time he did notify the employer but he seemed okay. Subsequently while walking he had a sudden pop in the left knee and now has increased fluid in this area." Petitioner was examined and assessed with a subsequent right knee injury. An MRI of the right knee was again ordered.

On 8/17/17 petitioner filed his Application of Adjustment of Claim for case 17 WC 23953. He alleged an injury on 6/22/17 to his right knee and leg, right elbow, right hip, arm and shoulder. That same day petitioner filed his Application for Adjustment of Claim for case 17 WC 23954. He alleged an injury on 7/18/17 to his right leg and knee.

On 8/23/17 presented to Christie Clinic for his right knee pain. Petitioner was unable to walk and was using crutches when out. Petitioner stated that his pain varies, with most days being bad. Petitioner reported that he wanted to see Dr. Li. Petitioner was examined and assessed with a subsequent encounter of a right knee injury. An MRI was ordered and he was referred to orthopedics. He was given home exercises.

On 8/31/17 petitioner presented to Dr. Li. Petitioner gave a history of an injury to his right knee on 6/22/17 while cranking up trailer dolly legs and the cranking handle slipped out of lock position. This caused petitioner to fall on his right side landing on his right hip, knee, elbow, and shoulder. He reported that he had ongoing pain in his right knee but was still able to work until 7/18/17 when he was getting up from having worked on something on the outside of his truck and twisted his right knee. He told Dr. Li that he felt a pop and then could not walk. Dr. Li noted that x-rays showed mild narrowing of the medial and patellofemoral joint of the right knee. Dr. Li assessed a right knee medial meniscus tear from a twisting injury that occurred at work. He opined that the two injuries he suffered on 6/22/17 and 7/18/17 are the cause of his current knee condition and need for treatment. Dr. Li recommended an MRI of the right knee.

On 9/1/17 petitioner underwent an MRI of the right knee. The results were radial tear/partial maceration of the posterior horn and posterior root ligament of the medial meniscus with developing medial extrusion of the body; multifocal tear of a discoid lateral meniscus; degenerative joint disease with high-grade chondral loss along the medial femoral condyle in the medial compartment; and mild to moderate subchondral bone marrow edema in the medial femoral condyle.

On 9/1/17 petitioner returned to Dr. Li. Dr. Li noted a Clinical Change from Last Visit. He noted that petitioner was a truck driver who had two dates of injuries. He noted that petitioner had an injury originally on 6/22/17 when he was cranking up trailer dolly legs and the cranking handle slipped out of a locked position. He noted that petitioner fell on his right side landing on his right hip, knee, elbow, and shoulder. He noted that petitioner had continued pain in his right knee but was still able to work, but then on 7/18/17 while petitioner was getting up from having worked on something on the outside of his truck he twisted his right knee. He noted that petitioner then felt a pop and then could not walk. Dr. Li examined petitioner, reviewed the MRI, and assessed a right knee posterior horn medial meniscus tear and horizontal tear of the lateral meniscus. Dr. Li recommended a right arthroscopic knee surgery. He released petitioner to sedentary work.

On 9/29/17 petitioner returned to Dr. Li for follow-up of his right knee. Dr. Li updated petitioner's prior history. He noted that between 6/22/17 and 7/18/17 petitioner had continued pain in his right knee, iced his knee, and took ibuprofen hoping it would improve. He also noted that petitioner told him that he took it easy in regards to his right knee, and the severity of the pain in his right knee had decreased, but was not gone. Dr. Li also updated petitioner's history of the alleged injury on 7/22/17. He noted that petitioner told him he had been kneeling on his right knee to assess the air buttons to slide the tandems back forward, after which he got up, took a few steps and then had severe pain in his right knee and could not walk. He noted that petitioner has had severe pain since then that has been unrelenting. Petitioner reported that his pain was worse than at his last visit. Dr. Li assessed right knee medial and lateral meniscus tears from a work injury on 6/22/17. He opined that petitioner tore his medial and lateral meniscus on 6/22/17 due to his pain ever since 6/22/17. He was of the opinion that when petitioner got up to walk on 7/18/17 after kneeling on his right knee, that is when the pain became much worse, although the knee pain was not as severe as around 7/18/17 as it was around 6/22/17. He was of the opinion that when petitioner started to walk a few steps on 7/18/17, after kneeling on his right knee, that is when his pain became much worse. He opined that since petitioner had continued pain since 6/22/17, some days better than others, and never had a day without any pain, that the original injury on 6/22/17, is the cause of his current knee condition and need for treatment.

On 10/27/17 Dr. Li restricted petitioner to limit lifting, pushing and pulling to 10 pounds.

On 11/27/17 petitioner underwent a Section 12 examination performed by Dr. John Krause, an orthopedic surgeon, at the request of the respondent. Petitioner gave a history of working as a truck driver for respondent on 6/22/17 and had just dropped off one load and hooked up another. Petitioner then went to crank the handle of the trailer and the crank was broken. As he pushed hard on the crank facing the back part of the truck, the crank gave way and he fell forward onto the concrete and hit his right knee, right elbow, and right shoulder. He stated that he suffered an abrasion to his right leg and shin and had some bleeding. Petitioner reported that he was able to ambulate, reported his injury, and was able to keep working. He stated that he took Advil for pain. Petitioner also gave a history of a second injury on 7/18/17. He reported that he backed his truck into unload the trailer. He noted that he was kneeling down on his right knee to push the release. Then he got up from the kneeling position, and as he turned and walked he felt a pop in his right knee. He stated that he had difficulty ambulating, but was able to get in his truck and drive back to Champaign from Chicago. Petitioner stated that he was seen later that day complaining of right knee pain at Convenient Care in Champaign where both injuries were documented, but the 2nd injury was reported as petitioner was walking on a flat surface and heard a pop in his knee. Dr. Krause noted that the record included no mention of petitioner kneeling down to finger a release, or a stand and pivot. Dr. Krause also noted that when petitioner saw Dr. Desalvio on 7/20/17 he described that petitioner was walking next

to his truck when he felt a sudden pop in his knee. Dr. Krause noted that Dr. Desalvio did not describe a kneeling to finger the release. Dr. Krause noted that Dr. Desalvio noted diffuse swelling and effusion in the right knee with medial and lateral joint line tenderness. Dr. Krause also reviewed the records of Dr. Schuchart and Dr. Li. Dr. Krause noted that the accident history in Dr. Li's records date 8/31/17 regarding the injury on 7/18/17 was the most consistent with the history petitioner provided him.

Dr. Krause examined petitioner and performed a record review which included petitioner's x-rays and MRI of the right knee. Following his examination and record review, Dr. Krause assessed a right knee contusion dated 6/22/17, resolved; right knee sprain with likely medial meniscus tear dated 7/18/17; right knee degenerative joint disease, preexisting; and discoid right lateral meniscus, cannot rule out tear. Despite the inconsistencies in the medical record, based on petitioner's history and records, Dr. Krause opined that petitioner's current right knee symptoms and need for treatment are causally related to the injury dated 7/18/17. He opined that petitioner's current right knee symptoms are not causally related to the injury dated 6/22/17. Dr. Krause noted that he disagreed with Dr. Li regarding which injury caused his current symptoms. Dr. Krause was of the opinion that standing from a squatting position and turning is much more likely to cause a meniscal tear than the contusion from 6/22/17. He opined that the injury on 7/18/17 is the prevailing factor in the petitioner's current right medial meniscus tear and need for surgery. Dr. Krause opined that petitioner's treatment to date was reasonable, and the surgery recommended was not unreasonable based on the clinical findings and MRI findings. He stated that if he was treating petitioner he would consider a corticosteroid injection prior to surgery, since this could make his symptoms significantly better. Dr. Krause was of the opinion that the treatment provided petitioner is causally related to the injury on 7/18/17, and that the injury dated 7/18/17 is causally related to the need for the surgery recommended by Dr. Li. Dr. Krause saw no symptom magnification, but noted that there are inconsistencies in the records describing the second injury. He noted that the records from Convenient Care, Dr. Desalvio, and Dr. Schuchart did not describe the squatting underneath the truck to use his fingers to release the structure, or the getting up from a squatting position and turning in which the petitioner had pain. The records only contained a history of walking straight forward and having pain. Dr. Krause was of the opinion that these were the main inconsistencies in the medical records. Dr. Krause was of the opinion that petitioner could perform sedentary work with intermittent standing of 30 minutes per hour, without climbing or heavy lifting. He related these restrictions to the injury on 7/18/17.

On 2/18/18 Dr. Li drafted a letter to "To Whom it May Concern". Dr. Li opined that petitioner needed surgery for his medial lateral meniscus tear due to his accident on 6/22/17 primarily, and 7/18/17. Dr. Li gave petitioner restrictions of lifting, pushing and pulling of 10 pounds.

Petitioner testified that the current pain level in his right knee is 5-9/10, depending on the weather. He testified that he takes Tylenol, and arthritis medicine that he had taken before the injuries. Petitioner stated that he only took the pain meds Dr. Li prescribed for 4 months because he does not like to take pain meds.

On cross examination petitioner testified that he always had right knee pain prior to the injury on 6/22/17, but the degree of pain varied. Petitioner testified that he was concerned about having an injury while working for respondent because if he loses his CDL due to medical reasons he would become ineligible to work for respondent. Petitioner testified that he is currently working for respondent even though he cannot drive a truck. Petitioner testified that he always has pain when kneeling on his right knee. Petitioner testified that on 7/18/17 he stood up from releasing the air switch, walked 2 steps and then heard a pop in his right leg. He stated that he had normal pain in his knee when he got up, and it was not until after he walked 2 steps, that he felt pain in his right knee. He agreed that there were no potholes, snow, ice, rain or defect in the asphalt where his right knee popped. He also testified that he was not carrying anything, or rushing.

On redirect examination petitioner testified that he did fill out some forms at the Clinic. He stated that he did not type the reports, nor was he asked to review them. Petitioner testified that prior to the injuries he always had pain in his knee below the knee cap. He further testified that after the accident on 6/22/17 he still had that same pain, and pain to the left and right of the middle of the knee cap. He testified that after the injury on 7/18/17 he had the same pain.

On recross examination petitioner testified that the pain on 7/18/17 was in the exact same spot as it was on 6/22/17.

Travis Schumate, Terminal Manager for respondent, was called as a witness on behalf of respondent. Schumate testified that he has been with respondent in this position for 5 years. He testified that his duties included work place injuries. Schumate stated that he had supervisory authority over petitioner. He also testified that he had a friendly relationship with petitioner that included going by each other's families, and going to a few NASCAR races together. Schumate testified that he saw petitioner 4 days a week. Schumate testified that petitioner called him on 6/22/17 and provided a consistent history of the accident and reported a little knee pain. He stated that petitioner told him he did not want to see a doctor. Schumate also stated that petitioner called him on 7/18/17 and told him while he was walking his right knee popped out. Schumate testified that between 6/22/17 and 7/18/17 he saw petitioner walking, and petitioner never complained of right knee pain or asked for any treatment. Schumate testified that prior to 6/22/17 petitioner walked with a little limp, and he noticed no difference in petitioner's walking between 6/22/17 and 7/18/17. Schumate testified that petitioner never lost time between 6/22/17 and 7/18/17. He further stated that respondent is currently accommodating petitioner's

restrictions. Schumate testified that he has flipped the air switch before and he would bend over to flip the switch, but not kneel.

On cross examination Schumate testified that although he did not recall petitioner telling him his right knee hurt between 6/22/17 and 7/18/17 he could state with absolute certainty that he didn't, but he does not recall such a conversation. Schumate testified that he finds petitioner to be truthful. Schumate testified that he does not find flipping switches awkward, but he is in his 30s.

Melissa Williams, Claim Adjustor with Auto Owners Insurance, was called as a witness on behalf of respondent. Williams handles work comp claims, investigates claims, talks to employers and injured workers, gets medical records, and makes decisions on compensability and treatment. Williams got petitioner's claim for the 7/18/17 injury on 7/26/17 and performed the investigation. Williams got a claim history from petitioner. Williams testified that she took a recorded statement from respondent because of the fall and what was on the Form 45 for the injury on 7/18/17. Williams testified that she listened to the recording of the recorded statement and reviewed the written statement and found the transcript consistent with her recollection of the recording.

On cross examination Williams testified that she compared the transcript to the audio recording and it was not 100% verbatim due to interruption time. She further testified that she found it accurate as to the accident description of what happened on 7/18/17. She testified that she never asked petitioner how he felt everyday between 6/22/17 through 7/18/17.

The respondent offered into evidence the audio tape of the recorded statement that Williams took of petitioner on 7/26/17. The audio tape is consistent with the recorded statement. During his recorded statement, 4 days after the injury petitioner made the following statements:

> "I was got to the location got checked in, backed into the dock. Got unloaded pulled out of the dock. Had to pull out of the dock to close the doors and to back in to because the trailers too close. Just have to do that and closed the doors and I had to slide my tandems and had a switch which is in front of the driver's side tandems on the frame I had to kinda kneel down to get the switch cause its low. I popped the switch and got back up and started to walk. It's a 53 foot trailer so I got about half way up the trailer and I heard a pop and about went down."
>
> "Once I got up. There's always a little pain when I kneel. I mean it's just; I've tried not to kneel very much. I don't even kneel in church because where that rod comes to my knee hooks on the bone it's all grown over and everything now but it just feels. I doesn't feel right cause it hurts. I've tried not to kneel but I have to kneel on that when I do the air switch."

Petitioner sustained an accidental injury to his right leg on 1/20/05. This case was filed with the Illinois Worker's Compensation Commission and given case number 06 WC 54853. An Arbitration Hearing was had on 9/24/14. For this injury petitioner sustained a diaphyseal fracture of the right tibia. Dr. Packard, an orthopedic

surgeon underwent a surgery consisting of open reduction and internal fixation of the tibial fracture with an intramedullary nail. Postoperatively petitioner underwent physical therapy. On 8/16/15 Dr. Dols, an orthopedic surgeon, associated with Dr. Packard, saw petitioner. Petitioner reported that he had refrained from jumping down from the cab; avoided kneeling; and stated that he could no longer run or squat. Dr. Dols was of the opinion that petitioner had to curb some of his normal activities, but that over time, petitioner might be able to ease back into them. Dr. Dols was of the opinion that whether or not petitioner would be able to resume all his normal activities remained to be seen. The arbitrator awarded petitioner 35% loss of use of the right leg. The Arbitrator's Decision dated 10/24/14 was not appealed.

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?

On 1/20/05 petitioner sustained an injury to his right leg that resulted in a diaphyseal fracture of the right tibia. For this he underwent a surgery consisting of an open reduction and internal fixation of the tibial fracture with an intramedullary nail. Following this injury, but prior to 6/22/17, petitioner reported pain on and off in his right knee when he would kneel, but it was not always in the same spot on the right knee. Then on cross-examination he testified that he always had right knee pain prior to the injury on 6/22/17, but the degree of pain varied. Then when he was under redirect examination, petitioner again stated that prior to 6/22/17 he always had pain in his right knee below the knee cap. Petitioner, in his recorded statement to Williams, stated that "there's always a little pain when I kneel. I mean it's just; I've tried not to kneel very much. I don't even kneel in church because where the rod comes to my knee hooks on the bone it's all grown over and everything now but it just feels. I doesn't feel right cause it hurts. I've tried not to kneel but I have to kneel on that when I do the air switch."

It is unrebutted that petitioner sustained an accidental injury to his right knee that arose out of and in the course of his employment by respondent on 6/22/17. Following that accident petitioner received no treatment for his right knee injury. Petitioner continued working without incident until the alleged injury on 7/18/17. He testified that between 6/22/17 and 7/18/17 he sought no treatment for his right knee, and that the pain in his right knee actually decreased between 6/22/17 and the alleged injury on 7/18/17. Petitioner reported to Dr. Desalvio that when he fell on 6/22/17 he scuffed both his knees, and did not seek treatment because he felt he recovered fairly well from that fall. When petitioner was examined by Dr. Krause he reported that he sustained an abrasion to his right leg and shin on 6/22/17. Dr. Krause diagnosed petitioner with a right knee contusion that had resolved.

Petitioner also alleges another injury to his right knee on 7/18/17, which is the basis of this claim. The primary issue with respect to this alleged injury is the accident history, which is not consistent throughout the record.

Listed below are the various accident histories petitioner provided, and the dates on which they were provided prior to the time his claim being denied, he secured counsel, and he filed his Application of Adjustment Claim for this alleged accident:

- On 7/18/17 Schumate reported that petitioner called him and told him that while he was walking his right knee popped out.
- On 7/18/17 petitioner reported to Carle Urgent Care and gave a history of walking on a flat surface and felt/heard a pop in his right knee.
- On 7/18/17 he underwent an x-ray and the technician reported a history of petitioner feeling right lateroanterior knee pop that day while working as a truck driver when walking outside his cab.
- On 7/18/17 petitioner completed a Form 45 and reported that the accident occurred while he was just walking on smooth service (sic) and felt a pop in a right knee.
- On 7/20/18 petitioner gave Dr. Desalvio a history of walking next to his truck when his right knee suddenly popped, causing him to experience extreme pain and almost causing him to fall to the ground. He reported that the surface he was walking on was smooth, and there was nothing that he was walking on that caused him to trip or fall.
- On 7/26/17 petitioner gave a recorded statement to Williams. He stated that he had to kinda kneel down to get the switch and pop the switch. Once he popped the switch he got back up and started to walk. He stated that he got about halfway up the 53 foot trailer and then heard of pop in his right knee. Petitioner also reported that when he knelt down to pull the switch he did not feel any pain. He then stated that he always has a little pain when he kneels. He stated that he tries not to kneel very much, and does not even kneel in church because of where the rod comes to his right knee and hooks on the bone.
- On 8/2/17 at Christie Clinic his history included that while he was walking he had a sudden pop in his right knee.

By 8/17/17, petitioner had secured counsel and filed his Application for Adjustment of Claim. Listed below are the accident histories petitioner provided after this date:

- On 8/31/17 petitioner presented to Dr. Li. He reported that when he was getting up from having worked on something on the outside of his truck he twisted his right knee. He reported that he felt a pop and could not walk.
- On 9/22/17 Dr. Li updated petitioner's accident history. He noted that petitioner told him he was kneeling on his right knee to assess the air buttons to slide the tandems back forward, after which he got up, took a few steps and then had severe pain in his right knee and could not walk.
- On 11/27/17 petitioner presented to Dr. Krause. He reported that he was kneeling down on his right knee to push the release. He then reported that he got up from the kneeling position and as he turned and walked he felt a pop in his right knee.
- On 5/9/18 petitioner testified at trial. He testified that he was on his right knee and released the air switch. He testified that after releasing the air switch he stood up. He testified that he had some pain in his right knee. He testified that he then turned to walk back to the cab, and after taking 2 steps, or going 5 feet, he heard a pop in his right knee.
- On 5/9/18 on cross examination petitioner testified that he always had pain in his right knee prior to 6/22/17, but the degree of pain varied. He also testified that he always has

pain when he kneels on his right knee. Petitioner gave the same accident history he gave on direct examination, but also admitted that when he got up off his right knee after releasing the air switch he had "normal pain" in his right knee. He testified that there were no potholes, snow, ice, rain, or defect in the asphalt where his right knee popped.

- On 5/9/18 on redirect examination he testified that prior to the injuries he always had pain in his right knee below the knee cap, and after the accident on 6/22/17 he still had that pain and pain to the left and right of the middle of the kneecap, and after the accident on 7/18/17 he had the same pain.
- On 5/9/18 on recross examination petitioner testified that pain on 7/18/17 was in the exact same spot as it was on the 6/22/17.

Based on these multiple accident histories, the arbitrator finds the accident histories most contemporaneous to the alleged injury on 7/18/17, and before he secured counsel and filed his Application of Adjustment of Claim on 8/17/17, were the most consistent and credible. These accident histories provided a history where petitioner, after getting up off his right knee on 7/18/17 after releasing the air switch, walked halfway to the cab of his truck, about 25 feet, before experiencing a sudden pop in his right knee. The arbitrator also finds it significant that after petitioner got up off his right knee, after releasing the air switch, he only had "normal pain" which he had had prior to 6/22/17. This "normal pain" was related to an injury he had in 2005 where he had a rod placed in his right leg from his ankle to his knee and he stated that because of where the rod comes to his knee and hooks on the bone it doesn't feel right and hurts.

The arbitrator finds the accident histories petitioner provided after 8/17/17 to be not only inconsistent with those most contemporaneous to the injury, but were inconsistent with each other. First, on 8/31/17 petitioner told Dr. Li that that when he was getting up from having worked on something on the outside of his truck he twisted his right knee and felt a pop. Then on 9/22/17 Dr. Li updated petitioner's accident history to state the petitioner told him he was kneeling on his right knee to assess the air buttons to slide the tandems back forward, after which he got up, took a few steps and then had severe pain in his right knee. The arbitrator notes that these two histories are not consistent with each other, or consistent with those prior to the filing of his Application for Adjustment of Claim. About two months later on 11/27/17, petitioner presented to Dr. Krause and reported that he was kneeling down on his right knee to push the release, and as he got up from the kneeling position, and turned and walked, he felt a pop in his right knee. Again, the arbitrator finds this history inconsistent with the histories most contemporaneous to the accident and prior to his Application for Adjustment of Claim being filed.

The arbitrator also finds it significant that the accident histories petitioner provided on direct examination at trial were different from those provided both before and after he filed his Application for Adjustment of Claim. At trial petitioner testified that after releasing the air switch he stood up, and had some pain in his right knee. He further testified that as he turned to walk back to the cab, and after taking 2 steps, or going 5 feet, he heard a pop in his right knee.

Based on the above, as well as the credible evidence, the arbitrator finds the accident histories petitioner provided most contemporaneous to the alleged injury to be the most credible, and far more persuasive than those inconsistent histories provided after the Application for Adjustment of Claim was filed, and those provided at trial.

Given that the petitioner has testified that he always had pain in his right knee when he kneeled since the rod was placed in his right leg in 2005; that when he got up from kneeling after releasing the air switch on 7/18/17 that the pain in his right knee was the same as it always was when he got up from kneeling; that prior to the Application of Adjustment of Claim being filed on 8/17/17, petitioner consistently testified that his right knee did not pop until he had gotten up and he had walked 1/2 way from the back of the trailer to the cab (about 25 feet) on a smooth surface without any defects or debris, the arbitrator finds the petitioner was at no greater risk than the general public when his right knee popped while he was simply walking on a smooth surface without debris or defect, and while he was not carrying anything. For these reasons, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his right knee that arose out of and in the course of his employment by respondent on 7/18/17.

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. IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE?
L. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

Having found the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his right knee that arose out of and in the course of his employment by respondent on 7/18/17, 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

Ferdinaze Hajrullahu,
Petitioner,

vs.

NO: 04WC 19313

CDW,
Respondent,

18IWCC0617

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, notice, medical, causation, temporary total disability, permanent total disability, vocational rehabilitation, 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 27, 2017 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

OCT 2 2 2018

DATED:

Charles J. DeVriendt

Joshua D. Luskin

L. Elizabeth Coppoletti

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CJD/rlc
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HAJRULLAHU, FERDINAZE
Employee/Petitioner

Case# **04WC019313**

04WC039980
06WC048515
06WC048516

CDW
Employer/Respondent

18IWCC0617

On 2/27/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.67% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4788 HETHERINGTON KARPEL BOBBER
PETER C BOBBER
120 N LASALLE ST SUITE 2810
CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
ELIZABETH C VICARS
140 S DEARBORN ST 7TH FL
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

18IWCC0617

- [ ] 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

Ferdinaze Hajrullahu
Employee/Petitioner

v.

CDW
Employer/Respondent

Case # **04 WC 19313**

Consolidated cases: 04 WC 39980; 06 WC 48515; 06 WC 48516

An *Application for Adjustment 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 **Chicago, Illinois** on **12/13/2016 and 12/22/2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On December 18, 2003, 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 $22,131.20; the average weekly wage was $425.60 .

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* 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 $8,182.51 under Section 8(j) of the Act.

ORDER

Having found that Petitioner failed to prove that she provided timely notice of accident on December 18, 2003, her 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

2/24/17
Date

FEB 27 2017

FINDINGS OF FACT:

See case 03 WC 34786 for a recitation of the facts.

In support of the Arbitrator's decision relating to (E), WAS TIMELY NOTICE GIVEN TO THE RESPONDENT, the Arbitrator finds the following:

Petitioner testified that on December 18, 2003, she was working packing boxes and getting boxes onto a conveyor belt when she experienced further low back pain and as well as neck pain. Petitioner stated that she informed a supervisor named "Scott" of her back and neck pain. She completed work and returned to Dr. Vidovic the following day.

On December 19, 2003, Dr. Vidovic recorded that Petitioner presented with worsening back pain with neck pain for a week. Dr. Vidovic ordered a cervical MRI; referred Petitioner to Dr. Gleason; and took Petitioner off work.

Petitioner presented to Dr. Gleason on December 23, 2003 with complaints of low back pain as well as tingling and numbness into the left first and second toes. Dr. Gleason noted that her symptoms had been present since May 2003, when she felt pain after removing a 40 pound box from a shelf. Dr. Gleason also noted Petitioner had cervical and left arm complaints which she originally stated "...started 1 month ago and then tried to say it was part of a work injury."

The alleged work accident took place on December 18, 2003. Although Petitioner stated that she informed a supervisor named "Scott" of her back and neck pain she also testified that she never filled out any documentation or Safety Incident Report for a December 18, 2003 work accident. The Arbitrator notes Petitioner had a previous work accident on May 28, 2003 in which she knew to report it within 45 days.

Petitioner's testimony is buttressed by the testimony of Ms. Jennifer Vega, Senior Benefits Manager at Respondent. Ms. Vega testified that she reviewed the entirety of Petitioner's personnel file. Ms. Vega testified that no safety incident report was prepared for a December 18, 2003 date of accident.

After considering the totality of the evidence, the Arbitrator finds that Petitioner failed to satisfy her burden of proof that she provided notice of the alleged accident to Respondent within 45 days as required pursuant to Section 6 of the Act.

All remaining issues are rendered 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

Ferdinaze Hajrullahu,
Petitioner,

vs.

NO: 04WC 39980
18IWCC0618

CDW,
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, notice, medical, causation, temporary total disability, permanent total disability, vocational rehabilitation, 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 27, 2017 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 22 2018

Charles J. DeVriendt

Joshua D. Luskin

L. Elizabeth Coppoletti

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CJD/rlc
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HAJRULLAHU, FERDINAZE
Employee/Petitioner

Case# **04WC039980**

04WC019313
06WC048515
06WC048516

CDW
Employer/Respondent

18IWCC0618

On 2/27/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.67% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4788 HETHERINGTON KARPEL BOBBER
PETER C BOBBER
120 N LASALLE ST SUITE 2810
CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
ELIZABETH C VICARS
140 S DEARBORN ST 7TH FL
CHICAGO, IL 60603

18IWCC0618

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

Ferdinaze Hajrullahu
Employee/Petitioner

v.

CDW
Employer/Respondent

Case # **04 WC 39980**

Consolidated cases: 04 WC 19313; 06 WC 48515; 06 WC 48516

An *Application for Adjustment 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 Chicago, on **December 13, 2016 and December 22, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On September 26, 2003, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$22,131.20**; the average weekly wage was **$425.60** .

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* 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 **$8,182.51** under Section 8(j) of the Act.

ORDER

Having found that Petitioner failed to prove that she provided timely notice of accident and that her present condition of ill-being is not causally related to the accident sustained on September 26, 2003, her 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

2/24/17
Date

FEB 2 7 2017

ICArbDec p. 2

FINDINGS OF FACT:

See case 03 WC 34786 for a recitation of the facts.

In support of the Arbitrator's Decision regarding (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, the Arbitrator finds the following: ARBITRATOR FINDS AS FOLLOWS:

Petitioner unrebutted testimony was that on September 26, 2003, she was filling a "big order" at work when she noticed her back hurting. Petitioner stated that she spoke to her supervisor, Rudy, and requested permission to go home. She indicated that her request was denied and she continued working. Petitioner stated that her pain continued to increase and she requested an ambulance to take her to the emergency room. Petitioner stated, "...the pain was becoming worse...I couldn't stay any longer. I couldn't handle it any longer." An ambulance arrived and Petitioner was transported to Condell Medical Center.

The Arbitrator notes that although the records from Condell Medical Center show that her chief complaint was back pain that started at work four months ago on May 28, 2003 while lifting. Also noted was that the recent injury occurred while lifting at work.

Based on the above, the Arbitrator finds that Petitioner sustained an accidental injury that arose out of and in the course of her employment with Respondent on September 26, 2003.

In support of the Arbitrator's decision relating to (E), WAS TIMELY NOTICE GIVEN TO THE RESPONDENT, the Arbitrator finds the following:

As noted above, on September 26, 2003, Petitioner was filling a "big order" at work when she noticed her back hurting. Petitioner stated that she spoke to her supervisor, Rudy, and requested permission to go home. She indicated that her request was denied and she continued working. Ultimately, Petitioner requested an ambulance to take her to the emergency room. Petitioner testified that she never filled out any documentation or Safety Incident Report for a September 26, 2003 work accident. Petitioner also testified that she never reported a specific work accident to Rudy and merely stated that she told him she had back pain.

Respondent's witness, Rudy Gonzalo, supervisor at Respondent on September 26, 2003, testified that Petitioner never reported any work injury to him on September 26, 2003. Mr. Gonzalo also testified that Petitioner has never reported any work injury to him during his employment with Respondent.

Respondent's second witness, Ms. Jennifer Vega, Senior Benefits Manager at Respondent testified that she reviewed the entirety of Petitioner's personnel file. Ms. Vega indicated that although the personnel filed contained an Emergency Incident Report prepared by the security staff documenting that Petitioner was taken to Condell Medical Center on September 26, 2003, the personnel file did not contain a Safety Incident Report prepared for a September 26, 2003 accident at work. Ms. Vega testified that this report is different than an Emergency Incident Report. Ms. Vega further testified that the Emergency Incident Report indicated Petitioner complained of low back pain and that she previously injured her back approximately four months prior. The Emergency Incident Report also indicates that the responsible supervisor was not notified. (Also see Resp.2 Ex. 10)

The work accident took place on September 26, 2003. Both Petitioner and Rudy Gonzalo testified that she did not report a specific work incident to an individual in a managerial position at the Respondent. The Arbitrator notes that Petitioner had a previous work accident on May 28, 2003 that she reported within the 45 day requirement.

The Arbitrator does not find it persuasive that defective notice was provided to Respondent. Pursuant to Section 6(c) of the Act, "[n]o defect or inaccuracy of such notice shall be a bar to the maintenance of proceedings on arbitration or otherwise by the employee unless the employer proves that he is unduly prejudiced in such proceedings by such defect or inaccuracy." While Petitioner was taken by ambulance to Condell Medical Center on September 26, 2003 from work, it is evidenced on the CDW Emergency Incident Report dated September 26, 2003 that Petitioner merely reported that approximately four months prior, she had injured her back, but no new September 26, 2003 work incident was reported. (Resp. No.2 Ex. 10).

Based upon the foregoing, the Arbitrator concludes that the Petitioner failed to satisfy her burden of proof that timely notice of the accident was given to Respondent as required under the Act.

In support of the Arbitrator's decision relating to (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, the Arbitrator finds the following:

Based upon the Arbitrator's findings on issue "E", the Arbitrator finds the issue of causal connection moot as Petitioner is not entitled to such benefits under the Act.

Nevertheless, the Arbitrator also finds that Petitioner's current condition of ill-being is not causally related to the work accident of September 26, 2003.

Petitioner had a pre-existing lumbar spine condition that was the result of a May 28, 2003 work accident. Petitioner testified to and the medical records show a long-standing history of chronic pain resulting from a degenerative lumbar spine condition. Petitioner testified that her low back pain pre-existed September 26, 2003. Petitioner confirmed that she was never free of lumbar pain following her work accident on May 28, 2003. Petitioner's testimony and the medical records show she was never discharged from care by her treating physician, Dr. Vidovic, prior to September 26, 2003 and that she was still undergoing ongoing lumbar spine treatment. It is also important to note that on September 16, 2003, just 13 days before the alleged September 26, 2003 work accident, Petitioner underwent an evaluation with Dr. Rafai at Pain Management Center for a four month history of lower back pain and it was recommended that she undergo a lumbar epidural steroid injection. (Pet. Ex. 8)

The record is replete with references that Petitioner's lumbar condition of ill-being was related to her work accident of May 28, 2003. Respondent's Section 12 examiner, Dr. Goldberg on multiple occasions provided that Petitioner's lumbar condition of lumbar spondylothesis with fusion was causally related to only the May 28, 2003 work accident. Dr. Goldberg's IME reports indicate that the only work accident reported by Petitioner was a May 28, 2003 work accident.

Therefore, Petitioner's testimony and medical records support the conclusion that Petitioner's lumbar spine condition is causally related to the pre-existing condition that began on May 28, 2003, and not the work accident occurring on September 26, 2003.

All remaining issues are 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

Ferdinaze Hajrullahu,
Petitioner,

vs.

NO: 06WC 48515

18IWCC0619

CDW,
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, notice, medical, causation, temporary total disability, permanent total disability, vocational rehabilitation, 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 27, 2017 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 2 2 2018

082918
CJD/rlc
049

Charles J. DeVriendt

Joshua D. Luskin

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HAJRULLAHU, FERDINAZE
Employee/Petitioner

Case# **06WC048515**

03WC034786
04WC019313
04WC039980
06WC048516

CDW
Employer/Respondent

18IWCC0619

On 2/27/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.67% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4788 HETHERINGTON KARPEL BOBBER
PETER C BOBBER
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CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
ELIZABETH C VICARS
140 S DEARBORN ST 7TH FL
CHICAGO, IL 60603

18IWCC0619

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

Ferdinaze Hajrullahu
Employee/Petitioner

v.

CDW
Employer/Respondent

Case # **06 WC 48515**

Consolidated cases: 03 WC 34786; 04 WC 19313; 04 WC 39980; 06 WC 48516

An *Application for Adjustment 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 **Chicago, Illinois** on **12/13/2016 and 12/22/2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On August 22, 2005, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner *did 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 $22,131.20; the average weekly wage was $425.60.

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* 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 $8,182.51 under Section 8(j) of the Act.

ORDER

Having found that Petitioner failed to prove that she provided timely notice of accident on August 22, 2005, her 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

2/24/17
Date

FEB 27 2017

ICArbDec p. 2

FINDINGS OF FACT:

See case 03 WC 34786 for a recitation of the facts.

In support of the Arbitrator's decision relating to (E), WAS TIMELY NOTICE GIVEN TO THE RESPONDENT, the Arbitrator finds the following:

Petitioner testified that on August 22, 2005 she was packing and scanning boxes when she experienced increased back pain while at work. Petitioner stated that she did not report the August 22nd occurrence to anyone at Respondent nor did she fill out any documentation regarding an August 22, 2005 accident.

After considering the totality of the evidence, the Arbitrator finds that Petitioner failed to satisfy her burden of proof that she provided notice of the alleged accident to Respondent within 45 days as required pursuant to Section 6 of the Act.

Petitioner admitted in her testimony that she never reported an August 22, 2005 work accident to anyone at her employer. Petitioner testified that she "didn't talk to anyone."

Because Petitioner admitted that she never reported an August 22, 2005 work accident to anyone at her employer, the Arbitrator finds the Respondent had no notice of an August 22, 2005 work accident until the filing of the Petitioner's Application for Adjustment of Claim on November 8, 2006. (Resp.2 Ex.9)

Based upon the foregoing, the Arbitrator finds that Petitioner failed to satisfy her burden of proof that timely notice of the accident was given to Respondent as required under the Act.

All remaining issues are rendered 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

Ferdinaze Hajrullahu,
Petitioner,

vs.

NO: 06WC 48516

18IWCC0620

CDW,
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, notice, medical, causation, temporary total disability, permanent total disability, vocational rehabilitation, 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 27, 2017 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 22 2018

Charles J. DeVriendt

Joshua D. Luskin

L. Elizabeth Coppoletti

082918
CJD/rlc
049

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HAJRULLAHU, FERDINAZE
Employee/Petitioner

Case# **06WC048516**

03WC034786
04WC019313
04WC039980
06WC048515

CDW
Employer/Respondent

18IWCC0620

On 2/27/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.67% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4788 HETHERINGTON KARPEL BOBBER
PETER C BOBBER
120 N LASALLE ST SUITE 2810
CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
ELIZABETH C VICARS
140 S DEARBORN ST 7TH FL
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

18IWCC0620

☐ 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

Ferdinaze Hajrullahu
Employee/Petitioner

v.

CDW
Employer/Respondent

Case # **06 WC 48516**

Consolidated cases: 03 WC 34786; 04 WC 19313; 04 WC 39980; 06 WC 48515

An *Application for Adjustment 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 **Chicago, Illinois** on **12/13/2016 and 12/22/2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On December 5, 2005, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner *did 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 $22,131.20; the average weekly wage was $ 425.60 .

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

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

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

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

Respondent is entitled to a credit of $8,182.51 under Section 8(j) of the Act.

ORDER

Having found that Petitioner failed to prove that she provided timely notice of accident on December 5, 2005, her 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

2/24/17
Date

FEB 27 2017

FINDINGS OF FACT:

See case 03 WC 34786 for a recitation of the facts.

In support of the Arbitrator's decision relating to (E), WAS TIMELY NOTICE GIVEN TO THE RESPONDENT, the Arbitrator finds the following:

Petitioner testified that she returned to restricted work for Respondent. Petitioner testified that she continued working her 4 hour shifts performing scanning of small parts, approximately 4000 per shift. Petitioner indicated that in December 2005 she began experiencing pain in her left hand. Petitioner stated that she advised a supervisor but she couldn't remember who she spoke to.

Petitioner testified that she never filled out any incident report or documentation with her employer regarding a December 2005 date of accident or regarding her hand pain in general.

Petitioner admitted on both direct and cross-examination that she could not remember to whom she reported a left hand injury at the employer. The Arbitrator notes that Petitioner had a previous work accident on May 28, 2003 that she reported within the 45 day requirement.

The Arbitrator also notes that Petitioner reported to Dr. Hoepfner on June 22, 2016 that her left hand pain began in January 2005. Because Petitioner is claiming entitlement to Workers' Compensation Benefits under a repetitive trauma theory, the Arbitrator takes into account the potential delay in reporting a repetitive trauma manifestation date based upon the date that a causal link between the employee's left hand condition and the employee's work would become apparent to a reasonable person. However, because Petitioner reported to Dr. Hoepfner that her left hand pain began in January 2005, the Arbitrator cannot ignore the fact that Petitioner had approximately 12 months prior to the alleged manifestation date of December 5, 2005 to report hand pain to her employer.

Based upon the foregoing, the Arbitrator finds that Petitioner failed to satisfy her burden of proof that timely notice of the accident was given to Respondent as required under the Act.

All remaining issues are rendered 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 LAKE	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☒ PTD/Fatal denied
		☒ Modify down	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

FERDINAZE HAJRULLAHU,
Petitioner,

vs.

NO: 03 WC 34786

CDW,
Respondent.

18IWCC0621

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the Respondent and Petitioner herein and notice provided to all parties, the Commission after considering the issues of causation, temporary total disability benefits, temporary partial disability benefits, permanent disability benefits, medical expenses, and penalties and fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Temporary Partial Disability Benefits

The Commission vacates the award for temporary partial disability benefits. The Illinois Workers' Compensation Act did not allow for such benefits until it was amended by P.A. 94-277 which reflects the amendatory changes apply to accidents occurring on or after February 1, 2006. As Petitioner's work accident occurred on May 28, 2003, she was not eligible for temporary partial disability benefits.

Permanent Disability Benefits

The Commission vacates the award of permanent total disability benefits pursuant to Section 8(f) of the Act and finds Petitioner is entitled to an award of 60% loss of use of the person as a whole pursuant to Section 8(d)2 of the Act.

Both Petitioner and Respondent retained vocational experts, Mr. Edward J. Rascati and Ms. Sharon Babat, respectively. Each provided testimony via evidence deposition. The Commission affords greater weight to the opinions offered by Ms. Sharon Babat, Respondent's vocational expert.

On March 30, 2016, Mr. Rascati testified he is a certified rehabilitation counselor. PX7,

p. 5. Mr. Rascati testified he met with Petitioner on May 19, 2015 and conducted an interview regarding Petitioner's prior educational and vocational history. Mr. Rascati noted Petitioner immigrated to the United States in 1999 and speaks Albanian. PX7, p. 8. Upon arrival in the United States, Petitioner attended three months of ESL classes (English as a second language), but he had no knowledge of any education beyond her high school diploma received in Albania. *Id.* Regarding Petitioner's vocational background, Mr. Rascati understood Petitioner to be a bookkeeper in Albania and upon her arrival in the United States, she obtained employment through Respondent as a picker-packer. PX7, p. 9. Based upon this information, in part, Mr. Rascati determined no stable labor market existed. PX7, p.10. Mr. Rascati testified Petitioner possessed limited transferable skills, and even if placement services were considered, Petitioner would require significant assistance. PX7, p.11.

On cross-examination, Mr. Rascati testified he was unaware of Petitioner's two-year post-high school education. PX7, p. 28. Mr. Rascati did not utilize any independent testing regarding Petitioner's computer skills nor relative to her math and language capabilities. PX7, p. 30. Mr. Rascati acknowledged individual employers might consider a high school diploma from another country. PX7, p. 34.

On July 7, 2016, Ms. Babat testified she is a certified rehabilitation counselor. RX5, p.6. Ms. Babat testified she met with Petitioner on May 21, 2015 and conducted an interview regarding Petitioner's prior educational and vocational history. Ms. Babat testified she was able to communicate with Petitioner in English. RX5, p. 8. Ms. Babat noted Petitioner's basic computer skills in that Petitioner was able to use e-mail, Facebook, and Skype. RX5, p. 12-13. Petitioner also reported she is able to read and write in English, but her primary language is Albanian. RX5, p. 13. Ms. Babat testified Petitioner completed high school in Albania with a three-month course to improve her English skills upon arrival in the United States. RX5, p. 14. In reviewing certain records, Ms. Babat indicated Petitioner obtained two years of post-high school/college education. *Id.* Ms. Babat testified Petitioner reported her vocational history to include her job with Respondent as well as a bookkeeper in Albania from 1984 to 1999. Based on this information, in part, Ms. Babat opined a stable labor market existed and identified some available positions. RX5, p. 20. Ms. Babat testified a labor market survey was subsequently conducted which provided a sampling of possible jobs. RX5, p. 26-27.

On cross-examination, Ms. Babat testified no job placement services were provided to Petitioner. RX5, p. 31. Ms. Babat testified she did not provide the labor market survey to Petitioner. RX5, p. 32. Ms. Babat explained the labor market survey identified 12 jobs which were available and for which Petitioner qualified. RX5, p. 33.

As previously stated, the Commission affords greater weight to the opinions of Ms. Babat over those of Mr. Rascati. Ms. Babat possessed a better understanding of Petitioner's prior educational history as well as vocational history in making her determination that Petitioner has transferable skills affording her access to a stable labor market. Certainly, Petitioner testified she contacted the 12 employers identified in the labor market survey without success, but in contacting the employers, Petitioner testified her attempts only consisted of making phone calls. T. 89-90. She never requested any assistance from her own vocational counselor. *Id.* Further, Ms. Babat testified the labor market survey was not exhaustive but merely representative, and

Petitioner could anticipate obtaining employment at her pre-injury wage rate. RX5, p. 27.

The Commission finds Petitioner's injury precluded her from returning to her usual and customary occupation, but such injury does not result in an impairment of her earning capacity. As such, the Commission awards 60% loss of use of the person as a whole pursuant to Section 8(d)2 of the Act.

Penalties and Fees

The Commission affirms the arbitrator's denial of penalties pursuant to Sections 19(l) and (k) and fees pursuant to Section 16 of the Act. "The employer has the burden of justifying the delay, and the employer's justification for the delay is sufficient only if a reasonable person in the employer's position would have believed that the delay was justified." *Jacobo v. Illinois Workers' Compensation Commission*, 2011 IL App (3d) 100807WC, ¶ 19.

Petitioner underwent an extensive course of medical treatment for both her lumbar and cervical spine, the particulars of which are fully outlined in the Arbitrator's decision. Germane to the present issue, on January 13, 2004 on the referral of Dr. Vidovic, Petitioner was evaluated by Dr. Gleason who reviewed an MRI which demonstrated degenerative disc disease. Dr. Gleason recommended conservative care including over-the-counter medication and a home exercise program as well as a referral to a pain center. PX13. Thereafter on April 14, 2004 again on the referral of Dr. Vidovic, Petitioner was evaluated by Dr. Lazar who concurred with the recommendation of continued conservative treatment including physical therapy but disagreed with the recommendation of injections for pain management. On April 28, 2006, Dr. Lazar re-evaluated Petitioner and found a normal neurological examination and felt Petitioner's problems stemmed from arthritis. PX14.

On May 9, 2007, Dr. Triester evaluated Petitioner at the request of her attorney. Dr. Triester found Petitioner exhibited multiple Waddell findings and diagnosed a lumbar strain which morphed into "chronic pain syndrome." Dr. Triester stated "She has psychiatric/psychological aberrations in that she perceives numerous pain producing problems, yet there is simply no rational objective medical explanation for the severity of her many complaints. Unfortunately, in patients who develop such a 'chronic pain syndrome' the administration of injections (such as epidural steroids) and the use numerous medications serves to further re-enforce the pain syndrome rather than alleviate it." PX18. On November 3, 2008, Petitioner was evaluated by Dr. Goldberg at the request of Respondent. Dr. Goldberg diagnosed degenerative disc disease with lumbar radiculitis caused by Petitioner's injury and recommended an FCE. RX2.

The Respondent acted reasonably and provided an adequate justification for its delay in payment of compensation when it relied on the medical opinions of Drs. Gleason, Lazar and Triester. Certainly, Dr. Goldberg, Respondent's examining expert physician found Petitioner's accident aggravated her underlying degenerative condition which lead to the need for treatment, but Dr. Triester, Petitioner's examining expert physician found the contrary and recommended no additional medical treatment beyond psychological/psychiatric treatment which Petitioner declined to pursue. An expert physician employed by either Petitioner or Respondent is not their agent. *Taylor v. Kohli*, 162 Ill. 2d 91, 642 N.E.2d 467 (1994). Binding a party to its examining physician's opinion is simply not supported by the law. *Kraft General Foods v. Industrial*

18IWCC0621

Commission, 287 Ill. App. 3d 526, 678 N.E.2d 1250 (1997). Therefore, despite Dr. Goldberg's opinion, Respondent was reasonably justified in relying on the differing opinions offered by Drs. Gleason, Lazar, and Triester in its delay of payment of compensation. As the Commission finds Respondent's delay in payment was reasonable, it follows Section 19(l) and (k) penalties and Section 16 attorneys' fees are not applicable.

The Commission, therefore, affirms and adopts the Arbitrator regarding causation, temporary total disability, medical expenses, and the denial of penalties and fees, but modifies the Arbitrator's award of odd-lot permanent total disability to a 60% loss of person as a whole. The Commission further vacates the award of temporary partial disability.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $310.60 per week for a period of 492 2/7 weeks (May 29, 2003 through July 20, 2003; October 7, 2003 through November 2, 2003; December 19, 2003 through January 9, 2005; August 23, 2005 through September 22, 2005; February 21, 2006 through May 14, 2006; July 17, 2006 through July 31, 2006; September 25, 2006 through October 22, 2006; and November 6, 2006 through June 23, 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 $376.66 per week for a period of 300 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 60% loss of person as a whole

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $91,478.05 for medical expenses under §8(a) of the Act, subject to the fee schedule in §8.2 of the Act.

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

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

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 2 2018

Charles J. DeVriendt

Joshua D. Luskin

L. Elizabeth Coppoletti

CJD/dmm
O: 082918
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HAJRULLAHU, FERDINAZE
Employee/Petitioner

Case# **03WC034786**

04WC039980

CDW
Employer/Respondent

18IWCC0621

On 2/27/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.67% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4788 HETHERINGTON KARPEL BOBBER
PETER C BOBBER
120 N LASALLE ST SUITE 2810
CHICAGO, IL 60601

2542 BRYCE DOWNEY & LENKOV LLC
EDWARD JORDAN
200 N LASALLE ST SUITE 2700
CHICAGO, IL 60601

STATE OF ILLINOIS)SS.

COUNTY OF Lake)

18IWCC0621

☐ 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

Ferdinaze Hajrullahu
Employee/Petitioner

v.

CDW
Employer/Respondent

Case # **03** WC **34788**

Consolidated cases: **04WC39980, et al**

An *Application for Adjustment 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 **Chicago, Illinois** on **12/13/2016 and 12/22/2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS 18IWCC0621

On **05/28/2003**, 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 $**24,226.80**; the average weekly wage was $**465.90**.

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 $**4,561.38** for TTD, $**664.60** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**5,226.07**.

Respondent is entitled to a credit of $**8,182.51** under Section 8(j) of the Act. 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.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**310.60**/week for **492-2/7ths** weeks, for periods indicated in the attached Addendum, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent and total disability benefits of $**376.66**/week for life, commencing **June 12, 2014**, as provided in Section 8(f) of the Act.

Respondent shall pay Petitioner temporary partial disability benefits of $**155.30**/week for **64-1/7ths** weeks, for periods indicated in the attached Addendum, as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services of **$91,478.05**, as provided in Sections 8(a) and 8.2 of the Act.

Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund***, as provided in Section 8(g) of the Act.

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

2/24/17
Date

FINDINGS OF FACT:

Petitioner was born on March 14, 1962 and was 41 years old on May 28, 2003. She was born in Kosovo and came to the United State in 1999 as a war refugee. She has been married for 34 years and obtained her U.S. citizenship in 2005.

Petitioner testified that she did not obtain any education in the United States and the highest level of education she completed in Kosovo was high school. After high school, she attended some college classes focusing on preschool education. She did not obtain a certificate or degree as a result of those classes. Petitioner provided that her native language is Albanian. She is able to speak and understand some English although her reading and writing English skills are weak.

Petitioner testified that prior to working for Respondent, she worked in Kosovo as a payroll clerk which involved keeping track of employee's hours and wages. Petitioner stated that she did not utilize a computer to perform this work and instead performed same manually. She held this clerical job from 1981 through 1999.

Petitioner testified that she commenced employment with Respondent on December 6, 1999. She found the job with the assistance of a humanitarian organization that helped bring her and her children to the Chicago area. This organization also assisted with paying her rent, utilities and providing her family food. With regard to the job at CDW, the organization drove Petitioner and others in a van to Respondent's facility where she was hired. She also received assistance filling out the application for the job.

Respondent is a company which provides computers and accessories to its customers. Petitioner provided that she worked as a picker/packer which required her to pick various parts of an order from the warehouse; scan them; pack them into boxes; and then move the completed boxes/orders to a conveyor. She indicated that her job would require lifting up to 70 pounds with individual parts weighting 10-25 pounds. She also had to lift and maneuver empty wooden pallets that weighed "at least 50 pounds."

Petitioner sustained an undisputed accident on May 28, 2003. Petitioner testified that she was performing her regular work when she injured her low back attempting to pull a component from a warehouse shelf. Petitioner stated that she had climbed the shelf framing to reach a part deep on a shelf when she noted sudden pain in her low back while lifting the part and attempting to descend the shelving to the floor.

Petitioner first sought medical treatment for her injuries the following day, May 29, 2003. Then, she saw Dr. Vidovic, her primary care physician at Ravenswood Medical Professional Group. Dr. Vidovic noted Petitioner complained of severe low back pain that started at work when she was lifting heavy packages. Upon examination, Dr. Vidovic noted Petitioner was in significant distress due to back pain which radiated into her left lower extremity. Dr. Vidovic took Petitioner off work and treated the condition conservatively with medication. (Pet. Ex. 8)

On June 5, 2003, Petitioner retuned to the Ravenswood Medical Professional Group where she saw Dr. Powell. Petitioner complained of low back pain with radiation down the left leg. Dr. Powell diagnosed sciatica, prescribed medication, and referred Petitioner to Dr. Abraham of the same medical group. (Pet. Ex. 8)

On June 6, 2003, Petitioner completed a Safety Incident Report. The incident report states that Petitioner experienced back pain after lifting heavy boxes "...up and down the different levels of the picking module." (Resp. Ex. 12)

Dr. Abraham first saw Petitioner on June 17, 2003 at which time he noted a consistent history of accident. Petitioner reported shooting pain from the low back radiating down the left leg. Upon examination, Dr. Abraham recorded positive straight leg raising regarding the left leg. X-rays of the lumbar spine showed no gross pathology. Petitioner was diagnosed with lumbar disc disease and left sciatica. The doctor also ordered a lumbar MRI (Pet. Ex. 8) which when completed on June 18, 2003, showed some facet arthropathy at L5-S1, without disc herniation, central spinal or neuroforaminal stenosis. (Pet. Ex. 8)

Petitioner returned to Dr. Abraham on July 8, 2003. Dr. Abraham noted Petitioner had a set-back with continual with left leg pain. Petitioner also reported that the pain would awaken her at night. Dr. Abraham assessed low back pain acute herniation; L4-L5, L5-S1 disc degeneration. The doctor felt Petitioner could return to work on July 21, 2003 and her pain medications were continued. (Pet. Ex. 8)

Petitioner saw Dr. Vidovic on July 15, 2003 and wanted to return to work. Dr. Vidovic released Petitioner to return to work with restrictions. (Pet. Ex. 8) Petitioner returned to light duty work on July 21, 2003.

Following her return to work, Petitioner returned to Drs. Vidovic and Abraham on August 26, 2003. Petitioner reported that her back pain was unbearable. She also reported that working an eight hour shift exacerbated the pain which started in her low back and radiated into the left leg. Dr. Abraham noted that Petitioner would sleep on the floor due to the pain. Dr. Abraham limited Petitioner to avoid lifting over 25 pounds. The doctor also recommended lumbar epidural steroid injections. (Pet. Ex. 8)

Consistent with Dr. Abraham's referral, Petitioner presented to Dr. Rifai of the Pain Management Center at Advocate – IMMC on September 16, 2003. Dr. Rifai noted a consistent history of the May 28, 2003 work injury. Objectively, he noted positive straight leg raising on the left at 30 degrees as well as decreased strength in the left leg. Dr. Rifai diagnosed lumbar radiculopathy and recommended a series of lumbar epidural steroid injections the first of which he administered that day. (P. Ex. 10, p.1).

Petitioner testified that on September 26, 2003, she was filling a "big order" at work when she noticed her back hurting. Petitioner stated that she spoke to her supervisor, Rudy, and requested permission to go home. She indicated that her request was denied and she continued working. Petitioner stated that her pain continued to increase and she requested an ambulance to take her to the emergency room. Petitioner stated, "...the pain was becoming worse...I couldn't stay any longer. I couldn't handle it any longer."

Petitioner was transported to Condell Medical Center. Records submitted show that her chief complaint was back pain that started at work four months ago on May 28, 2003 while lifting. Also noted was that the recent injury occurred while lifting at work. The "reason for the visit" further show she "complained of back X four months receiving cortisone injections." Petitioner was discharged with a diagnosis of chronic low back pain and instructed to follow up with her physician. (Pet. Ex. 11)

Petitioner followed up with Dr. Vidovic on September 29, 2003. Dr. Vidovic noted Petitioner had been doing well since the September 16 injection until her back pain returned on September 26th when she worked a 13 hour shift. Dr. Vidovic returned Petitioner to modified work effective September 30, 2003 with no more than 8 hours of work per day. (Pet. Ex. 8)

Dr. Vidovic took Petitioner off work on October 7, 2003, (P. Ex. 8) She underwent a second lumbar ESI with Dr. Rifai on October 10, 2003. (Pet. Ex. 10) Thereafter, Dr. Vidovic returned Petitioner to part-time work, four hours a day, effective November 3, 2003 for four weeks. (Pet. Ex. 8) Petitioner testified that she returned to part-time work on November 4, 2003.

Petitioner returned to Dr. Vidovic on December 2, 2003. Petitioner reported that she was doing better on Celebrex. The doctor noted that Petitioner wanted to return to an eight hour shift. (Pet. Ex. 8)

Petitioner testified that on December 18, 2003, she was working packing boxes and getting boxes onto a conveyor belt when she experienced further low back pain and as well as neck pain. Petitioner stated that she informed a supervisor named "Scott" of her back and neck pain. She completed work and returned to Dr. Vidovic the following day.

On December 19, 2003, Dr. Vidovic recorded that Petitioner presented with worsening back pain with neck pain for a week. Dr. Vidovic ordered a cervical MRI; referred Petitioner to Dr. Gleason; and took Petitioner off work. (Pet. Ex. 8)

Petitioner underwent the prescribed cervical MRI on December 20, 2003. The study revealed disc bulging, with protrusions and disc degeneration at C3 through C7. (Pet. Ex. 12)

Petitioner presented to Dr. Gleason on December 23, 2003 with complaints of low back pain as well as tingling and numbness into the left first and second toes. Dr. Gleason noted that her symptoms had been present since May 2003, when she felt pain after removing a 40 pound box from a shelf. Dr. Gleason also noted Petitioner had cervical and left arm complaints which she originally stated "...started 1 month ago and then tried to say it was part of a work injury." In addition to performing an examination, Dr. Gleason reviewed the June 2003 lumbar MRI which he felt demonstrated degenerative disc disease L3-4-5 greater than L5-S1 as well as facet arthropathy at L5-S1. Dr. Gleason diagnosed left lumbar radicular syndrome. He recommended a MRI of the pelvis, an EMG/NCV study and physical therapy. (Pet. Ex. 13)

Petitioner underwent the prescribed EMG/NCV on December 29, 2003. Same was determined to be a normal study. Specifically, it was noted there was insufficient evidence for a left S1 radiculopathy and there was no electrical evidence for a peripheral neuropathy. (Pet. Ex. 9)

Petitioner commenced physical therapy at Swedish Covenant Hospital January 8, 2004 and continued through January 16, 2004. (Pet. Ex. 9)

Petitioner returned to Dr. Gleason on January 13, 2004 at which time he recommended continued use of medications, a home exercise program and a chronic pain management program. (Pet. Ex. 13)

Based on Dr. Vidvovic's referral on February 17, 2004, (Pet. Ex. 8) Petitioner returned to Dr. Rifai on February 23, 2004. Dr. Rifai noted Petitioner complained of cervical neck pain with numbness in the left 3rd and 5th digit. Petitioner also reported that the previous two injections provided no relief. Dr. Riai assessed cervical disc disease and lumbar and cervical radiculopathy. Dr. Rifai ordered Flexeril and administered a cervical epidural injection. (Pet. Ex. 10)

Pursuant to a neurosurgical consult referral by Dr. Vidovic, Petitioner was seen by Dr. Sheldon Lazar on April 14, 2004. The doctor recorded Petitioner complained of continual low back and left leg radicular pain after injuring herself at work the year prior while reaching for an object. She also reported that earlier in 2004, while working, she developed pain in her neck and upper extremities. Dr. Lazar opined that Petitioner did not have a surgical problem in her neck or lumbar spine. He recommended conservative management with physical therapy and exercise. The doctor also recommended against any further injections in either her cervical or lumbar region. Instead, he felt Petitioner should be treated with non-steroidal, anti-inflammatory drugs and mild analgesics. (Pet. Ex. 14) Thereafter, Petitioner underwent further physical therapy from April 27, 2004 through May 21, 2004. (Pet. Ex. 9)

At Petitioner's attorney's request, she underwent a Section 12 examination with Dr. Charles Slack on September 2, 2004. Dr. Slack recorded a history that Petitioner developed low back and bilateral leg pain while trying to lift a heavy box from a high upper shelf on May 28, 2003. He noted that Petitioner returned to work on July 21, 2003 and continued to work until September 26, 2003 when she developed increased low back, neck and arm pain. Dr. Slack noted that Petitioner continued working, but had been off work since December 18, 2003 when she had increasing low back and neck pain. Dr. Slack diagnosed Petitioner with persistent lumbar radiculopathy on the left with an apparent aggravation of underlying degenerative disk disease. Dr. Slack indicated that because of the exacerbation of back and leg symptoms after the September 26, 2003 incident at work, Petitioner should undergo a new lumbar MRI to determine if there had been a progression of the degenerative disc disease. He stated that if no significant changes were noted, then Petitioner would be a candidate for pain management care. Lastly, Dr. Slack opined that Petitioner was disabled from work at that time. (Pet. Ex. 15)

Dr. Vidovic returned Petitioner to work effective January 13, 2005 with limitations including no lifting over 20 pounds, no shift greater than 8 hours and two fifteen minute breaks during a shift for rest. On February 8, 2005, Dr. Vidovic noted Petitioner had significant back pain with the eight hour shift. The doctor limited Petitioner's work to 4 hours per shift and referred her to Dr. Schuette for possible further injections. (Pet. Ex. 8)

Petitioner presented to Dr. Schuette on February 14, 2005. After an examination and reviewing the previous diagnostic studies, Dr. Schuette assessed Petitioner with chronic low back pain, now accompanied by diffuse pain syndrome. The doctor recommending that she take Neurontin and Dolobid and hold off on further injections. (Pet. Ex. 16) During the March 9, 2005 follow-up visit, Dr. Schuette proceeded with a lumbar epidural steroid injection. On March 23, 2005, Dr. Schuette noted improvement with the radiating pain following the initial injection. He administered a second injection and noted that Petitioner's neck pain was predominantly the result of muscular spasm and strain. He noted same was likely referred pain from the back. (Pet. Ex. 16)

Petitioner returned to Dr. Schuette on May 4, 2005. Petitioner reported that her back pain had gotten worse. The pain radiated into the left leg and she had a return of numbness and tingling. Dr. Schuette stated that clearly Petitioner had recurrent problems with her back. Dr. Schuette administered a third injection that day and recommended further therapy as well as strengthening and exercise. (Pet. Ex. 16)

Records submitted show Dr. Schuette kept Petitioner off work from March 9, 2005 through March 10, 2005; March 23, 2005 through March 24, 2005; and May 4, 2005 through May 8, 2005. (Pet. Ex. 16)

Petitioner testified that on August 22, 2005 she was packing and scanning boxes when she experienced increased back pain while at work. Petitioner stated that she did not report the August 22nd occurrence to anyone at Respondent nor did she fill out any documentation regarding an August 22, 2005 accident.

Petitioner returned to Dr. Vidovic on August 23, 2005. Petitioner reported increased pain again in the low back after reinjuring the back at work the previous day. Dr. Vidovic ordered 6 therapy sessions (Pet. Ex. 8) which Petitioner underwent at Swedish Covenant Hospital. (Pet. Ex. 9) Dr. Vidovic returned Petitioner to 4 hour per day work effective on September 26, 2005. On October 26, 2005, Dr. Vidovic took Petitioner off work completely until October 31, 2005. (Pet Ex. 8)

Petitioner testified that she returned to restricted work for Respondent. Petitioner testified that she continued working her 4 hour shifts performing scanning of small parts, approximately 4000 per shift. Petitioner indicated that in December 2005 she began experiencing pain in her left hand. Petitioner stated that advised a supervisor but she couldn't remember who she spoke to.

Petitioner presented to Dr. Vidovic on December 5, 2005 with pain in her left wrist, thumb and index finger. Dr. Vidovic noted that Petitioner had been at work scanning four hours daily with her left hand. Dr. Vidovic assessed carpal tunnel syndrome, recommended a wrist brace and released Petitioner to work 4 hours per day in a sitting position. (Pet. Ex. 8)

Petitioner continued treating with Dr. Vidovic for persistent low back pain into 2006. Dr. Vidovic ordered more physical therapy, (Pet. Ex. 8) which Petitioner underwent from March 14, 2006 through March 27, 2006. (Pet. Ex. 9) Dr. Vidovic kept Petitioner off work effective February 21, 2006. (Pet. Ex. 8)

Consistent with Dr. Vidovic referral, Petitioner returned to Dr. Lazar on March 17, 2006. Dr. Lazar recorded that two weeks prior, she developed severe pain in her back and could barely move. Dr. Lazar indicated Petitioner probably had a large disc protrusion or spinal stenosis causing nerve root compression on the left primarily involving the L5 nerve root. The doctor ordered a repeat lumbar MRI and prescribed medication (Pet. Ex. 14)

Petitioner underwent the MRI on March 24, 2006. The scan revealed slight to moderate bulging from L3-4 and L4-5. There was minimal bulging from L2-L3 and L5-S1 as well as degenerative changes from L3-4, L4-5 and L5-S1. (Pet. Ex. 12)

Dr. Lazar saw Petitioner again on April 28, 2006. Dr. Lazar noted the recent MRI revealed diffuse, mild degenerative changes without any significant nerve root or cauda equina compression at any level. He recorded that the left sciatica was gone and her neurological examination was completely within normal limits. Dr. Lazar indicated that Petitioner had problems throughout her skeleton and her problems were primarily arthritis which could be helped after a thorough evaluation. Dr. Lazar felt a referral to a rheumatologist would be helpful. (Pet. Ex. 14)

Dr. Vidovic returned Petitioner to 4 hour shifts as of May 14, 2006. (Pet. Ex. 8)

Petitioner testified that she was involved in a non-worked related motor vehicle collision on July 11, 2006. Petitioner presented to the emergency room at Condell Medical Center with complaints of neck, back and hip pain. Hospital records show she was primarily treated for neck and hip pains. She was discharged that day with a diagnosis of acute multiple contusions. (Resp. No.2 Ex. 2)

Petitioner saw Dr. Wu in Dr. Vidovic's absence the following day. Dr. Wu noted Petitioner was complaining of nausea, dizziness, vomiting and neck pain. A head CT scan was ordered. No lumbar pain was noted. (Pet. Ex. 8) Petitioner presented to Dr Vidovic on July 19, 2006. The doctor diagnosed her with cervical strain post motor vehicle accident. She also took Petitioner off work from July 17, 2006 through July 31, 2003. (Pet. Ex. 8) Petitioner testified that her cervical and lumbar conditions did not change as a result of the car accident.

On September 25, 2006, Petitioner returned to Dr. Vidovic. Records show she complained of "pain all over." The doctor also noted that her left hand was swollen and red. Petitioner was taken off work at that time. Petitioner remained off until Dr. Vidovic released her to return to work as of October 9, 2006. (Pet Ex. 8)

At her attorney's request, Petitioner underwent a Section 12 examination with Dr. Daniel Nagle, on October 31, 2006, for complaints of left hand pain. Although the doctor could not provide a definite diagnosis, Dr. Nagle believed Petitioner suffered from double crush syndrome. He believed the compression of the proximal nerve roots had rendered the distal extension of those nerve roots more susceptible to compression and the effects of repetitive activities. Dr. Nagle also noted that Petitioner presented with irritation of median and

ulnar nerves in the left upper extremity. She also had findings suggestive of cervical radiculopathy. He recommended an EMG/NCV study. (Pet. Ex. 17)

On November 8, 2006, Dr. Vidovic took Petitioner off work until further notice and ordered a cervical MRI. (Pet. Ex. 8)

Respondent placed Petitioner on an approved leave of absence commencing November 6, 2006. (Pet. Ex. 28).

Petitioner underwent the prescribed cervical MRI on November 10, 2006. The study revealed multilevel disc and facet degeneration with areas of stenosis and spinal cord deformity. (Pet. Ex. 12)

Dr. Vidovic referred Petitioner to Dr. Simikin for evaluation and a cervical EMG/NCV. Dr. Simikin administered the testing on January 17, 2007 and his findings revealed "no clear electrodiagnostic evidence of cervical radiculopathy or peripheral neuropathy. (Pet. Ex. 8)

At her attorney's request, Petitioner underwent a Section 12 examination with Dr. Michael Treister on April 26, 2007. In his report dated May 9, 2007, Dr. Treister noted that Petitioner sustained a low back injury resulting in lower back and left lower extremity pain on May 28, 2003 and had been diagnosed with a lumbar spine strain in the presence of degenerative disc disease at L4-L5 and L5-S1 and developed cervical spine pain in late 2003. Dr. Triester also noted that in July 2006 Petitioner was in a motor vehicle accident that caused some neck pain. Dr. Triester noted that none of Petitioner's MRIs or EMGs documented any disc herniation or rational basis for Petitioner's radicular complaints. Upon examination, Dr. Triester found many Waddell findings. He opined that Petitioner's lumbar strain morphed into chronic pain syndrome. He indicated she had psychiatric/psychological aberrations in that she perceives numerous pain producing problems, yet there were no rational objective medical explanation for the severity of her many complaints. Dr. Treister stated that while she may indeed experience pain, the extent of her complaints far exceed what the pathology might reasonably be expected to generate. He added that any more injections, medications, or physical therapy would only reinforce her perception of disease and disability. Lastly, the doctor indicated that Petitioner was severely disabled from the current medical problem, "chronic pain syndrome," and that even with excellent psychological and psychiatric care, it could take many years to put her on the road to recovery. (Pet. Ex. 18)

Petitioner continued to follow with Dr. Vidovic through 2007. Petitioner last saw the doctor on November 7, 2007 at which time she returned Petitioner to four hour shifts from November 12, 2007 until further notice. (Pet. Ex. 8)

Respondent terminated Petitioner's employment effective November 6, 2007. (Pet. Ex. 28) Petitioner testified that with the termination of her employment, she lost her health insurance coverage and was unable to obtain medical care. Petitioner also indicated that she received no workers' compensation benefits following said termination.

At Respondent's request, Petitioner underwent a Section 12 examination with Dr. Edward Goldberg on November 3, 2008. Dr. Goldberg opined Petitioner had some degenerative disk disease of the cervical spine. The doctor explained that because Petitioner's cervical complaints did not occur until December 2003, same was not related to work. With respect to Petitioner's lumbar condition, the doctor opined Petitioner had some degenerative disk disease with lumbar radiculopathy. He felt that her lumbar condition of ill-being was related to the May 28, 2003 work accident. He also noted that because Petitioner did not offer another injury of December 2003, September 2003, August 2005 or December 2005, he did not believe any of Petitioner's conditions of ill-being was related to those accident dates. Further, he opined that there was no additional injury caused by the July 11, 2006 motor vehicle accident. Dr. Goldberg opined that Petitioner had chronic behavior.

He did not believe she was a surgical candidate nor would he offer any further injections. The doctor added that the only additional treatment would be due to the May 28, 2003 accident. Lastly, he indicated Petitioner could work 8 hours per day lifting no more than 20 pounds. (Pet. Ex. 19)

Petitioner testified that in 2009 she obtained health insurance through her husband's group carrier, Union Health Service. Dr. Jovanovich became her primary care provider under that insurance plan. Dr. Jovanovich first examined Petitioner on March 17, 2009. Dr. Jovanovich noted a consistent history of the 2003 work accident. The doctor's impressions amongst other diagnoses were neck, shoulder and back pain. (Pet. Ex. 20)

By June 23, 2009, Petitioner continued with neck and back pain complaints. Dr. Jovanovich referred Petitioner to Dr. Edward Abraham for orthopedic care to the spine. (Pet. Ex. 20) Dr. Abraham examined Petitioner on August 6, 2009 at which time he diagnosed low back pain/syndrome and ordered a lumbar MRI and EMG of the upper extremities. Dr. Abraham next saw her on September 10, 2009 noting that the EMG was unremarkable but the lumbar MRI showed spondylosis bilaterally at L5, bulging at L3-4 and L4-5 with stenosis at L4-5 and bilateral degenerative facets at L4-5 and L5-S1.Dr. Abraham noted that although Petitioner's findings were consistent with age, it did not seemed to explain the entire picture she presented with. He diagnosed Petitioner with chronic low back and neck pain syndrome. (Pet. Ex. 20)

Petitioner continued following with Dr. Jovanovich thereafter. According to Dr. Jovanovich's records dated June 14, 2010, Petitioner's husband call his office and reported that Petitioner's pain was getting worse and radiating into the left lower leg. Dr. Jovanovich referred her for another MRI and for a neurosurgical consult. (Pet. Ex. 20)

Dr. Slavin first saw Petitioner on October 4, 2010. Dr. Slavin reviewed a lumbar MRI indicating same demonstrated partial lumbarized S1 vertebral bone and severe degeneration at L4-L5 and L5-S1 with disk protrusion and bilateral foraminal stenosis, worse on the left. Dr. Slavin felt Petitioner did not require surgery at that time. He indicated that she may eventually require surgery to the low back, but in the interim, injections and nerve blocks might be the most appropriate modalities. (Pet. Ex. 21) Petitioner refused further injections indicating they were not successful in the past. (Pet. Ex. 20)

On March 28, 2011, Dr. Slavin referred Petitioner to his partner, Dr. Neckrysh, who specializes in complex spine surgery. (Pet. Ex. 21) Dr. Neckrysh first examined Petitioner on April 15, 2011. At that time, Dr. Neckrysh noted a history of the onset of spinal pain as a result of a work lifting incident at work 8 years prior. Petitioner complained of low back pain radiating into the left leg and less severe neck pain radiating bilaterally. Dr. Neckrysh reviewed Petitioner's March 2011 lumbar and cervical MRIs. The doctor noted the lumbar MRI showed diffuse degenerative disc disease with mild spinal stenosis at L3-4 and L4-5 along with mild retrolothesis at L3 and L4. He opined that the cervical MRI showed right sided osteophyte pressing on C5 nerve root and C5, C6 level osteophyte complex on the left. He recommended Petitioner undergo a C3-5 cervical arthroplasty, discectomy and removal of osteophytes at C5-6 along with anterior cervical fusion at C5-6. (Pet. Ex. 21)

Petitioner was admitted to UIC Hospital on May 19, 2011 with an eight year history of neck and back pain with sudden onset after lifting heavy objects at work with a gradual increase of left hand weakness and dropping objects thereafter. Dr, Neckrysh performed an anterior cervical discectomy at C4-5 and C5-6 along with cervical fusion at C5-C6. Post-operatively, Petitioner was diagnosed with C4-5 and C5-6 herniated disc with cervical radiculopathy. (Pet. Ex. 21)

Respondent had a second Section12 examination with Dr. Edward Goldberg on June 24, 2011. Dr. Goldberg again opined that the care to the cervical spine was not related to the work accident since the cervical symptoms "did not appear until multiple months after the alleged accident of 2003." With respect to the lumbar

spine, the doctor opined that although there was some pain behavior, there was no symptom magnification. The doctor felt she should undergo a FCE once her cervical fusion healed. In the meantime, from the lumbar perspective, she could work with a 20 pound lifting restriction. (Pet. Ex. 19)

Petitioner continued treating with Dr, Neckrysh post-operatively. On September 23, 2011, Petitioner reported that her radicular symptoms into her arms had significantly improved. The doctor felt she was developing a solid fusion at C5-C6. Regarding her low back, Petitioner reported continual complaints of radiating low back pain. Dr. Neckrysh ordered updated MRI, CT and EMG of the low back/lower extremities. (Pet. Ex. 21)

Petitioner underwent the lumbar EMG on November 7, 2011. The EMG revealed minimal evidence of S1 radiculopathy. (Pet. Ex. 21) On December 9, 2011, Dr. Neckrysh recorded that Petitioner underwent the prescribed diagnostics. The doctor provided that the x-ray and MRI showed degenerative changes in the lumbar spine with disc protrusions at L5-S1. The CT scan revealed mild foraminal stenosis at L5-S1 bilaterally, left greater than right. Dr. Neckrysh recommended AC joint injections and selective nerve root blocks. (Pet. Ex. 21)

Dr. Bartis performed lumbar epidural steroid injections on January 12, 2012, February 6, 2012, and March 8, 2012. (Pet. Ex. 21)

On July 24, 2012, Petitioner presented to Dr. Neckrysh reporting a significant amount of back pain. Dr. Neckrysh noted that Petitioner's back corresponded with very arthritic facets at L4-L5 and L5-S1. He also noted she had left S1 radiculopathy. The doctor felt all non-operative options had been exhausted. As a result, he recommended Petitioner undergo an L5 laminectomy with nerve root decompression. (Pet. Ex. 21)

On August 15, 2012, Dr. Neckrysh performed a lumbar fusion of L4 through S1 with utilization of an iliac crest autograft and laminectomies at L4 and L5. The postoperative diagnosis was lumbar spondylotic radiculopathy. (Pet. Ex. 21) Postoperatively, Dr. Jovanovich ordered physical therapy which took place at Accelerated Rehabilitation from September 28, 2012 through November 8, 2012. (Pet. Ex. 22). By December 4, 2012, Petitioner presented to Dr. Neckrysh complaining of some pain and numbness in the left side S1 distribution. The doctor opined that Petitioner should have 12 months of recovery to establish a solid fusion. The doctor also felt Petitioner was not able to work as a machine operator in a factory and could not lift weights in the 70lb. range. (Pet. Ex. 21)

At the one year follow up visit on September 10, 2013, Dr. Neckrysh noted that Petitioner's left leg radicular symptoms improved by 50%. On November 28, 2013, the doctor opined that Petitioner could return to work with a permanent 10 pound weight lifting limit. (Pet. Ex. 21)

Dr. Goldberg, Respondent's Section 12 examiner, performed a third examination on May 9, 2014. Dr. Goldberg opined that Petitioner's lumbar spondylosis and left leg radicular pain was aggravated by the May 28, 2003 work accident. He opined that the lumbar and cervical treatment including surgical interventions was reasonable and necessary, although the cervical treatment was not work related. Dr. Goldberg opined that Petitioner could return to work with a 10 pound lifting restriction and recommended an FCE to determine her true capabilities and return work. He opined that Petitioner's work restrictions were due to the fusion necessitated by the May 28, 2003 work accident. Lastly, Dr. Goldberg opined Petitioner would be at MMI after she underwent an FCE of the lumbar spine. He noted the MMI did not apply to the cervical spine as it was his opinion same was not work related. (Pet. Ex. 19)

Petitioner underwent the FCE on June 23, 2014. The FCE was deemed valid showing Petitioner demonstrated functional capabilities at the sedentary to light physical demand level. Petitioner demonstrated physical capabilities of lifting 21.4 lbs desk to chair level, 14.8 lbs above shoulders bilaterally, and lifting and

carrying 17 lbs in each hand. The FCE noted Petitioner was capable of working 8 hours per day with 8 hours of sitting, 3-4 hours of standing, and 6-7 hours of walking. Also noted was that she was able to perform occasional bending, stooping, kneeling, crawling, crouching and squatting. (Pet. Ex. 23) Petitioner testified that following the evaluation, she had to lay down for approximately two days due to the increased neck and back pain caused by the evaluation.

At Petitioner's attorney's request, she underwent a vocational evaluation with Certified Vocational Rehabilitation Counselor Edward Rascati on March 19, 2015. In his report dated March 24, 2015, CRC Rascati noted that Petitioner's strengths were her long and consistent work history. Her vocational barriers consisted of singular work history; non-English speaking; no HS or GED; physical restrictions of maximum 10# lifting; minimal computer skills; and limited transferrable skills. CRC Rascati opined that based upon Petitioner's restrictions, limited transferrable skills, limited education, language barrier and minimal computer skills, no stable labor market exists for Petitioner. CRC Rascati added that "job placement would likely be a long drawn out affair with minimal chance at reemployment." He further added that "...if placement were to be considered [Petitioner] would benefit from immediate enrollment into English as a Second Language (ESL) courses." He further indicated Petitioner would need assistance with the identification of introductory computer and keyboarding classes. (Pet. Ex. 2)

Respondent obtained the services of CompAlliance for the purpose of performing a vocational assessment, transferable skills assessment and a labor market survey. The initial assessment conducted by CRC expert Sharon Babat occurred on May 21, 2015. In her report dated June 15, 2015, CRC Babat opined that a stable labor market existed for Petitioner. She indicated the "positive factors to successful outcome/assets" included, 1.) Petitioner completed high school and reported basic computer skills; 2.) Petitioner was bilingual in English and Albanian; 3.) Petitioner had been released to Sedentary to Light physical demand level; and 4.) Petitioner had access to an automobile. With respect to the "barriers and problem identification," CRC Babat indicated "[Petitioner's] reported physical limitations are more restrictive than what was demonstrated in the ATI Physical Therapy evaluation." CRC Babat felt Petitioner was employable in alternative occupations such as front desk clerk, customer service clerk, cashier and receptionist among others. (Resp1. Ex. 6)

CRC Babat also conducted a labor market survey. In her report dated July 7, 2015, CRC Babat identified twelve employers which she opined Petitioner would be able to qualify and secure employment. The positions identified included front desk clerk, desk office clerk, entry-level billing clerk, customer service clerk, sales clerk, call center clerk, cashier, receptionist and work order dispatcher. CRC Babat opined Petitioner could obtain and maintain employment in her local community. (Resp1. Ex 7)

On December 30, 2015, CRC Rascati authored an Updated Vocational Evaluation. CRC Rascati noted that he reviewed the vocational evaluation and labor market survey prepared by CRC Babat. CRC Rascati noted that although CRC Babat reported that Petitioner had been released to a Sedentary to Light physical demand level, he had not received any medical reports releasing Petitioner to that level of functioning. He noted that of the fourteen (14) alternative jobs noted by CRC Babat, only four (4) were classified as sedentary. Nine positions were classified as light and one position classified as medium. CRC Rascati opined all were beyond the recommendations of both Dr. Neckrysh and Dr. Goldberg. CRC Rascati specifically identified five (5) of the positions which he felt were beyond Petitioner's restrictions. Additionally, CRC Rascati noted that ten (10) of the twelve (12) positions required a high school or GED. CRC Rascati was unclear as whether Petitioner's education in Albania and/or her work history would be considered in lieu of a high school diploma or GED. Also, CRC Rascati noted that he was advised that with the help of Petitioner's daughter, Petitioner contacted the identified employers without any call backs. In conclusion, CRC Rascati provided that his opinion remained unchanged indicating that a viable and stable labor market did not exist for Petitioner. (Pet. Ex. 3)

Petitioner continued to treat with Dr. Neckrysh through 2016. On March 15, 2016, Dr. Neckrysh noted that one of the surgical rods below S1 appeared broken. Thereafter, on April 12, 2016, Dr. Neckrysh opined Petitioner's present pain complaints in the lumbar spine were caused by early degeneration above the fusion for which he indicated Petitioner should follow up as symptoms increase. (Pet. Ex. 21)

Petitioner testified that she had never suffered an injury prior to her May 28, 2003 work accident. She indicated that she had never suffered an injury to; required medical treatment for; or missed work for any problem with her neck, left hand or low back. Petitioner indicated that although she has not worked anywhere since she last worked at Respondent, on November 6, 2006, she would like to work. Petitioner indicated that she has never created a resume and had no experience looking for a job. She provided that since her 2007 termination of her employment with Respondent, no one has assisted her regarding how or where to find a job. Petitioner stated that she contacted all employers listed in the labor market survey. She obtained no job offers as a result and she has not performed any other job searching. Petitioner's Exhibit 27 is a copy of notes Petitioner and her daughter kept in connection with the contacts they made with said potential employers.

Petitioner testified that presently, she suffers from constant neck and low back pain which radiates to her left foot. She indicated that the pain prevents her from sitting more than 25 minutes at a time. Petitioner indicated that she no longer sleeps with her husband because the pain wakes her often as she does not sleep more than 2 hours at a time. Petitioner also has difficulty brushing her teeth, getting dressed, using the toilet and showering due to low back pain. Petitioner stated she requires assistance from family members with laundry as she has difficulty lifting a heavy laundry basket due to her low back problems. She also requires assistance with cooking as she has difficulty standing more than 20 minutes. She requires assistance with grocery shopping due to difficulty with lifting heavy items and standing in line too long. Lastly, Petitioner testified that she takes Vicodin and Ibuprofen on a daily basis to address her back pain.

CRC Edward Rascati testified via deposition in this matter. CRC Rascati testified that in his opinion there is no current viable and stable labor market for Petitioner. In forming his opinions, CRC Rascati indicated that he relied on her work history, Petitioner's current level of physical functioning at the sedentary level, her transferable skills noting that the majority of positions would require computer experience or interaction which Petitioner didn't have much experience. He noted that she Skypes but she doesn't really keyboard and she doesn't have any real experience with any software programs. He indicated that if placement were to be considered, Petitioner would require a lot of assistance. In addition to the above opinions, CRC Rascati provided that Petitioner's age and language skills were barriers. He indicated Petitioner would benefit from a course of English as a second language. (Pet. Ex. 7)

CRC Rascati testified that he was not provided information that Petitioner received a two-year post high school education in Kosovo. CRC Rascati testified that while Petitioner had some transferable skills including repetitive work, comparing data, taking instructions and handling objects, many of the jobs listed in the labor market survey require computer involvement and the use of the English language. He added that job placement would be a long drawn out affair with minimal chance of employment. (Pet. Ex. 7)

CRC Sharon Babat testified via deposition in this matter. CRC Babat testified that Petitioner had basic computer skills demonstrated by the fact that she used email, skype and facebook. CRC Babat testified that after reviewing a set of pre-employment application records, it was noted that Petitioner attended college for two years while in Kosovo. CRC Babat indicated that these attributes are beneficial in a job search along with the fact that she had been continuously employed since 1984. From 1984 to 1999, she worked as a bookkeeper in Kosovo. Then from 1999 through the date of accident, Petitioner worked for CDW as a pick-pack. (Resp. Ex. 5)

CRC Babat testified that she identified 12 jobs in a labor market survey and identified positions that indicate that Petitioner is employable. She stated that these jobs ranged from starting salary of $9.50 to $33.50 per hour and would be within Petitioner's work restrictions. CRC Babat estimated that average salary for these jobs would $15.00 per hour. CRC Babat testified that she does not agree with Petitioner's vocational expert, CRC Ed Rascatti, that no stable labor market exists for Petitioner indicating that she had a stable work history, she is bilingual, attended two years of college and has basic computer skills. Lastly, CRC Babat acknowledged she did not provide Petitioner any job placement services, but such services could benefit Petitioner. (Resp. Ex. 5)

Respondent presented Rudy Gonzalo, one of its shipping supervisors, who testified that Petitioner did not notify him of any work accident occurring on September 26, 2003. Further, Respondent presented Jennifer Vega, on if its Human Resources representatives who testified that Petitioner only filled out and submitted a Safety Incident Report or accident report regarding her May 28, 2003 accident, (See. Resp1 Ex. 12)

In support of the Arbitrator's decision relating to (F) IS THE PETITIONER'S CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, the Arbitrator finds the following:

Petitioner testified unrebutted that prior to her May 28, 2003 work accident, she never suffered injury to her low back; missed work due to her low back; or underwent any medical treatment to her low back. There is no evidence in the record of any pre-existing injury.

Following her May 28, 2003 undisputed work accident, Petitioner first obtained medical care the following day from Dr. Vidovic, her primary care physician. Dr. Vidovic noted a consistent history of injuring her back at work the day prior and she noted tenderness and spasm in her lumbar spine. Petitioner then underwent a prolonged course of treatment to her low back as detailed above in the statement of fact culminating in the August 15, 2012 lumbar fusion Dr. Neckrysh performed.

Every doctor that treated or examined Petitioner's back offered a consistent history of tracing Petitioner's low back problems to her undisputed May 28, 2003 work accident. These include the following specific references in the record:

a. Dr. Vidovic (P. Ex. 8, p.1);
b. Dr. Powell (P. Ex. 8, p. 2);
c. Dr. Abraham (P. Ex. 8, pp. 3, 5);
d. Dr. Rifai (P. Ex. 10, pp. 1, 3);
e. Condell Medical Center Emergency Room (P. Ex. 11, pp. 3, 5);
f. Dr. Gleason (P. Ex. 13, p. 1);
g. Dr. Slack (P. Ex. 15, p. 1);
h. Dr. Schuette (P. Ex. 16, p. 1);
i. Dr. Lazar (P. Ex. 14, p. 1);
j. Dr. Treister (P. Ex. 18, p. 1);
k. Dr. Goldberg (P. Ex. 19, pp. 2, 7, 9, 10, 15, 17);
l. Dr. Jovanovich (P. Ex. 20, pp. 1);
m. Dr. Neckrysh (P. Ex. 21, pp. 8, 17, 24; 32, 58, 83); and
n. Accelerated Rehabilitation (P. Ex. 22, p. 1).

The record is void of any evidence attributing Petitioner's low back pain with radiating pain into the left leg to any cause other than the May 28, 2003 work accident.

Specifically, the Arbitrator finds Respondent's Section 12 examining physician, Dr. Edward Goldberg of Midwest Orthopaedics at Rush especially persuasive in this matter. In his November 3, 2008 report, Dr. Goldberg opined that Petitioner's lumbar degenerative disc disease and radiculitis was caused by the May 28, 2003 work accident. He went on to note that since Petitioner offered him no history of any other work accidents, (like September or December of 2003 or August or December of 2005), that no condition of ill-being originates from any such claimed accidents. Dr. Goldberg went on to note that there was no additional injury caused by Petitioner's intervening July 11, 2006 motor vehicle accident.

Additionally, Dr. Goldberg opined in his June 24, 2011 report that Petitioner did not injure her cervical spine in the May 28, 2003 work accident. He went on to note again that "[h]er lumbar condition is due to the work-related accident of 5/28/2003," but "[h]er cervical condition is not related to that accident."

Lastly, in his May 9, 2014 report, Dr. Goldberg stated that Petitioner suffered lumbar spondylosis and left leg radicular pain which was aggravated by the May 28, 2003 work accident, and the resulting lumbar fusion surgery, which was reasonable and necessary, was related to that accident.

Relying on the consistency between Petitioner's testimony regarding the lack of any prior injury or treatment, the extensive consistent medical treatment records and Dr. Goldberg's persuasive opinions, the Arbitrator finds that a causal relationship exists between Petitioner's present condition of ill-being involving her low back and left leg and the undisputed work accident of May 28, 2003. Petitioner suffered injury to her lumbar spine involving an aggravation of degenerative changes in her lumbar spine which necessitated the extensive course of medical treatment indicated in the record, including, but not limited to, the lumbar fusion Dr. Neckrysh performed on August 15, 2012.

In support of the Arbitrator's decision relating to (J) WERE THE MEDICAL SERVICES PROVIDED TO PETITIONER REASONABLE AND NECESSARY ANS HAS RESPONDENT PIAD ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, the Arbitrator finds the following:

The Arbitrator notes that Dr. Goldberg, Respondent's examining doctor, opined that the treatment Petitioner underwent to the lumbar spine including the fusion surgery was appropriate, reasonable and necessary. There is no evidence in the record disputing or challenging the reasonableness or necessity of the medical care Petitioner obtained to her lumbar spine. Therefore, the Arbitrator, being persuaded by said opinion finds that the medical services rendered to Petitioner were reasonable and necessary.

Addressing the medical charges for said services, medical bills contained in Petitioner's Exhibit 24 and Petitioner's Exhibit 25 were entered into evidence at arbitration. These exhibits contain bills and itemized reimbursement claims from group insurance carriers who processed bills on Petitioner's behalf. The Arbitrator notes that given the findings regarding causal connection and reasonableness and necessity above, Respondent is liable for all bills related to the medical services Petitioner received for her lumbar spine condition only. Specifically, Respondent is liable to pay for the following bills (outstanding or paid by Petitioner) contained in Petitioner's Exhibit 24 to the extent indicated unless such bills are subject to reductions pursuant to the Medical Fee Schedule:

A. M. Ramez Salem & Assoc. (P. Ex. 24, pp. 2-3)	$15.00
B. North Suburban Neurosurgery (P. Ex. 24, p. 4)	$135.00
C. Condell Medical Center (P. Ex. 24, p. 5)	$141.60
D. Swedish Covenant Hospital (P. Ex. 24, p. 6)	$94.25
E. University of Illinois Anesthesiology (P. Ex. 24, p. 8)	$3,135.00
F. University of Illinois Hospital (P. Ex. 24, pp. 10-16)	$64,213.03

G. University of Illinois Hospital (P. Ex. 24, p. 17)		$224.00
H. University of Illinois Hospital (P. Ex. 24, p. 18)		$167.00
I. University of Illinois Hospital (P. Ex. 24, p. 19)		$89.00
J. ATI (P. Ex. 24, p. 47)		$2,762.28
K. Walgreens (P. Ex. 24, pp. 52-58)		$110.42
	TOTAL:	**$71,086.58**

The parties stipulated that Respondent is entitled to a credit pursuant to Section 8(j) for amounts paid by Blue Cross Blue Shield, Petitioner's group health carrier provided though Respondent, totaling $8,182.51. (Pet. Ex. 24, Arb. Ex. 1)

Lastly, Respondent is liable for lumbar-related bills paid by Union Health Service, Petitioner's health insurance carrier not provided by Respondent totaling $20,391.47 (Pet. Ex. 24), representing the $26,491.67 total paid less the $6,099.20 in bills paid for the unrelated cervical care/surgery. (*See* Pet. Ex. 24)

Based on the above, the Arbitrator orders Respondent to pay $91,478.05 for reasonable and necessary medical services, representing amounts paid by Petitioner out of pocket, amounts paid by Union Health service, and amounts remaining outstanding ($71,086.58 + $20,391.47 = $91,478.05).

In support of the Arbitrator's decision relating to (K) WHAT ARE PERIODS OF TEMPORARY TOTAL DISABILITY, TEMPORARY PARTIAL DISABILITY AND MAINTENANCE, the Arbitrator finds the following:

Petitioner testified, with no evidence offered in rebuttal, that she always followed her doctors' orders regarding being off work or working only four hour shifts. Respondent stipulated that Petitioner was off work from May 29, 2003 through July 20, 2003. (*See* Arb. Ex. 1) Dr. Vidovic then kept Petitioner off work from October 7, 2003 through November 2, 2003. (Pet. Ex. 8) On November 3, 2003, Dr. Vidovic returned Petitioner to working only 4 hour shifts through December 6, 2003 and Respondent stipulated to this period. (Pet. Ex. 8 , *See* Arb. Ex. 1)

Next, Dr. Vidovic kept Petitioner off work from December 19, 2003 through January 9, 2005. (Pet. Ex. 8, Resp2. Ex. 5) Petitioner then was restricted to four hours of work per day from February 8, 2005 through May 15, 2005, after which she went abroad to visit her ill mother who had suffered a stroke. (Pet. Ex. 8, Resp2. Ex. 4) Petitioner then returned to working four hour shifts from August 8, 2005 through August 22, 2005. (Resp2. Ex. 4)

Thereafter, Dr. Vidovic took Petitioner off work from August 23, 2005 through September 22, 2005 (Resp2. Ex. 4) after which Petitioner returned to four hour shifts from September 23, 2005 through February 20, 2006. Then, Dr. Vidovic took Petitioner off work from February 21, 2006 through May 14, 2006 and again returned Petitioner to four hour shifts from May 15, 2006 through July 16, 2006. (Resp2. Ex. 4, Pet. Ex. 8)

Dr. Vidovic took Petitioner back off work from July 17, 2016 through July 31, 2006 and then returned her to four hour shifts from August 1, 2006 through November 3, 2006 except for September 25, 2006 through October 22, 2006, during which she kept Petitioner off work. (Resp2. Ex. 4, Pet. Ex. 8)

Petitioner last worked for Respondent on November 3, 2006. Dr. Vidovic then took Petitioner off work from November 6, 2006 going forward. (Resp2. Ex. 4, Pet. Ex. 8) Thereafter, Respondent never provided any work, light duty or otherwise. On November 7, 2007, Dr. Vidovic indicated Petitioner could return to working 4 hour shifts until further notice. (Pet. Ex. 8) Respondent did not accommodate the restrictions and terminated Petitioner's employment effective November 7, 2007. (Pet. Ex. 28)

Following the termination of her employment, Petitioner, who was never released from care or deemed at MMI, lost her health insurance and did not obtain further medical care until her new insurance took effect. (Pet. Ex. 20) Dr. Neckrysh noted Petitioner "was not able to work anymore" from the time of his first visit with Petitioner on October 4, 2010. (Pet Ex. 21). Further, Petitioner testified that Dr. Neckrysh directed her not to work until November 26, 2013 when he issued permanent restrictions. Respondent did not offer Petitioner accommodating work thereafter as her employment with Respondent was terminated previously.

Dr. Goldberg, Respondent's IME, opined that from November 3, 2008, the date he first evaluated Petitioner, that Petitioner could work with restrictions of lifting no more than 20 pounds. (Pet. Ex. 19) He maintained that opinion at his second evaluation of Petitioner on June 24, 2011. (Pet. Ex. 19) Lastly, at his last examination on May 19 2014, he indicated Petitioner could work lifting up to 10 pounds and "[s]he will be at MMI after an FCE to her lumbar spine." (Pet. Ex. 19) The subsequent FCE took place on June 23, 2014. (*See* P. Ex. 23)

Given that Petitioner's condition of ill-being involving her lumbar spine had not stabilized at the time of the termination of her employment with Respondent in 2007 and she resumed care promptly when she obtained health insurance, and given that the Arbitrator is persuaded by Dr. Goldberg's opinions in this matter, the Arbitrator finds that Petitioner reached MMI on June 23, 2014. As such, the Arbitrator finds Petitioner was temporarily totally disabled from November 6, 2006 through June 23, 2014. Petitioner was under medical care and work restrictions during this period but Respondent did not provide accommodating light duty work during said period.

Regarding maintenance, the Arbitrator awards no benefits for maintenance finding that Petitioner did not partake in any vocational rehabilitation program. The Arbitrator notes that Respondent never authorized such a program, and her contacting the potential employers listed in the labor market survey does not constitute engaging in a self-directed job search.

Based on the above, the Arbitrator finds Petitioner was temporarily totally disabled and temporarily partially disabled for the following periods:

TTD periods:

5/29/2003through 7/20/2003, totaling 7 3/7ths weeks
10/7/2003 through 11/2/2003, totaling 3 5/7ths weeks
12/19/2003 through 1/9/2005, totaling 55 2/7ths weeks
8/23/2005 through 9/22/2005, totaling 4 2/7ths weeks
2/21/2006 through 5/14/2006, totaling 11 5/7ths weeks
7/17/2006 through 7 /31/2006, totaling 2 weeks
9/25/2006 through 10/22/2006, totaling 3 6/7ths weeks
11/6/2006 through 6/23/2014, totaling 398 weeks

TOTAL TTD: 492-2/7ths weeks at $310.60 per week

TPD periods:

11/3/2003 through 12/6/2003, totaling 4 5/7ths weeks, 4 hours per day
2/8/2005 through 5/15/2005, totaling 13 5/7ths weeks, 4 hours per day
8/8/2005 through 8/22/2005, totaling 2 weeks, 4 hours per day
9/23/2005 through 2/20/2006, totaling 21 3/7ths weeks, 4 hours per day

5/15/2006 through 7/16/2006, totaling 8 6/7ths weeks, 4 hours per day
8/1/2006 through 11/3/2006, totaling 13 3/7ths weeks, 4 hours per day

TOTAL TPD: 64-1/7ths weeks at $155.30 per week (representing 2/3 of the difference between the amount Petitioner could earn in the full performance of her work (AWW) and the gross amount she is able to earn in modified work (50% of the AWW (4 hours shifts)), = $465.90 - $232.95 = $232.95 x 2/3 = $155.30).

In support of the Arbitrator's decision relating to (L) WHAT IS THE NATURE AND EXTENT OF THE INJURY, the Arbitrator finds the following:

At arbitration, Petitioner testified that presently, she continues to suffer from constant low back pain which radiates into her left leg and into her left foot. Her back pain wakes her about every two hours during the night. She has difficulty dressing herself, bathing herself and sitting on the toilet. She needs assistance with laundry and shopping as she is unable to stand for prolonged periods or lift anything heavy. She can stand for only about 20 minutes, and she continues to take Vicodin and ibuprofen daily.

Dr. Neckrysh, Petitioner's surgeon, indicated that Petitioner's permanent restrictions were no lifting more than 10 pounds. (Pet. Ex. 21) Similarly, Respondent's Section 12 examining doctor, Dr. Goldberg agreed with Dr. Neckrysh opining that Petitioner has a 10 pound lifting restriction and that restriction is due to the lumbar spine injury. (Pet. Ex. 19)

The June 23, 2014 valid FCE showed Petitioner capable of work only at the sedentary to light level lifting from desk to chair level occasionally up to 21 pounds; lifting above shoulder level at 14.8 pounds occasionally and bilateral lifting from chair to floor at 14.8 pounds occasionally. Further, the evaluator noted Petitioner had difficulty with prolonged standing, bending, stooping, kneeling, crawling, crouching and squatting. (Pet. Ex. 23)

Most recently, Petitioner returned to Dr. Neckrysh with continued back pain. On April 12, 2016, he noted Petitioner was now experiencing the early stages of disk degeneration at L3-L4, the level immediately above the fusion. (Pet. Ex. 21)

The Arbitrator notes that Petitioner's picker/packer job with Respondent required her to lift up to 75 pounds and required her to stand and move quickly for eight or more hours per day. (Pet. Ex. 4)

Based on Petitioner's credible testimony regarding her current complaints, the consistent medical opinions and the valid FCE, the Arbitrator finds that as a result of her May 28, 2003 work accident, Petitioner is unable to return to her occupation as a warehouse worker for Respondent.

After the 2007 termination of Petitioner's employment, Respondent never offered Petitioner accommodating light work.

Certified Vocational Rehabilitation Counselor Edward Rascati performed a vocational assessment of Petitioner and found that given Petitioner's significant vocational barriers including limited transferable skills, her limited education (with no education in the United States), her limited ability to speak, understand, read and write English, her age and her limited computer skills, that no stable labor market exists for Petitioner and job placement services would likely be prolonged with a minimal change at reemployment. (Pet. Ex. 2)

Respondent's vocational counselor, Sharon Babat, opined that Petitioner is currently employable in various job categories of clerk jobs, i.e., motel clerk, reservation clerk, billing clerk and car rental clerk. CRC Babat never provided Petitioner any vocational rehabilitation services. Specifically, she never provided

Petitioner assistance drafting a resume, job leads, job placement services or any instruction on how to go about job searching.

Petitioner testified that with the assistance of her daughter, she contacted all the employers listed in the labor market survey, documented those contacts (*See* Pet. Ex. 27), and obtained no offers of employment from those contacts.

The Arbitrator is persuaded by CRC Rascati opinion regarding the lack of stable labor market for Petitioner. Further, although Petitioner knows and can speak some English, the Arbitrator observed that her language barrier is significant. Lastly, given her lack of computer skills, her lack of education in the United States, her age (54), lack of transferable skills, it is unlikely that even with extensive job placement services Petitioner would be employable.

The Arbitrator is not persuaded by CRC Babat in this matter. She classifies Petitioner as bilingual. It is clear that Petitioner's limited abilities with English would impede her with performing any job that would involve communicating in English with customers. Further, the Arbitrator notes that almost all of the categories of occupations identified by CRC Babat indicate Petitioner is able and qualified to perform (motel clerk, customer service clerk, billing clerk, car rental clerk, etc..), all require such English communication with customers. Therefore, the Arbitrator finds that these job categories of jobs propounded by CRC Babat that involve "clerk"-type jobs would not be feasible for this Petitioner.

The Arbitrator notes that Petitioner's counsel demanded Respondent provide vocational rehabilitation services. (Pet. Ex. 26) Respondent offered no such services without explanation. Respondent did not provide Petitioner with the vocational rehabilitation services she demanded. Having done so would have served to remove any doubt as to Petitioner's present employability.

Based on all the above, including but not limited CRC Rascati's persuasive opinion that no stable labor market exists for Petitioner, the Arbitrator finds that Petitioner has met her burden and proved that as a result of her May 28, 2003 work accident, she is permanently totally disabled from work on an odd-lot basis from June 23, 2014, the MMI date, continuing for life. Respondent is ordered to pay Petitioner benefits for said disability at a weekly rate of $376.66, representing the applicable minimum total permanent disability rate.

In support of the Arbitrator's decision relating to (M) SHOULD PENALTIES OR FEES BE IMPOSED UPON RESPONDENT, the Arbitrator finds the following:

The Arbitrator notes that this matter involved multiple claimed accidents, a complicated history of medical treatment, and contrary medical opinions specifically Dr. Slack, Dr. Trister and Dr. Laza. The Arbitrator declines to award penalties and attorney's fees.

In support of the Arbitrator's decision relating to (O) IS PETITIONER ENTITLED TO VOCATIONAL REHABILIATION, the Arbitrator finds the following:

Given the Arbitrator's findings as to the nature and extent of the injury finding that no stable labor market exists for Petitioner, the Arbitrator makes no award for vocational rehabilitation.

In support of the Arbitrator's decision relating to (O) DID PETITIONER VIOLATE THE TWO-DOCTOR RULE, the Arbitrator finds the following:

Petitioner chose to treat initially with Dr. Vidovic (Ravenswood Medical Group). Dr. Vidovic and her medical group provided referrals for Petitioner's care with Dr. Abraham, Dr. Rafai/Pain Management Center, Dr. Gleason, Dr. Lazar, Dr. Schuette and Dr. Simikin. Once Petitioner obtained her health insurance with Union Health Service, she chose to treat with Dr. Jovanovich who thereafter referred her to Dr. Abraham, Dr. Slavin, Dr. Neckrysh, Drs. Patel and Bartis. Dr. Slack, Dr. Nagle, Dr. Treister and Dr. Goldberg were Section 12 examining physicians.

Based on the above, the Arbitrator finds that none of Petitioner's care to her lumbar spine violated the two-doctor rule as all care was administered, directed or ordered by the two physicians she chose, namely Dr. Vidovic and Dr. Jovanovich, and was in their chain of referrals resulting therefrom.

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

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ALMA MUNOZ,

Petitioner,

vs.

NO: 14 WC 10947

ROCHELLE FOODS, LLC,

18IWCC0622

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, causation, medical expenses, temporary total disability, and "Arbitrator employed incorrect standard of review on medcial [sic] opinion evidence which failed to recognize that medical opinions must be based upon correct facts and correct date of onset of medical condition; other objections of record", and being advised of the facts and law, reverses the Decision of the Arbitrator on the issue of accident but attaches the Decision of the Arbitrator for the Statement of Facts, with the modifications noted below.

The Arbitrator found that Petitioner sustained low back injuries at Respondent on February 12, 2014 while lifting a bag of sugar. The Arbitrator wrote:

> In so concluding, the Arbitrator finds Petitioner's testimony to be credible, as it is corroborated by the treating medical records, various notations by Respondent's Section 12 examiner, Dr. Mercier, and also by Respondent's internal medical department records from Medcor. *Dec. at 10.*

In reversing the Arbitrator's decision, we view the evidence differently and find Petitioner not credible. Petitioner testified that she suffered from a prior low back injury in early 2013 when she slipped on ice in Respondent's parking lot. *T.16.* She did not report it to Respondent and did not file a claim. She received medical treatment for "like around three months" on her own. *T.16-17.* She testified:

Q: So about when if you can remember was the last time that you saw a doctor for any kind of back pain before February, 2014?
A: Like around May of 2013. *T.17.*

On cross-examination, Petitioner testified:

Q: Now, ma'am, as I understating your testimony on Direct Examination you testified that until you injured your back lifting this bag of – was it a 50-pound bag I think you said?
A: Yes.
Q: On the specific date of [2/12/14] that you had not had any treatment to your back going back at least as far as the previous May of the prior year, is that correct?
A: Yes.
Q: How can you be so sure you did not have any treatment during that period of time?
A: Because I would go to the doctor and after May I did not go to a doctor.
Q: Do you remember the date of the accident clearly?
A: The day I slipped on the ice?
Q: No, the day of [2/12/14], the date that we are here for today, do you remember that clearly?
A: Yes.
Q: How can you remember it so clearly?
A: Because for the 13th and 14th I had asked for permission to miss those two days.
Q: So you remember the date of it being the 12th, correct?
A: Yes. *T.32-33.*

Petitioner testified she provided all of the doctors the exact same history relating all of her problems to her injury of February 12, 2014. *T.36-38.* She testified that she reported the accident and went to the nurse at Respondent's medical department immediately after she injured her back. *T.38.* She then reaffirmed a lack of back pain prior to February 12, 2014.

Q: And you hadn't had any treatment for your back up until that point since the previous May, correct?
A: Correct.
Q: So everything – so now we know for a fact since – I agree with you, I agree with you that you did go to the nurse's station and report what you just previously testified to on February 12th. So we know for a fact that your claim is that you were hurt on February 12th on a Wednesday, correct, and that's when you back pain started, correct?
A: Correct.
Q: So all of the histories that you gave to all of your doctors you would agree with me, even if you were wrong on the date from – or the day of the week rather, you would agree with me that you were attempting to refer to was Wednesday, February 12, 2014 is when all your problems started, correct?
A: Correct.
Q: How can you be so sure that you weren't having any problems with your back before February 12th?

A: Because I didn't feel any pain – any problem.
Q: Are you just as sure you didn't have any problem with your back in 2014 prior to the date of February 12 as you are sure as you are sitting in this room right now?
A: Yes, I am sure. *T.38-40.*

Then Petitioner was asked:

Q: Isn't it true that contrary to your testimony you were seen at Rochelle Community Hospital for back pain on [2/6/14] approximately one week before this accident you are testifying to?
A: No, I did not go.
Q: You didn't go there?
A: No, I did not. *T.40-41.*

We find that, at this point in the proceedings, the Arbitrator properly overruled Petitioner's "Ghere" objection, since Petitioner's treating records were certified pursuant to Section 16 of the Act. Petitioner was then asked:

Q: Ma'am, I am going to read you records from Rochelle Hospital dated [2/6/14] from the emergency room department. Under the history of present illness, "Thirty-year old female complaining of low back pain, started yesterday. Patient states at work she has to do a lot of heavy lifting. She states after work she started noticing spasms in her lower back. Patient states she has pain in her lower lumbar region. Patient states she has a history of previous back problems."
Does that refresh your recollection as to whether or not you were at Rochelle Community Hospital, the emergency room, on [2/6/14], approximately one week before this accident that you testified to?
A: No, I don't recall that. *T.41-43.*

We find that Petitioner was less than candid in her testimony. Certainly, Petitioner admitted to prior back problems but testified her treatment ended in May 2013. Petitioner testified emphatically that thereafter, she did not experience back pain until the alleged incident of February 12, 2014. However, even when confronted with the medical records evidencing prior low back treatment, Petitioner initially denied receiving treatment then inexplicably could not remember such treatment. We find that the Rochelle Community Hospital records from February 6, 2012 (Rx1) are credible and belie Petitioner's testimony regarding the onset of back pain being associated with an alleged lifting incident on February 12, 2014.

The Arbitrator in her decision attempts to rehabilitate Petitioner's suspect testimony by proposing a theory of recovery not even advanced by Petitioner stating:

> It is wholly plausible that when Petitioner presented to work on February 12, 2014 she was in a diminished physical condition due, in part, to her overweight condition, heavy lifting activities at prior to her emergency room visit on February 6, 2014, prior low back treatment ending in 2013 or some combination thereof. However, Petitioner claims that she was injured in a specific, traumatic incident on February 12, 2014 in which she experienced an acute onset of low back pain after performing a particular activity require of her at work.

> Petitioner's testimony is not only uncontroverted with regard to the occurrence of the acute injury on February 12, 2014, but is also corroborated by other records evidence supporting the conclusion that she was "suddenly disabled" as a result of lifting a 50 pound bag of sugar on February 12, 2014, "a" causative factor in her low back condition thereafter[.] *Decision at 11.*

First, if Petitioner had admitted that she went to the emergency room on February 6, 2012 for low back pain but did not experience radiating pain, such theory of recovery could have been plausibly advanced by Petitioner. But her testimony at trial is simply inconsistent with such a theory. As the Court stated "[t]estimony under oath and subject to cross-examination is the bench mark of credibility. [citation omitted]. If the claimant did not testify truthfully under oath, then he had no credibility." *Chi. Messenger Serv. V. Industrial Commission*, 356 Ill. App. 3d 843, 850 (2005).

Petitioner in her brief, consistent with the Arbitrator's opinion, attempts to offer this new theory of recovery, but again, Petitioner's testimony at trial does not support it. Petitioner in her brief concedes receiving treatment at the emergency room on February 6, 2012 despite her trial testimony to the contrary and argues she suffered a significant change in her condition after the alleged February 12, 2014 accident which caused radiating symptoms. Again, a valid argument assuming Petitioner testified to the same at trial, but she simply did not. Additionally, in advancing this argument, Petitioner posits after recovering from her 2013 back injury, it was not until the alleged February 12, 2014 accident that she was medically unable to work. The medical records from the emergency room visit on February 6, 2014 do not support this argument. During her visit, Petitioner was provided with a Toradol shot due to back pain. Further, Petitioner's pain was so significant, she was advised to remain off work for four days. (Rx1). Petitioner's arguments that the alleged incident of February 12, 2014 lead to deteriorating back pain and altered work status are not supported by the evidence.

Second, we find the number of corroborating medical records to be immaterial as such records are based upon histories provided by a Petitioner who is not credible. As Petitioner was not truthful regarding her visit to the emergency room a week prior to the alleged accident, we are unwilling to trust her claim of injury on February 12, 2014. None of the treating physicians testified in this case. Although their records reflect the consistent history provided by Petitioner of an acute onset of pain as of February 12, 2014, thereby leading to their opinions that her condition was "work-related," none of the physicians were aware of Petitioner's February 6, 2012 emergency room visit. Not even Respondent's Section 12 physician, Dr. Mercier, was aware of the visit when he opined that Petitioner's condition was related to her accident (although he eventually opined that she had no objective findings to support her subjective complaints).

We find that the Arbitrator's reliance on a consistent history in the medical records is meaningless since they are all based on information provided by Petitioner. She has been shown to be not credible due to her multiple denials under oath about having sought treatment at the emergency room for her low back six days before her alleged work injury. The treating records of February 6, 2012 clearly contradict her denials. We find that Petitioner has failed to prove she sustained an accident on February 12, 2012.

18IWCC0622

Based on our finding regarding accident, all other issues are moot. However, on the issue of causation, we again note that none of Petitioner's doctors testified in this matter and it is clear that their causation "opinions" were based on a history of a specific injury on February 12, 2014 without having any knowledge of Petitioner's emergency room visit six days earlier for low back pain. Furthermore, none of the doctors opined that this was a repetitive trauma injury nor an aggravation of a pre-existing injury.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision is hereby reversed and all awards vacated.

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 2 2 2018

Joshua D. Luskin

L. Elizabeth Coppoletti

SE/
O: 8/29/18
49

Dissenting Opinion

I respectfully dissent. Petitioner denied visiting the Rochelle Community Hospital emergency room on February 6, 2014. *T.41.* When she was shown records that purported to reflect a visit there, Petitioner testified that it did not refresh her recollection and she did not recall that visit. *T.42-43.* Even though Petitioner did not recall that visit, I would still find that her documented work injury on February 12, 2014, while lifting a 50-pound bag of sugar, was at least a contributing factor in her current low back condition and need for treatment. That February 6th emergency room record reflects only muscle tenderness and spasm with no radiation of pain or weakness in the lower extremities. However, subsequent to her work injury, she began to complain of tingling in her legs, and an MRI on February 27, 2014, revealed a broad-based central and right paracentral disc protrusion with minimal caudal migration and abutment of the ventral and proximal right descending S1 nerve root. Petitioner's condition has continued to deteriorate, despite multiple epidural steroid injections, and surgery has been recommended.

The Arbitrator found Petitioner credible about the change in her condition after her documented work injury and I agree with that determination. I would affirm and adopt the Arbitrator's decision.

Charles J. DeVriendt

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

MUNOZ, ALMA
Employee/Petitioner

Case# **14WC010947**

ROCHELLE FOODS LLC
Employer/Respondent

18IWCC0622

On 3/16/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1427 BERG & BERG
STEPHEN M WAUCK ESQ
2100 W 35TH ST
CHICAGO, IL 60609

2986 PAUL A COGHLAN & ASSOC
15 SPINNING WHEEL RD
SUITE 100
HINSDALE, IL 60521

18IWCC0622

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
19(b) & 8(a)

Alma Munoz
Employee/Petitioner

v.

Rochelle Foods, LLC
Employer/Respondent

Case # 14 WC 10947

Consolidated cases: N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Wheaton II (Elgin)**, on **January 6, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, February 12, 2014, Respondent *was* operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident *was* given to Respondent as explained *infra*.

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

In the year preceding these injuries, Petitioner earned $28,600.00; the average weekly wage was $550.00.

On this date of accident, Petitioner was 30 years of age, *married* with 4 dependent children.

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

Respondent shall be given a credit for $3,823.83 for TTD, $0 for TPD, $0 for maintenance, and as agreed for other benefits (i.e., "Resp. Ex of paid medical by group"), for a total credit of $3,823.83 and as agreed[1].

ORDER

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner has established that she sustained an injury on February 12, 2014 arising out of and occurring in the course of her employment with Respondent as well as a causal connection between the low back injury at work and her current condition of ill-being.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $366.67/week for 110 & 1/7th weeks, commencing August 9, 2014 through October 15, 2014 and commencing February 4, 2015 through January 6, 2017, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from February 12, 2014 through January 6, 2017, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit for $3,823.83 for temporary total disability benefits that have been paid. *See* AX1.

Medical Benefits

Respondent shall pay reasonable and necessary medical services as reflected in Petitioner's Exhibit 6 for medical bills that remain unpaid pursuant to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive a credit as agreed by the parties for any payments made with respect to

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[1] The parties stipulated on the Request for Hearing form that Respondent is entitled to a credit for "To Be Shown – see Respondent's exhibit re: group medical payments" under Section 8(j) of the Act. *See* AX1. Respondent entitlement to credit for group payment made, and the amount of any such credit, was not made an issue at the hearing. Id. The parties further agreed that Respondent should be entitled to a credit based on "Resp. Ex of paid medical by group." *Id.* Respondent submitted into evidence Respondent's Exhibits 4, 6 and 7 without objection.

Petitioner's medical bills through the group insurance carrier. *See* AX1.

Prospective Medical Treatment

As explained in the Arbitration Decision Addendum, the Arbitrator awards the prospective medical care in the form of a laminectomy and fusion surgery at L5-S1 as prescribed by Dr. McNally pursuant to Section 8(a) of the Act.

Penalties

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

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

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

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

Signature of Arbitrator

March 3, 2017
Date

MAR 16 2017

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

Alma Munoz
Employee/Petitioner

v.

Rochelle Foods, LLC
Employer/Respondent

Case # **14** WC **10947**

Consolidated cases: **N/A**

FINDINGS OF FACT

The issues in dispute include whether Petitioner sustained a compensable accident on February 12, 2014, whether there is a causal connection between Petitioner's current condition of ill being and his alleged accident, whether Respondent is liable for payment of certain medical bills, whether Petitioner is entitled to temporary total disability benefits commencing on August 9, 2014 through October 15, 2014 and February 4, 2015 through January 6, 2017, whether Petitioner is entitled to prospective medical treatment in the form of a lumbar fusion, and whether Respondent is liable for penalties and fees pursuant to Sections 19(k), 19(l) and 16 of the Illinois Workers' Compensation Act ("Act"). Arbitrator's Exhibit[2] ("AX") 1. The parties have stipulated to all other issues. AX1.

Background

Alma Munoz (Petitioner) testified that she was employed by Rochelle Foods, LLC (Respondent) on February 12, 2014 and had been so employed for approximately six to seven years as a Pickle Maker. In her position, Petitioner explained that she had to go to a department on the lower level and get the orders from the supervisor to see what pickles were going to be made. Then, Petitioner would go back upstairs to the pickle-making room and check the vinegars and juices that were to be used. Petitioner testified that she used dextrose, corn syrup, sugar, salt, sodium, and big barrels of different liquids. She explained that these liquids came in bags weighing about 50 pounds each. Petitioner testified that her job required her to lift these bags constantly and weigh them consistent with the amount needed for each order. She also testified that she had to go up and down the stairs and walk constantly. There were also occasions when the barrels were left on pallets and Petitioner would have to bring those down.

Prior Medical Treatment

Petitioner testified that she has had other accidents while working for Respondent prior to the one she sustained on February 12, 2014. Approximately one year prior to the accident at issue in the above-captioned case, Petitioner testified that she slipped in the parking lot while leaving work. She testified that she did not immediately report this accident, but went home and awoke later with a lot of pain such that it caused her difficulty walking. Petitioner reported it the following Monday and received medical treatment on her own, not through the company. Petitioner testified that she had about three months of medical treatment, which ended in approximately May of 2013. Petitioner described the pain from that accident to be as though something had stretched in her back. By comparison, Petitioner testified that her back pain after the 2014 accident felt as

[2] The Arbitrator similarly references the parties' exhibits herein. Petitioner's exhibits are denominated "PX" and Respondent's exhibits are denominated "RX" with a corresponding number as identified by each party.

though she was being stabbed with a knife and the pain radiated down her right leg. Petitioner testified that she did not have leg pain in 2013.

The medical records of Rochelle Community Hospital reflect that Petitioner sought emergency room treatment on June 3, 2010 for "lower back discomfort for the past 2 to 3 days. Sometimes the pain radiates around to her mid abdomen." RX1[3]. She was diagnosed with a back strain, given an injection, and discharged the same day. Id.

Petitioner was next evaluated at Rochelle Community Hospital in 2013 after her fall in the parking lot at work on February 9, 2013. RX1. She was ultimately discharged from physical therapy on March 31, 2013 for spondylolisthesis at L5-S1 and sacroiliitis. Id.

On cross examination, Petitioner testified that she did not have medical treatment to her back between May of 2013 and her accident at work. However, the medical records reflect that Petitioner presented at Rochelle Community Hospital's emergency room on February 6, 2014. RX1. The emergency room physician noted the following history:

> 30-year-old female complaining of low back pain started today. Patient states at work she has to do a lot of heavy lifting. She states after work she started noticing the spasms in her lower back. Patient states she has pain in her lower lumbar region. The pain feels like a muscle spasm. There is no radiation of pain. There is no weakness in the lower extremities. Patient states she has previous history of back problems. All other review of systems negative.

Id. On physical examination, the physician noted bilateral paraspinal muscle tenderness and spasm. Id. Petitioner was diagnosed with a low back strain (acute) and he prescribed extra strength Tylenol. Id. Petitioner was discharged the same day and placed off work through February 10, 2014. Id.

February 12, 2014

Petitioner testified that she was working for Respondent on February 12, 2014. She explained that when she arrived to work her second shift, the pallets were stacked and the machine that lifted up the pallet as supplies were removed was not there. Consequently, Petitioner testified that she had to bend more often to grab bags of sugar and, while she was lifting sugar, she felt as though something cracked in the lower part of her back followed by pain. Petitioner testified that she reported the accident to her supervisor, Miguel Aparicio, and he sent her to the medical department.

Petitioner went to the medical department and testified that they made some type of medical report. She returned to work with help lifting throughout the remainder of the shift. On cross examination, Petitioner testified that she recalls the accident occurring on February 12, 2014 because she asked to be off of work on February 13 and 14, 2014.

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[3] Respondent's Exhibit 1 is comprised of non-certified hospital records reflecting medical treatment rendered to Petitioner prior to the alleged accident and procured pursuant to subpoena. Petitioner objected to the admissibility of RX1 because it includes emergency room records that were not produced 48 hours in advance of the hearing in violation of case law broadly interpreting the application of Section 12 of the Act to apply to treating physicians. No other legal basis for the exclusion of RX1 was raised at the hearing. Respondent responded that the records were subpoenaed hospital records and presumptively admitted pursuant to Section 16 of the Act. No medical testimony or opinions were offered by any medical provider that rendered treatment to Petitioner at the time of her emergency room care or as a result of prior medical treatment at Rochelle Community Hospital. Petitioner's objection is overruled and Respondent's Exhibit 1 is admitted.

Respondent offered into evidence the records of Medcor. RX5. Allen Proffitt (Mr. Proffitt)[4] noted the following:

> Assessment: Employee reporting to health services with report of lower back pain that developed while lifting a 50 lb. bag of sugar. Employee states that she was pulling a 50 lb bag of sugar across a stack of other sugar bags at chest level and then she grabbed it in a bear hug fashion to lift up when she felt a pop in her back followed by pain that employee currently rates 7/8 on a scale of 0-10. Employee has been doing this job for just over a year without any challenges and she states that she normally wears a back support but for some reason she states she did not put it on today. Employee denies any radiating pain and states that is in one spot right in the middle of her lower back. Large ice pack is applied to lower back over employees clothing with a pillow behind her in a chair. Vitals are assessed as documented and 650 mg tylenol is administered with water in clinic. Employee is advised to continue with icing at lunch break and after work as well, employee states that she is off work the next 4 days and she is instructed to alternate ice and heat and continue otc medications as directed on package while she is off and agrees. Safety director is also present and advised employee that if she has any worsening symptoms to call health services or call security and have them contact the safety director and he will get back to her. Employees supervisor Miguel Appericho contacted and he stated he would have someone help her out the rest of the night. After 20 mins ice pack is removed and employee returns to work without further questions, comment, complaint or incident.

Id. Mr. Proffitt noted his impression that Petitioner sustained a "sprain/strain." Id. Joshua Becker (Mr. Becker)[5] later noted the following update:

> Assessment: Employee contacted health services from the pickle room phone. She explained that her back pain has become worse since she reported it and was wondering what to do. Employee was instructed to follow-up with medical as soon as possible. She agreed to wearing her back support at this time. Last treatment was discussed and she was reminded to follow up for cold therapy as soon as possible. Employee stated that she would contact her supervisor and let them know she would be going down. Medical agreed and conversation was ended. As of 1805 employee had not reported for treatment.

RX5. Mr. Becker then noted the following, final update:

> Assessment: employee returned to health services on her lunch break for cold therapy and otc for her lower back injury. Upon arrival gate is abnormal and she shows signs of pain/discomfort when sitting. She explains that she was working upstairs in the pickle room when the injury occurred. Employee was picking up a 50lb bag of sugar when she felt a "crack" in her lower back. Pain starts in the center and radiates laterally. Upon exam there are no signs of swelling, bruising, or other deformities. Employee has past history of lower back pain after a fall in the parking lot last year. No other allergies or history to report. A large cold pack was secured with employee's back support. Vitals were assessed an employee was given 650 mg Aminofen and was taken while in health services. She was advised to follow up after her lunch break and left health services. Employee returned about 20 min. later and stated that her pain was about the same. Cold pack was removed and she was instructed to follow up after work for continued treatment. She agreed and return to work with no further complaint.

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[4] Mr. Proffitt's position with Medcor at Respondent's facility and any identifying credentials are not reflected in the record. RX5. Mr. Proffitt was not called as a witness.

[5] Mr. Becker's position with Medcor at Respondent's facility and any identifying credentials are not reflected in the record. RX5. Mr. Becker was not called as a witness.

Id. Mr. Becker noted his impression that Petitioner sustained a "sprain/strain." Id.

Medical Treatment

Petitioner testified that she underwent x-rays and received medications from the clinic to which she was referred by Respondent's medical department, Rockford Orthopedics. The medical records of Rockford Orthopedic Associates reflect that Petitioner initially presented on February 19, 2014 to see Robin Borchardt, M.D. (Dr. Borchardt). PX1. Dr. Borchardt noted the following history:

> Date of Injury:
> 1. 02/12/14.
> Work Injury:
> Employer: Rochelle Foods.Job Title: Pickle Maker . The patient did seek medical care with: none . How did the accident occur: patient states that she was lifting a 50 pound bag of sugar and felt a pop in her back. She had an immediate onset of pain when feeling the pop in her back . Body part affected: low back . Pain level at rest: 6/10, with activity: 10/10. Associated symptoms: tingling going down the right leg . Symptoms are aggravated: lifting or twisting motions . Symptoms are relieved by: ice . Previous treatment none . Previous diagnostic testing: none. Is the patient currently working at regular duty job: No patient states that she has worked 2 days since original injury but not at her regular station .

Id. On physical examination, Dr. Borchardt noted tenderness across the whole lumbar spine, level scoliosis, and sensation to light touch decreased in the right lower extremity. Id. Dr. Borchardt diagnosed Petitioner with low back pain. Id. In so doing, she noted that Petitioner's examination did not show any spasm or shift, or findings consistent with radicular pain. Id. Dr. Borchardt also noted that if Petitioner had to leave work early or miss work due to her injury, she would have to notify Respondent's health service, Medcor, and "let us know." Id. Petitioner was released back to work with restrictions. Id.

On February 25, 2014, Petitioner returned to Dr. Borchardt reporting worsening since her last visit as well as tingling in her legs when she walks. PX1. Dr. Borchardt maintained Petitioner diagnosis of low back pain. Id. In so doing, Dr. Borchardt noted Petitioner's complaint of pain across her low back mostly on the right side, radiating pain down the back of both legs, and negative straight leg raising. Id. Dr. Borchardt indicated that Petitioner's subjective complaints were without objective findings, but it would be helpful to obtain a lumbar MRI to rule out a herniated disc. Id. Petitioner remained on work restrictions. Id.

On February 27, 2014, Petitioner underwent the recommended lumbar spine MRI. PX1. The interpreting radiologist noted L5-S1 degenerative disc disease with broad-based central and right paracentral disc protrusion with minimal caudal migration and abutment of the ventral and proximal right dissenting S1 nerve root, a mildly enlarged right S1 nerve root suggesting neuritis, no high grade neural compression, but an underlying shallow disc bulge with mild by foraminal narrowing. Id.

On March 3, 2014, Petitioner returned to Dr. Borchardt reporting improvement as compared to her initial injury with pain at rest at a level of 5/10 and with activity at a level of 8/10, which was stabbing and sharp in nature. PX1. Dr. Borchardt maintained Petitioner's diagnosis of low back pain noting that she had a right-sided S1 protrusion. Id. In so doing, Dr. Borchardt noted that Petitioner did not present clinically with a radicular issue

and that her examination showed mild pain to palpation across the lumbar spine. Id. Dr. Borchardt increased Petitioner's lifting restriction and scheduled a follow up in three weeks. Id.

On March 24, 2014, Petitioner reported doing slightly better since her last visit, but continued tingling down the right leg after her shift at work. PX1. Dr. Borchardt maintained Petitioner's low back pain diagnosis. Id. Dr. Borchardt also noted Petitioner's report that she had been pushing and pulling at work, which increased her discomfort, as well as Petitioner's presentation with low back pain without any radicular symptoms, spasm, or shift. Id. No further follow up visits were scheduled and Petitioner remained on light duty work restrictions with no lifting over 30 pounds or overtime work. Id.

In a letter addressed to Respondent's internal health department, Medcor, dated April 23, 2014, Dr. Borchardt indicated that Petitioner had been released from care because she was at maximum medical improvement. PX1. Dr. Borchardt noted that Petitioner's MRI showed a broad-based central and right paracentral disc protrusion with some caudal migration as well as degenerative disc disease at the L5-S1 level. Id. She also noted that Petitioner's last visit revealed some back discomfort but no radiating symptoms with more diffuse complaints. Id. Dr. Borchardt indicated that Petitioner's subjective complaints did not correlate with her objective findings, Petitioner had previous back problems, and she was very de-conditioned. Id. Dr. Borchardt did not recommend that Petitioner return to the job she was previously performing because she understood it involved picking up 50 pound sacks times throughout the workday and, irrespective of Petitioner's MRI scan findings, she was not in very good physical condition. Id.

Petitioner testified the treatment at the clinic did not help her and they only gave her medications. While receiving medical treatment through the clinic, Petitioner continued to work for Respondent, but not as a Pickle Maker. First, Petitioner testified that she was placed in the microwave department opening the "re-work" and performing the work in a seated position. After some time, Petitioner testified that she was placed in the job in which hams were injected.

On August 9, 2014, Petitioner presented at the emergency room of Kishwaukee hospital. PX2. Petitioner testified that she went to the emergency room because she felt a lot of pain in her back and leg. The hospital records reflect Petitioner's report in pertinent part of "back pain for 2 days. She was seen at another facility. They started her on some Norco and cyclobenzaprine. The patient states after a dose of these medicines it does not seem to be helping anymore, so she came to our emergency department for evaluation. … The is in [sic] her lower back and it does radiate down the back of her left leg. She has had no numbness or tingling. She has had no difficulty walking other than the pain." Id. Roy Werner, M.D. (Dr. Werner) of the emergency room noted that Petitioner had pain with straight leg raises and an abnormal neurovascular exam. Id. He diagnosed Petitioner with sciatica and low back pain. Id. Dr. Werner provided a prescription for Motrin and Norco, and she was instructed to continue the cyclobenzaprine. Id. He also indicated that she would benefit from physical therapy and Petitioner was discharged home. Id.

Approximately 3 ½ months later, Petitioner sought treatment at Suburban Orthopaedics. PX3. Petitioner testified that she went to Suburban Orthopaedics and received medications, three injections, a discogram, and that they checked her leg nerves. Petitioner testified that the injections helped her for some days, but then her pain continued and she experienced tingling in the bottom of her right foot, which went numb.

The Suburban Orthopaedics records reflect that Petitioner initially presented on August 19, 2014 and saw Howard Freedberg, M.D. (Dr. Freedberg). PX3. Dr. Freedberg noted the following history:

> Alma Munoz is a 30y old female who complains of low back pain from a work related injury on 2/12/2014. Patient states that she was bending over to lift a 50lb bag when she felt like her back cracked. She states that she was sent to Rockford Orthopedics, and was then referred for a lumbar spine MRI. Patient states that she was told that she didn't need any therapy and could engage in home exercises, and was given medications to help alleviate pain. Patient states that she has not experienced any relief since onset of injury, noting worsening levels of pain over the past several weeks. Patient was then referred to Dr. Freedberg for further evaluation and treatment.
>
> Patient describes her current lower back as intermittent sharp pains, stating that her pain is near constant. Patient locates her pain throughout the right side of the lower back, reporting that her pain radiates through the right leg down through the foot. She notes frequent numbness and tingling through right leg. Patient states that driving causes the worst exacerbation of her pain, and notes that she has moderate difficulty sleeping due to current levels of pain.
>
> Patient reports to be taking pain medications PRN, doesn't recall names.

Id. On physical examination, Dr. Freedberg noted tenderness in the spinous process and paraspinal muscles, limited range of motion due to pain, and a positive right straight leg raise test. Id. Dr. Freedberg also reviewed Petitioner's February 27, 2014 MRI. Id. He diagnosed Petitioner with lumbar neuritis/radiculitis. Id. Dr. Freedberg ordered a lumbar corset, various medications, and referred Petitioner to his colleague, Dr. Novoseletsky, for evaluation. Id. In the interim, Petitioner remained on light duty work restrictions. Id.

First Section 12 Examination – Dr. Mercier

On September 16, 2014, Petitioner submitted to a medical evaluation with Charles Mercier, M.D. (Dr. Mercier) at Respondent's request. RX2. After a review of various medical records, a physical examination, and taking a history from Petitioner, Dr. Mercier rendered opinions regarding Petitioner's alleged injury at work. Id. Dr. Mercier was provided with various records from Medcor (Respondent's internal employee health department), Dr. Borchardt, and Dr. Freedberg. Id.

Dr. Mercier noted Petitioner's history as follows: "[t]he patient states that on February 12, 2014, while at work, she states that she was lifting a bag of sugar weighing approximately 50 pounds and heard a pop in her back, and developed some pain and she immediately called his supervisor." RX2. He also noted Petitioner's complaints at the time of his examination to include constant low back pain radiating into the right lower extremity, tingling and numbness in the entire left lower extremity, increased back pain with prolonged sitting, walking, standing, stair climbing, and bending forward as well as awakening at bedtime because of the back pain. Id. Dr. Mercier found that "the patient demonstrates increased low back pain with trunk rotation. She has extensive nonanatomical sensory loss of both lower extremities with good retained sweating. Her straight leg testing is contradictory and nonanatomical, bilaterally. These findings represent false reporting to clinical testing. Otherwise she is neurologically intact." Id.

Notwithstanding, Dr. Mercier opined that, "[d]espite her willingness to falsify information on her physical exam today, she does have pathology on her MRI that could cause low back pain and right leg symptoms. Unfortunately, she is already seven months status post her injury with only basic medical care provided to date. I suggest she try one or two epidurals in an effort to decrease her image nerve root neuritis. She could also return to work with restrictions of no repeated lifting over 20 pounds or bending at the waist. Based on her exam today, she is not a surgical candidate. She should continue her home physical therapy." Id.

On cross examination, Petitioner testified that she told Dr. Mercier that she hurt her back while lifting a 50 pound bag at work and she gave the same history to the doctors at Suburban Orthopaedics and at the Rockford clinic.

Continued Medical Treatment

On October 13, 2014, Petitioner saw Dmitry Novoseletsky, M.D. (Dr. Novoseletsky) who noted the history of Dr. Freedberg. PX3. On physical examination, Dr. Novoseletsky noted positive tenderness in the middle back, low back, and PSIS. Id. He also noted a positive straight leg raise test on the right, Fabere test, and sacrum PSIS. Id. Dr. Novoseletsky diagnosed Petitioner with low back pain with right leg pain and peers the easiest, with differential diagnoses of lumbar disc displacement, lumbar sacral radiculopathy lash radiculitis, lumbar spinal stenosis, sacroiliitis, and lumbosacral spondylosis. Id. Dr. Novoseletsky recommended a right S1 transforaminal epidural steroid injection. Id. Petitioner underwent this injection on October 28, 2014. Id.

On November 11, 2014, Petitioner returned to Dr. Novoseletsky reporting that the injection reduced the numbness in her right foot for two days, but did not offer her any pain relief. PX3. She also reported that she had continued low back pain with radiating pain down the posterior-lateral aspect of her right leg with continued numbness on the right foot. Id. Dr. Novoseletsky recommended a right L5-S1 transforaminal epidural steroid injection. Id. Petitioner underwent this injection on November 18, 2014. Id.

On November 24, 2014, Petitioner reported that the last injection helped her 90% for a few days with no leg pain and only pressure on her low back, but then her left leg started to have pain although not as painful as prior to the injection. PX3. Petitioner also reported no numbness injection. Id. Dr. Novoseletsky recommended a repeat right L5-S1 transforaminal epidural steroid injection. Id.

On December 16, 2014, Petitioner reported a new symptom of a burning sensation in the right leg that comes on either after work or in the middle of her workday. PX3. On January 12, 2015, Petitioner reported continued low back pain which was more pronounced on the right side as well as continued radiating pain down the right leg in the lateral and posterior aspect stopping at the heel. Id. Dr. Novoseletsky ordered an EMG of the bilateral lower extremities, and reiterated his recommendation for a repeat right L5-S1 transforaminal epidural steroid injection at both visits. Id. Petitioner underwent the repeat injection on January 13, 2015. Id. Petitioner also underwent the recommended EMG on January 14, 2015. Id. The interpreting physician, Alfredo Lopez, M.D. (Dr. Lopez) found evidence of an acute left L4 and L5 radiculopathy, chronic right L5 and S1 radiculopathy, and no evidence of nerve entrapment or polyneuropathy. Id.

On January 26, 2015, Petitioner reported 15-20% relief from the repeat injection for a couple of hours, followed by a return of tingling and pain symptoms in both legs after the injection. PX3. Dr. Novoseletsky noted that Petitioner was to follow up for medication management and he referred Petitioner to his colleague, Dr. McNally, for a surgical consultation given Petitioner's MRI and EMG findings as well as lack of significant response to the three epidural steroid injections. Id.

Second Section 12 Examination – Dr. Mercier

On February 19, 2015, Petitioner submitted to a second medical evaluation with Dr. Mercier at Respondent's request. RX2. Dr. Mercier noted Petitioner's additional treatment with Dr. Borchardt and Dr. Novoseletsky. Id. Dr. Mercier again indicated that Petitioner "demonstrates nonanatomical sensory loss in the left lower extremity with contradictory and nonanatomical straight leg testing bilaterally. Her subjective low back pain is

increased with gentle axial shoulder compression and trunk rotation. These findings indicate her persistent willingness to falsify information on her clinical exam." Id. Dr. Mercier recommended a repeat MRI of the lumbosacral spine. Id.

Continued Medical Treatment

Petitioner returned to Dr. Novoseletsky on February 23, 2015 at which time he reiterated his referral to Dr. McNally. Id. Petitioner was also placed off of work until Dr. McNally's evaluation. Id.

On March 12, 2015, Petitioner underwent a lumber MRI as ordered by Dr. Novoseletsky. PX3. The interpreting radiologist noted loss of disc height, discogenic end plate change, and small central subligamentous disc herniation and small separate left paracentral/foraminal disc protrusion at L5-S1. Id. He also noted mild left foraminal stenosis, but no significant central stenosis. Id. The radiologist further noted that the central subligamentous disc herniation contacted the right S1 nerve root, but did not compress or displace the root. Id. He suggested correlation for right S1 radiculopathy. Id.

Petitioner returned to Dr. Novoseletsky on March 19, 2015 with continued low back pain and radiating symptoms into the right leg to the foot. PX3. He reiterated his referral to Dr. McNally, scheduled a follow up appointment for the medication management, and kept Petitioner off of work until Dr. McNally's evaluation. Id.

First Addendum Report – Dr. Mercier

On April 8, 2015, Dr. Mercier issued an addendum report after reviewing the repeat MRI that he suggested as well as Petitioner's March 19, 2015 progress note from Suburban Orthopaedics without the last page reflecting the treating physician's recommendations. RX2.

Dr. Mercier indicated that the "repeat March 12, 2015 MRI of the lumbosacral spine is markedly improved over the one done on February 27, 2014. The disc protrusion is now very small without neural impingement. The nerve root neuritis has resolved." Id. He also indicated that "[n]o pathology was noted that could cause radicular pain or neurological losses in the lower extremity." Id. Dr. Mercier further noted that as of March 19, 2015, Petitioner was neurologically intact with positive straight leg raise testing. Id.

Dr. Mercier opined that "[b]ased on the medical records, I have, the patient's low back injury is work related." RX2. He further opined that Petitioner has maximized the value of conservative care, which should be discontinued, and that she is not a surgical candidate or a candidate for further injections. Id. Dr. Mercier indicated that Petitioner was at maximum medical improvement and could return to regular work. Id.

Continued Medical Treatment

Petitioner returned to Dr. Novoseletsky reporting persistent symptoms on April 17, 2015, May 15, 2015, and June 12, 2015. PX3. Dr. Novoseletsky maintained his referral to Dr. McNally, scheduled follow up appointments for medication management, ordered physical therapy for evaluation and treatment, and kept Petitioner off of work until Dr. McNally's evaluation. Id. As of July 10, 2015, Dr. Novoseletsky noted that Petitioner was scheduled to see Dr. McNally later in the month. Id. Petitioner was released back to work with restrictions. Id.

On July 28, 2015, Petitioner had an initial evaluation with Thomas McNally, M.D. (Dr. McNally). PX3. He noted Petitioner's report that she was injured at work on "02/12/2014. She reports that the time of injury she was bending forward to pick up a 50lbs bag of sugar. She reports while picking up the back [sic] of sugar, she felt her back crack causing the pain." Id. On physical examination, Dr. McNally noted tenderness to palpation in the midline and right sacroiliac joint. Id. He diagnosed Petitioner with lumbar disc displacement, lumbosacral spinal stenosis, lumbosacral disc degeneration, radiculopathy, and a resolved lumbar strain. Id. Dr. McNally ordered a discogram of the lumbar spine and suggested a decompression and fusion as an option thereafter. Id.

Petitioner returned to Dr. Novoseletsky on August 7, 2015 for continued medication management. PX3. He echoed Dr. McNally's order for a discogram at L4-L5 and L5-S1 and reiterated his order for physical therapy. Id. Petitioner remained on light duty work restrictions. Id.

Petitioner returned to Dr. Novoseletsky on September 11, 2015 reporting that approval of the discogram per Dr. McNally remained pending. PX3. Petitioner continued to report low back pain with radiating symptoms into the right leg down to the foot. Id. Dr. Novoseletsky kept Petitioner on work restrictions and noted his pending order for physical therapy and approval of Dr. McNally's order for a discogram. Id.

On January 27, 2016, Petitioner underwent the discogram recommended by Dr. McNally, which was performed by Dr. Novoseletsky from L4-S1. PX3. Pre- and post-operatively, Dr. Novoseletsky diagnosed Petitioner with lumbosacral degenerative disc disease, lumbar degenerative disc disease, and chronic low back pain. Id.

Petitioner returned to Dr. McNally on February 16, 2016. PX3. He noted the results of Petitioner's discogram and reiterated that Petitioner "had back and right leg pain since it work related injury on 2/12/2014. Her symptoms are consistent with her medical imaging and testing to date." Id. Dr. McNally recommended a laminectomy and fusion at L5-S1 and maintained Petitioner's work restrictions. Id.

Petitioner underwent urine drug testing on March 24, 2016, which was negative. PX3. On May 4, 2016, Petitioner saw Dr. Novoseletsky who continued to recommend medication management, physical therapy, and continued follow up with Dr. McNally for the recommended lumbar spine fusion. Id. She remained on light duty work restrictions. Id. On June 1, 2016 and July 27, 2016, Dr. Novoseletsky noted that Petitioner underwent six weeks of physical therapy with no relief. Id.

Third Section 12 Examination – Dr. Mercier

On August 23, 2016, Petitioner submitted to a third medical evaluation with Dr. Mercier at Respondent's request. RX2. Dr. Mercier noted Petitioner's additional treatment with Dr. Novoseletsky and Dr. McNally. Id. Dr. Mercier reiterated the conclusions of his prior examinations that Petitioner showed nonanatomical, contradictory findings on physical examination indicating "the patient's persistent willingness to falsify information on her clinical exam putting in serious doubt the reliability of her subjective complaints." Id. He maintained that Petitioner has maximized the value of conservative care, which should be discontinued, and that surgery was contraindicated. Id. Dr. Mercier further indicated that Petitioner was at maximum medical improvement and could return to regular work. Id.

Continued Medical Treatment

On September 12, 2016 and October 10, 2016, Petitioner returned to Dr. Novoseletsky. PX3. He noted that

Petitioner's six weeks of physical therapy provided no relief and he continued to recommend that Petitioner undergo surgery as prescribed by Dr. McNally. Id. She remained on light duty work restrictions. Id.

Additional Information

Regarding her current condition of ill-being, Petitioner testified that her pain has not subsided even with therapy. She testified that she wishes to undergo the surgery recommended by Dr. McNally. Petitioner further testified that she is not receiving benefits from Respondent and she requests payment of those benefits as well as her unpaid medical bills.

ISSUES AND CONCLUSIONS

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

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

Given the totality of this record, the Arbitrator finds that Petitioner has established that she sustained a compensable accident on February 12, 2014 as claimed. In so concluding, the Arbitrator finds Petitioner's testimony to be credible, as it is corroborated by the treating medical records, various notations by Respondent's Section 12 examiner, Dr. Mercier, and also by Respondent's internal medical department records from Medcor.

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

Petitioner testified that on February 12, 2014, pallets were stacked and the machine that could assist her in lifting up the pallet as supplies were removed was not available. Consequently, she explained that she had to bend more often to grab bags of sugar and, while she was lifting sugar, she felt as though something cracked in the lower part of her back followed by pain. Petitioner testified that she reported the accident to her supervisor, Miguel Aparicio, and he sent her to the medical department. Mr. Aparicio did not testify at the hearing. However, the records of Respondent's in-house medical department corroborate Petitioner's testimony. These records reflect that on February 12, 2014 Petitioner presented reporting that she felt a "pop" or "crack" in her lower back after lifting a 50 pound bag of sugar.

Beginning on February 12, 2014 Petitioner specifically and repeatedly reported to Medcor, her treating physicians, and Dr. Mercier that she was injured at work while lifting sugar on February 12, 2014. No witnesses testified at the hearing to controvert Petitioner's testimony that she sustained the acute injury at work while engaged in her normal work duties lifting a 50 pound bag of sugar on February 12, 2014 as claimed. Indeed, the injury as described by Petitioner occurring at work on February 12, 2014 was immediately recorded by several of Respondent's own medical department personnel.

Notwithstanding, medical records were submitted into evidence reflecting Petitioner's presentation approximately one week earlier at the emergency room of Rochelle Community Hospital and Respondent offered into evidence the opinions of its Section 12 examiner, Dr. Mercier, who steadfastly maintained that Petitioner was falsifying her condition in relation to any activities at work and that her physical condition was wholly unrelated to any injury at work. The emergency room records reflect medical treatment related to the low back shortly before the acute injury on February 12, 2014. At the time of her emergency room visit, Petitioner reported low back pain as a result of heavy lifting activities at work. Petitioner did not recall or denied undergoing medical treatment after May of 2013 until her date of accident at work on February 12, 2014. However, Petitioner readily acknowledged on direct and cross examination that she had previously received approximately three months of medical treatment for low back complaints ending in approximately May of 2013.

"[E]ven though an employee has a preexisting condition which may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor." *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 205 (2003). In its analysis, the Illinois Supreme Court noted precedent establishing that "[i]t is a well-settled rule that where an employee, in the performance of his duties and as a result thereof, is suddenly disabled, an accidental injury is sustained even though the result would not have obtained had the employee been in normal health." *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d at 205 (citing *Caterpillar Tractor Co. v. Industrial Comm'n*, 92 Ill. 2d at 36; *Williams v. Industrial Comm'n*, 85 Ill. 2d 117, 122, 51 Ill. Dec. 685, 421 N.E.2d 193 (1981); *County of Cook v. Industrial Comm'n*, 69 Ill. 2d 10, 18, 12 Ill. Dec. 716, 370 N.E.2d 520 (1977); *Town of Cicero v. Industrial Comm'n*, 404 Ill. 487, 89 N.E.2d 354 (1949)). The Court went on to state that an "[a]ccidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was a causative factor in the resulting condition of ill-being." Id., at 205.

It is wholly plausible that when Petitioner presented to work on February 12, 2014 she was in a diminished physical condition due, in part, to her overweight condition, heavy lifting activities at work prior to her emergency room visit on February 6, 2014, prior low back treatment ending in 2013 or some combination thereof. However, Petitioner claims that she was injured in a specific, traumatic incident on February 12, 2014 in which she experienced an acute onset of low back pain after performing a particular activity required of her at work. Petitioner's testimony is not only uncontroverted with regard to the occurrence of the acute injury on February 12, 2014, but it is also corroborated by other record evidence supporting the conclusion that she was "suddenly disabled" as a result of lifting a 50 pound bag of sugar on February 12, 2014, "a" causative factor in her low back condition thereafter

Moreover, Respondent's Section 12 examiner, who believed that Petitioner was willing to "falsify information on her physical exam[,]" noted in his initial report that there was objective evidence of clinical pathology "on her MRI that could cause low back pain and right leg symptoms." Dr. Mercier's dismissal of the described acute injury at work on February 12, 2014 being the sole cause of Petitioner's condition is not dispositive given the entirety of this record as to whether such an injury was a cause of Petitioner's low back condition pursuant

to the Act. To the contrary, Dr. Mercier's acknowledgement of the presence of objective medical evidence to support Petitioner's subjectively reported low back and right leg symptoms after February 12, 2014 lends additional credence to Petitioner's reported February 12, 2014 injury as a cause of the qualitatively different low back and new lower extremity symptoms from those that she previously experienced in the years or weeks before February 12, 2014. The Arbitrator does not find Dr. Mercier's opinions to be persuasive given the entirety of the evidence in this case.

Based on the foregoing, the Arbitrator finds that Petitioner has established that she sustained an injury at work that arose out of and in the course of her employment with Respondent on February 12, 2014 as claimed.

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

The Arbitrator finds that Petitioner's claimed current condition of ill-being is causally related to the injury sustained at work on February 12, 2014. In so finding, the Arbitrator again notes the consistency of Petitioner's testimony with the medical records, Respondent's own medical department records, and Petitioner's reports to Dr. Mercier.

As explained in the accident analysis above, the record contains sufficient credible evidence to establish that Petitioner sustained an acute injury at work on February 12, 2014. The record reflects that Petitioner next sought medical attention on February 19, 2014 with Dr. Borchardt for low back pain and symptoms as well as tingling going down her right leg. She continued to receive treatment and eventually underwent conservative treatment with Dr. Novoseletsky and Dr. McNally without substantial or prolonged relief of her symptoms. There is no evidence that Petitioner had any radiating symptoms into either leg during medical treatment rendered prior to February 12, 2014. Even Respondent's Section 12 examiner, Dr. Mercier, noted in his initial report that there was objective medical evidence to support Petitioner's reported low back pain and right leg symptoms regardless of his opinions about the lack of relation between her condition and any accident at work. Moreover, there is no evidence to suggest that Petitioner's low back condition and radiating symptoms were due solely to a pre-existing condition, non-occupational accident, or intervening event.

Thus, the Arbitrator finds that Petitioner's claimed current condition of ill-being is causally related to the injury sustained at work on February 12, 2014.

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

Petitioner claims entitlement to payment of reasonable and necessary medical bills from medical providers that administered care after her accident at work on February 12, 2014. As explained above, the Arbitrator finds that Petitioner sustained a compensable accident at work as well as a causal connection between her accident and ongoing condition. The medical treatment rendered to Petitioner after her accident is reflective of reasonable and necessary medical treatment to alleviate her of the effects of the injury she sustained. Thus, the Arbitrator awards payment of the medical bills submitted into evidence in PX6 pursuant to Sections 8(a) and 8.2 of the Act.

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

As explained above, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to her accident at work. Petitioner's condition has not improved after her accident at work despite conservative medical treatment efforts. Thus, the Arbitrator awards the recommended prospective medical care in the form of a laminectomy and fusion surgery at L5-S1 as prescribed by Dr. McNally pursuant to Section 8(a) of the Act as this treatment is reasonable and necessary to alleviate Petitioner from the effects of her injury at work.

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

"The period of temporary total disability encompasses the time from which the injury incapacitates the claimant until such time as the claimant has recovered as much as the character of the injury will permit, i.e., until the condition has stabilized." *Gallentine v. Industrial Comm'n*, 201 Ill. App. 3d 880, 886 (2nd Dist. 1990). The dispositive test is whether the claimant's condition has stabilized, i.e., reached MMI. *Sunny Hill of Will County v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130028WC at *28 (June 26, 2014, Opinion Filed); *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003). To show entitlement to temporary total disability benefits, a claimant must prove not only that he did not work, *but also that he was unable to work. Gallentine*, 201 Ill. App. 3d at 887 (*emphasis* added); *see also City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090 (5th Dist. 1996).

Petitioner's testimony and the medical records reflect that Petitioner underwent medical treatment, and was incapacitated as a result of, the effects of her injury at work such that she was placed off of work by her treating physicians. Based on the foregoing, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits commencing August 9, 2014 through October 15, 2014 and commencing February 4, 2015 through January 6, 2017. As agreed by the parties, Respondent is entitled to a credit for payment of $3,823.83 for temporary total disability benefits that have been paid. AX1.

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

Given the facts presented in this case, and after considering the parties' motion and response, the Arbitrator finds that Respondent had a reasonable dispute as to whether Petitioner's alleged injury on February 12, 2014 was compensable and arose out of her employment as alleged. Respondent engaged its Section 12 examiner, Dr. Mercier, to examine Petitioner on several occasions and render opinions regarding the relatedness, if any, of Petitioner's physical condition to any work-related activities. Respondent's conduct was not unreasonable, vexatious and/or in bad faith. Thus, Petitioner's claim for penalties and fees under Sections 19(k), 19(l) or 16 of the Act is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kazimierz Malik,

Petitioner,

vs.

NO: 09 WC 20637

18IWCC0623

M.P. Trailer Repair, Ltd., Marcin Panek,
d/b/a M.P. Trailer Repair, Ltd., Alexi Giannoulias,
Illinois Treasurer, Ex-Officio Custodian of the
Illinois Injured Worker Benefit Fund,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of the Arbitrator's denial of reinstatement, vacates the Order of the Arbitrator, reinstates the claim and remands the matter to the Arbitrator for further proceedings, for the reasons stated below.

By way of procedural history, the Commission notes that this claim was originally dismissed for want of prosecution by the Arbitrator on 3/14/14. Petitioner subsequently filed a "Motion to Vacate Dismissal for Want of Prosecution and Reinstate" on 3/31/14.

On 5/14/14 the Arbitrator denied Petitioner's Motion to Vacate Dismissal by checking "denied" off on the Notice of Motion and Order form presented by Petitioner as part of his motion. No hearing was held on the record at that time and no separate order explaining the basis for his ruling was issued. Petitioner thereupon filed a Petition for Review on 6/13/14.

In a "Decision and Opinion on Review" dated 4/23/15, the Commission noted that "[t]his matter came before the Commission based on a review of the Arbitrator's denial of Petitioner's Motion to Vacate Dismissal for Want of Prosecution and Reinstate. No hearing was held before the Arbitrator, and thus no evidence was taken with regard to the reasons for the original dismissal, or the reasons for the denial of the reinstatement. As such, the Commission has no way to

determine the propriety of the original dismissal or the denial of reinstatement." (15 IWCC 290). The Commission thereupon "... remand[ed] this matter back to the Arbitrator, and direct[ed] the Arbitrator to hold a hearing on Petitioner's Motion to Vacate Dismissal for Want of Prosecution and Reinstate. Evidence should be taken with regard to the basis for the original dismissal, as well as with regard to the propriety of reinstatement." (15 IWCC 290).

Pursuant to the above remand order, a hearing was held before the Arbitrator on 3/8/16. Thereafter, in a "Denial of Reinstatement" dated 6/1/16, the Arbitrator set forth the bases for his previous ruling denying Petitioner's motion to reinstate, including the following:

1) Petitioner filed an Application for Adjustment of Claim on 5/13/09;
2) The Application named the Illinois Injured Workers' Benefit Fund as co-respondent apparently evidencing that Petitioner was aware that his alleged employer was uninsured;
3) The address listed for Respondent MP Trailer Repair on the original application was the residential address of Marcin Panek, the owner of MP Trailer Repair;
4) No significant action supposedly occurred for nearly five years while the matter was pending before the Commission from 2009 to 2014;
5) The claim was "above the red-line" as of 5/13/12, given that it was over three years old;
6) As a result, pursuant to Commission Rule 7020.60(c) the case was to be given a trial date at the status call unless "a written request has been made to continue the case for good cause" and that such a written request must be received by the Arbitrator "at least 15 days in advance of the status call date" in order to allow the Arbitrator to rule on such a request;
7) The claim was "... nearly five years old, so it was well above the red line.";
8) No written request to continue the matter was made 15 days before the status call;
9) "In such matters, it is the Arbitrator [who] determines whether to continue the case, not Petitioner's counsel. Petitioner's counsel seems to be under the misapprehension that if a claimant simply appears in court and states that they cannot proceed, then the matter must be continued.";
10) That on 3/14/14 "... Petitioner's attorney stated that they could not proceed because they 'were unable to obtain proper notice to MP Trailer Repair because Respondent had recently relocated.'";
11) "Petitioner did not state when original notice was attempted.";
12) "Petitioner did not state the new address [of] MP Trailer Repair.";
13) "Petitioner did not state if notice was ever attempted.";
14) "Petitioner was aware that Respondent was uninsured in 2009, when the [A]pplication for [A]djustment of [C]laim was filed. (PX #1).";
15) "There is no requirement that a certificate of non-insurance be obtained prior to proceeding on an ex-parte hearing before the Illinois Workers' Compensation Commission. (PX #14).";
16) "There is no requirement that actual notice be obtained before proceeding on an ex-parte hearing before the Illinois Workers' Compensation Commission. Due diligence is, however, is [*sic*] a requirement.";
17) "Petitioner made no attempt to notify the registered agent of MP Trailer Repair of the trial date. (PX #10).";
18) "As a result of the above, the Arbitrator determined that no 'good cause' was shown to continue the case. No significant activity had taken place on the file in nearly five years, and the claim was dismissed for want of prosecution.";

18IWCC0623

19) "Less than a month after the dismissal, notice was achieved on Marcin Panek... (PX #17).";
20) "The Arbitrator notes that the above service address was not new. It is a residential address that Petitioner has been aware of since 2009, as it is listed on the Petitioner's [A]pplication for [A]djustment of [C]laim. (PX #1)[.] It was also registered with the Illinois Secretary of State. (PX #10)."

Based on the above, and the record taken as a whole, the Commission finds that while the Arbitrator was entirely within his right to dismiss the claim for want of prosecution, given the red-line status of the case, extenuating circumstances and/or "good cause" did in fact exist that necessitated the continuance of the matter. In support of this holding the Commission notes that added difficulties attendant to pursuing a claim against an uninsured employer, including the inclusion of the Attorney General's office on behalf of the Injured Workers' Benefit Fund, the need to obtain a certificate of no insurance from the Commission's Non-Compliance department as well as the serving of notice to oftentimes uncooperative and/or AWOL party opponents. The evidence in this case shows that Petitioner has been proactive on most if not all of these fronts, and in the interest of fairness and equity, should be allowed to have his day in court. As a result, the Commission hereby vacates the Arbitrator's denial of reinstatement, reinstates Petitioner's claim and remands it to the Arbitrator for further proceedings, including possible trial.

Furthermore, the Commission notes that Petitioner conceded that United Global was not an employer in this matter, and that said named Respondent should be allowed out of these proceedings. As a result, the Commission hereby dismisses United Global from this case.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's denial of reinstatement is hereby vacated, Petitioner's claim is reinstated and the matter is remanded to the Arbitrator for further proceedings consistent with this order, including possible trial.

IT IS FURTHER ORDRED BY THE COMMISSION that United Global is hereby dismissed as a co-Respondent in this matter, for the reason set forth 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 23 2018
o: 8/22/18
TJT/pmo
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

State of Illinois)
) SS
County of Cook)

18IWCC0623

Before the Illinois Workers' Compensation Commission

Kazimierz Malik,	)	
Petitioner,	)	
vs.	)	09 WC 020637
M.P. Trailer Repair, Marcin Panek, d/b/a M.P. Trailer Repair Ltd.,	)	
United Global Logistics, Inc., Alex Giannoulias, Illinois State	)	
Treasurer, Ex-Officio Custodian of the Illinois Injured Workers'	)	
Benefit Fund.	)	
Respondent.	)	

Denial of Reinstatement

1. Petitioner filed an application for adjustment of claim with the Illinois Workers' Compensation Commission on May 13, 2009.

2. The application named the Illinois Injured Workers' Benefit Fund as a co-respondent. As a result, it appears the Petitioner was aware that his alleged employer was uninsured.

3. The address listed for respondent, MP Trailer Repair is listed on the original application as 661 West Beach in Addison, Illinois. The Arbitrator notes this is residential address of Marcin Panek, the owner of MP Trailer Repair.

4. No significant action occurred on this claim for nearly five years. No 19(b)s or 19(b)(1) were filed. No motions or request for hearings are listed as being filed and entered in the mainframe database of the Illinois Workers' Compensation Commission at any time from 2009 to 2014.

5. As of May 13, 2012, the above claim was "above the red line," as it was over three years old.
6. When a claim is over three years old, Commission Rule 7020.60(c) applies. As a result, the case will be given a trial date at the status call unless "a written request has been made to continue the case for good cause." Further, the written request must be received by the Arbitrator "at least fifteen days in advance of the status call date." The Arbitrator shall rule on such requests for continuances.

7. In the above case, the matter was nearly five years old, so it was well above the red line.

State of Illinois)
) SS
County of Cook)

18IWCC0623

8. In the above case, no written request to continue the matter was made 15 days before the status call.

9. In such matters, it is the Arbitrator determines whether to continue the case, not Petitioner's counsel. Petitioner's counsel seems to be under the misapprehension that if a claimant simply appears in court and states that they cannot proceed, then the matter must be continued.

10. On March 14, 2014, the Petitioner attorney stated that they could not proceed because they "were unable to obtain proper notice to MP Trailer Repair because Respondent had recently relocated."

11. Petitioner did not state when original notice was attempted.

12. Petitioner did not state the new address MP Trailer Repair.

13. Petitioner did not state if notice was ever attempted.

14. Petitioner was aware that Respondent was uninsured in 2009, when the application for adjustment of claim was filed. (PX #1)

15. There is no requirement that a certificate of non-insurance be obtained prior to proceeding on an ex-parte hearing before the Illinois Workers' Compensation Commission. (PX #14)

16. There is no requirement that actual notice be obtained before proceeding on an ex-parte hearing before the Illinois Workers' Compensation Commission. Due diligence is, however, is a requirement.

17. Petitioner made no attempt to notify the registered agent of MP Trailer Repair of the trial date. (PX #10)

18. As a result of the above, the Arbitrator determined that no "good cause" was shown to continue the case. No significant activity had taken place on the file in nearly five years, and the claim was dismissed for want of prosecution.

19. Less than a month after the dismissal, notice was achieved on Marcin Panek at 661 West Beach in Addison, Illinois 60101. (PX #17)

20. The Arbitrator notes that the above service address was not new. It is a residential address that Petitioner has been aware of since 2009, as it is listed on the Petitioner's application for adjustment of claim. (PX #1) It was also registered with the Illinois Secretary of State. (PX #10)

6-1-16

JUN 1 - 2016

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

Melissa Clark,

Petitioner,

vs.

NO: 16WC 29692

State of Illinois, Pollution Control Board,

18IWCC0624

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 25, 2018 is hereby affirmed and adopted.

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

18IWCC0624

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

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

No bond or summons required for State of Illinois cases.

DATED: OCT 23 2018

Kevin W. Lamborn

Michael J. Brennan

Thomas J. Tyrrell

o101618
KWL/jrc
042

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

CLARK, MELISSA
Employee/Petitioner

Case# **16WC029692**

ST OF IL POLLUTION CONTROL BOARD
Employer/Respondent

18IWCC0624

On 1/25/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.61% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0352 LaMARCA LAW OFFICE PC
WILLIAM LaMARCA
1118 S 6TH ST
SPRINGFIELD, IL 62703

4993 ASSISTANT ATTORNEY GENERAL
CHELSEA GRUBB
500 S SECOND ST
SPRINGFIELD, IL 62706

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

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

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

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

JAN 25 2018

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

18IWCC0624

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)

Melissa Clark
Employee/Petitioner

v.

State of Illinois, Pollution Control Board
Employer/Respondent

Case # **16** WC **029692**

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 **Lee**, Arbitrator of the Commission, in the city of **Springfield**, on **12/21/17**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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, **06/23/2016**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$65,304.20**; the average weekly wage was **$1,255.85**.

On the date of accident, Petitioner was **47** 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 **$0.00** for other benefits, for a total credit of **$0.00**.

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

ORDER

Respondent shall pay reasonable and necessary medical contained in Petitioner's Medical Bill Exhibit as provided in Section 8(a) of the Act.

Respondent shall also pay for prospective medical treatment as recommended by Dr. Greatting, including but not limited to the recommended carpal tunnel releases.

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

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

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

Edward Lee

Signature of Arbitrator

1/23/18

Date

ICArbDec19(b)

JAN 25 2018

Statement of Facts

At arbitration Petitioner testified regarding her employment for Respondent and her job duties. Prior to working for the Illinois Pollution Control Board, Petitioner had worked at the Governor's office, starting in 1989. Petitioner testified while working at the Governor's office her job duties involved typing, keyboarding and the use of a mouse. Petitioner testified in 1998 she transferred to CMS where she was a file clerk processing applications and assisting the director with typing in the applications online, requiring the use of a keyboard as well as handling documents.

Petitioner testified she began working at the Illinois Pollution Control Board in 1999. Petitioner confirmed that in her position for Respondent, she operates a keyboard, uses a mouse and handles documents. With respect to the typing activity, Petitioner testified her work for Respondent involves entering vouchers into a computer system of, "massive spreadsheets with reconciliations," filing, keyboarding, using the mouse and handling documents. Petitioner testified she also uses a stapler on a frequent basis.

Petitioner was asked to describe in a typical shift the percentage of time she operates a keyboard, mouse, calculator and handes documents. Petitioner testified, "a majority of the time is the keyboard, probably 60% of the time; then handling the documents and stapling probably 40% of the time." Petitioner testified while handling documents she is using some degree of force to grip the documents, especially when having to staple them. Petitioner testified she uses both hands in the process of gripping and handling documents. Petitioner testified she is entitled to two breaks, although she does not normally take them because of her work load. She is also entitled to take a 30 minute lunch break.

Petitioner confirmed she began noticing hand and arm symptoms approximately ten years ago. Petitioner testified that since the initial onset of symptoms there has been a change in the number of co-workers and staff that would be available to help with her daily workload. Petitioner testified when her symptoms first began she had six people doing the job she does now. Within the last four to six years, Petitioner testified she has assumed the workload of the six people that have left, causing an increase in her workload. During the period of time after the staff reduction, Petitioner testified she noticed an increase in her hand and arm symptoms. In that regard Petitioner described symptoms to include, "my hands go completely numb, tingling, I have to shake them out and it's - it's almost constant during the day. As long as I am typing or doing, you know stuff they are constantly numb. Fingertips - I am dropping things." Petitioner testified her symptoms were initially worse on the right side but both sides are now equal in terms of severity.

Petitioner was asked to demonstrate the position of her arms while she is typing. Petitioner testified her keyboard sits on her desk. Petitioner demonstrated her elbows are flexed at approximately 75 to 90 degrees at the elbow.

Petitioner testified she underwent an EMG on June 23, 2016 at which time she filed a Notice of Injury with Respondent on July 8, 2016. The Notice of Injury was included in Petitioner's Exhibit 8. Petitioner verified when she saw Dr. Becker for the EMG she had an opportunity to discuss the onset of her symptoms and her work activities. Dr. Becker recommended splints but they did not provide Petitioner with relief.

Petitioner also testified she was referred to Dr. Greatting. Petitioner testified she also had an opportunity to discuss the onset of her symptoms and her work activities with Dr. Greatting. Petitioner testified Dr. Greatting

recommended surgery to treat the condition of her hands and arms. Petitioner testified it was her desire to undergo the treatment Dr. Greatting recommended.

Petitioner was asked about other medical conditions referenced in her medical records. Petitioner confirmed she had been diagnosed with a thyroid condition which was being treated with medication. It was Petitioner's understanding the medication was controlling the condition. Petitioner also testified she was diagnosed with diabetes and was being treated with medication in the form of a pill. Petitioner testified her condition of diabetes was being monitored by her physician and was under control. Petitioner confirmed she had not been diagnosed with hepatitis. She had been diagnosed with sclerosis of the liver. However, she was never advised by a doctor that the condition of her liver may have caused the symptoms she developed in her hands and arms.

Petitioner was asked if she recalled being examined by Dr. Naam at the request of Respondent. Petitioner testified she did recall seeing Dr. Naam. Petitioner was asked about certain measurements contained in Dr. Naam's report marked and introduced as Respondent's Exhibit 2. Petitioner testified Dr. Naam attempted to have her demonstrate the position of her arms when she is at her work station performing her job duties. Petitioner testified the location of the keyboard in Dr. Naam's office was at a different height than the keyboard she uses at work and so she could not accurately demonstrate the exact location of her hands on the keyboard or the position of her arms. Specifically, Petitioner testified the angle of her arms at the elbow is greater at her work station than it was when Dr. Naam measured the angle at his office. Petitioner was also asked how long Dr. Naam spent with her. She testified he spent five minutes with her at the most before sending her for a test.

Petitioner was asked to examine Respondent's Exhibit 3, a job or position description. Petitioner was asked if the job description accurately describes her job duties. Petitioner testified the job description did not accurately describe her job duties. Petitioner testified she performs more activity than the job description includes, in part because an Account Tech referred to in the job description is no longer employed by Respondent. The job description was prepared on May 1, 1999. Petitioner was asked if her job duties have increased since the description was prepared. Petitioner stated, "I would say by triple."

On cross-examination Petitioner was asked about her work activities and how often she was asked to work overtime. Petitioner was also asked to clarify the differences in her work duties between ten years ago compared to the present. Petitioner testified with changes in the programs currently being used, her use of a keyboard and mouse have increased. One task Petitioner performs is called, "reconciliation." Petitioner was asked to describe what that entailed. Petitioner testified the amount of reconciliations she performed on the computer probably tripled. Petitioner described this process as printing reports from the Comptroller's office and comparing them to the vouchering system Respondent uses. That activity is included in Petitioner's estimate of performing typing activities during 60% of her shift.

Petitioner was asked on cross-examination about the measurements Dr. Naam performed confirming that the measurements were not accurate. She attempted to point this out to Dr. Naam. She was also asked if Dr. Greatting measured the bend in her elbows. Petitioner confirmed she did not discuss any differences in the job description Dr. Naam was provided and her actual job duties, although she did have an opportunity to discuss her job duties with Dr. Naam.

Petitioner introduced nine exhibits at arbitration. Exhibit 1 is an office note from Dr. Becker dated June 10, 2016. At that time Petitioner complained of, among other things, numbness and tingling in her hands, bilaterally, difficulty moving her fingers and pain starting in her upper arm and radiating down her arm.

Petitioner's Exhibit 2 was an EMG dated June 23, 2016 performed by Dr. Becker. The EMG revealed bilateral carpal and cubital tunnel syndrome.

Petitioner's Exhibit 3 contains physical therapy notes dated June 27, 2016 involving fitting of bilateral wrists splints.

Petitioner's Exhibit 4 contained office notes from Dr. Mark Greatting from August 31, 2016 through July 10, 2017. In his office note dated August 31, 2016 Dr. Greatting describes Petitioner's symptoms. He also refers to Petitioner's job description and the staff reduction that occurred in Petitioner's department at work. Dr. Greatting states in the same office note that, "Based on her history, it sounds like her work activities do significantly aggravate her symptoms." At that time Dr. Greatting recommended right cubital and carpal tunnel releases and an injection to the right thumb followed in four weeks by a left cubital and carpal tunnel release. At the most recent office visit on July 10, 2017 Dr. Greatting documents complaints of worsening symptoms. The surgical procedures previously discussed were again recommended.

A narrative report from Dr. Greatting dated May 23, 2017 was marked and introduced as Petitioner's Exhibit 6. Also contained in the exhibit was a letter from Petitioner's attorney dated April 5, 2017 providing Dr. Greatting with a description of Petitioner's work activities asking for a narrative report addressing the issue of whether within a reasonable degree of medical certainty he believes Petitioner's work activities could have caused or contributed to the development of her bilateral cubital and carpal tunnel syndrome and osteoarthritis of the carpometacarpal joint. In his narrative report Dr. Greatting states that, while Petitioner has certain pre-disposing factors, he believed Petitioner's work activities were a significant factor which aggravated or accelerated her bilateral cubital and carpal tunnel syndrome. Dr. Greatting did not feel Petitioner's right thumb arthritis was in any way related to her work activities.

The deposition of Dr. Greatting dated September 25, 2017 was marked and introduced as Petitioner's Exhibit 6. Dr. Greatting testified he is board certified in orthopedic surgery with an added qualification of surgery of the hands. Dr. Greatting confirmed when he first saw Petitioner on August 31, 2016 he obtained a history concerning her complaints, which were bilateral hand symptoms, right worse than left, including pain and numbness and tingling. Petitioner told Dr. Greatting those symptoms had developed approximately ten years ago and had gotten progressively worse. Dr. Greatting also testified Petitioner told him, "she would notice symptoms with keyboarding with both hands or using her mouse with her right hand. She would also notice symptoms with driving and she said she would wake up at least three time per night with pain, numbness and tingling. She tried wrist splints and they didn't help, and she had no significant complaints of neck and shoulder pain." Dr. Greatting was asked if Petitioner provided him with any information regarding her employment. Dr. Greatting stated Petitioner advised him she had been employed by the State of Illinois for twenty-seven years and that Petitioner also told him there had been five or six people in her department and due to a decrease in staffing Petitioner felt her work load, "had significantly increased." Petitioner also told Dr. Greatting she did not believe her symptoms were as bothersome when she had time off of work or was away from work and that her symptoms were significantly increased during her work activities. Dr. Greatting also testified Petitioner had complained of beginning to drop things which he testified was a common complaint associated with carpal tunnel and cubital tunnel syndrome.

Based on his exam and a review of the EMG performed on June 23, 2016, Dr. Greatting diagnosed Petitioner with bilateral cubital and carpal tunnel syndrome as well as right thumb carpal metacarpal joint arthritis. Dr. Greatting testified his recommendations for treatment included a right cubital and carpal tunnel release, injection of her right thumb followed by a left cubital and carpal tunnel release three weeks later.

Dr. Greatting confirmed Petitioner had certain medical conditions that were risk factors to developing carpal tunnel and cubital tunnel syndrome. He also testified Petitioner's work activities significantly aggravated her symptoms. With regard to some of Petitioner's medical conditions, it was Dr. Greatting's opinion the

medications Petitioner was taking for her diabetes and thyroid deficiency were designed to compensate for the conditions. With respect to Petitioner's diabetes Dr. Greatting testified the EMG would have revealed if Petitioner's diabetes had progressed to the point where it was causing peripheral neuropathy. There was no evidence of peripheral neuropathy. Dr. Greatting confirmed it continued to be his opinion Petitioner was a candidate to undergo surgical procedures to address her bilateral carpal and cubital tunnel syndrome.

Dr. Greatting was asked about his narrative report dated May 23, 2017 marked and introduced as Petitioner's Exhibit 5 at arbitration. Regarding his comments about presidposing factors, Dr. Greatting stated having those condition doesn't necessarily mean the person will develop carpal tunnel or cubital tunnel syndrome, just that they are more likely to develop it. He was also asked if there are individuals who develop carpal tunnel and cubital tunnel that do not have these predisposing factors.

Dr. Greatting provided additional detail as to how Petitioner's work activities can cause, aggravate or accelerate carpal tunnel and cubital tunnel syndrome. Dr. Greatting stated the positioning of the wrist and the repetitive motion of the wrists and fingers while performing those activities are factors. With respect to cubital tunnel syndrome, Dr. Greatting stated it can be related to positioning of the elbow and the Petitioner's filing activities. Dr. Greatting testified it can also be related to the increased work load Petitioner described when a number of people in her department who had left were not replaced. Dr. Greatting also confirmed he believed he had sufficient information and details about Petitioner's work activities to render an opinion within a reasonable degree of medical certainty.

Petitioner also introduced Exhibit 7, a set of work station photographs and a job description.

Petitioner's Exhibit 9 was a set of medical bills Petitioner testified were associated with treatment she had received for the condition of bilateral carpal tunnel and cubital tunnel through the date of arbitration.

Respondent introduced three exhibits. Respondent's Exhibit 1 is a Notice of Injury signed by Petitioner on July 8, 2016 describing her condition and the activities she was performing including repetitive use of her left and right hands on the keyboard and mouse.

Respondent's Exhibit 2 is a medical report dated March 3, 2017. Petitioner testified she had been examined by Dr. Naam. The report appears to have been authored by Dr. Stewart. Dr. Stewart's assessment of Petitioner's condition was bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome and minimal symptoms of CMC arthritis. It was Dr. Stewart's opinion that treatment received so far was appropriate. He also believed the surgical treatment recommended by Dr. Greatting was also appropriate to treat her conditions. Dr. Stewart described Petitioner's participation in the examination as appropriate and forthcoming. No explanation was given as to why Dr. Stewart signed the report.

Regarding causal connection, Dr. Stewart stated he did not believe data entry involved the requisite force to lead to the development of compression neuropathies. Regarding the position of Petitioner's arms while operating her keyboard, Dr. Stewart stated Petitioner's arms were, "only slightly flexed." Petitioner had testified she did not believe the position Dr. Naam placed her in accurately duplicated the position of her arms at her work station. Dr. Stewart also talked about certain risk factors Petitioner had, including being female and post-menopausal.

Respondent's Exhibit 3 is a Central Management Services Position Description dated May 1, 1999. Petitioner was asked about the description. She testified the description does not accurately describe her job duties for Respondent. She testified the description accurately describes her job duties in 1999 but not at the time her symptoms began or at the time of her accident.

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

The Arbitrator has considered the testimony of Petitioner and the medical exhibits introduced by Petitioner including the evidence deposition of Dr. Mark Greatting and independent medical examination report marked as Respondent's Exhibit 2. The Arbitrator concludes Petitioner's condition of bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome arose out of and in the course of her employment for Respondent and is causally related to her work activities for Respondent. Petitioner's unrebutted testimony was that her bilateral hand and arm symptoms developed approximately ten years ago. They became progressively worse after a reduction in work force in her department causing an increased work load. Petitioner testified her hands go numb while performing her work activities, especially keyboarding and the use of a mouse. Dr. Greatting testified that although Petitioner has certain predisposing factors, her repetitive work activities aggravated or accelerated her bilateral carpal and cubital tunnel syndrome. The Arbitrator considers the opinion of Dr. Greatting to be more credible than the opinion of Dr. Stewart.

As the Court stated in *Durant v. Industrial Commission*, 24 IL 2d 53, 64, 862 N.E. 2d; 918, 308 IL. Dec. 715 (2006), a claimant seeking to recover for a repetitive trauma injury is held to the same standard of proof as any claimant under the Act. The Arbitrator concludes Petitioner presented sufficient evidence to satisfy her burden of proof that the condition of her hands and arms were caused or aggravated her work activities for Respondent.

Were the medical services that were provided to Petitioner reasonable and necessary?

Petitioner marked and introduced Petitioner's Exhibit 9, which contains a group of medical bills and a summary of medical expenses. The summary reflects the total amount of bills for treatment Petitioner received as a result of her accident of June 23, 2016.

The Arbitrator has reviewed the medical exhibits introduced by Petitioner and the medical bills contained in Petitioner's Exhibit 9. The medical expenses appear to be reasonable and necessary and related to Petitioner's accident of June 23, 2016. Having ruled that Petitioner sustained an accidental injury that arose out of and in the course of her employment for Respondent and that the current condition of Petitioner's hands is causally related to her accident, the Arbitrator finds that Respondent is responsible for the payment of any and all unpaid related medical expenses incurred by Petitioner for the treatment of these conditions as per the medical fee schedule.

Is Petitioner entitled to any prospective medical care?

Having ruled that the condition of Petitioner's arms and hands is causally related to an accident she sustained in the course of her employment for Respondent, the only issue is whether the recommended treatment is reasonable and necessary. Dr. Greatting believed the surgery he recommended for the condition of Petitioner's bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome would improve the current condition of her arms and hands. Dr. Stewart also believed surgical intervention to treat Petitioner's condition of bilateral cubital tunnel and carpal tunnel syndrome was appropriate. The Arbitrator therefore concludes the recommended surgical procedure is reasonable and related to Petitioner's accident and therefore the responsibility of Respondent to pay. Respondent is ordered to approve the recommended treatment.

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

Marcus Adams,

Petitioner,

vs.

NO: 13WC 28878

18IWCC0625

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 11, 2017 is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 23 2018
o101618
KWL/jrc
042

Kevin W. Lamborn

Michael J. Brennan

Thomas J. Tyrrell

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

ADAMS, MARCUS
Employee/Petitioner

Case# **13WC028878**

HI-TECH INDUSTRIAL SERVICES INC
Employer/Respondent

18IWCC0625

On 10/11/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.22% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0834 KANOSKI BRESNEY
CHARLES N EDMISTON
129 S CONGRESS
RUSHVILLE, IL 62681

2904 HENNESSY & ROACH PC
PAUL N BERARD
2501 CHATHAM RD SUITE 220
SPRINGFIELD, IL 62704

STATE OF ILLINOIS)
)SS.
COUNTY OF ADAMS)

- [ ] 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)

MARCUS ADAMS
Employee/Petitioner

v.

HI-TECH INDUSTRIAL SERVICE, 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 **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Quincy, IL** on **09/07/2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **08/09/13**, 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 partially 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 child.

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

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

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

ORDER

The Arbitrator awards related medical expenses identified in Petitioner's Exhibit 5 through March 29, 2017, pursuant to Section 8(a) and 8.2 of the Act, subject to the fee schedule.

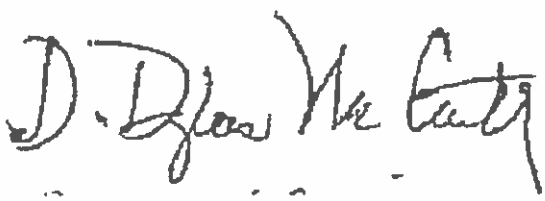
Petitioner failed to prove that his condition of ill-being of complex regional pain syndrome after January 28, 2016, is causally related to his work injury. Therefore, Petitioner's claim for prospective medical treatment is hereby denied.

No other 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.



Signature of Arbitrator

10/2/2017
Date ICArbDec19(b)

OCT 11 2017

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner sustained an undisputed left wrist laceration on August 9, 2013. On January 16, 2015, this matter was tried by Arbitrator Maureen Pulia pursuant to Section 19(b) of the Act. The issues in dispute were accident, causal connection, medical expenses, temporary total disability and prospective medical expenses. Arbitrator Pulia issued a decision on February 4, 2015. She found that Petitioner sustained an accidental injury to his left arm that arouse out of and in the course of his employment by Respondent on August 9, 2013; Petitioner's current condition of ill-being as it relates to his left arm and complex regional pain syndrome was causally related to the injury he sustained on August 9, 2013; Respondent shall pay Petitioner temporary total disability from August 10, 2013, through January 16, 2015; Respondent shall pay reasonable and necessary medical services related to Petitioner's left arm treatment from August 9, 2013, through January 16, 2015; and that Respondent shall authorize and pay for the reasonable and necessary medical expenses associated with the left arm and complex regional pain syndrome after Dr. Stuart Baker had an opportunity to re-examine him given that the time for most of his treatment recommendations had passed. (PX 1)

Respondent appealed the Arbitrator's Decision, and on October 23, 2015, the Illinois Workers' Compensation Commission issued a 2-1 Decision and Opinion on Review affirming and adopting the Decision of the Arbitrator. Commissioner Lamborn issued a dissenting opinion that the Arbitrator's finding of a causal connection was against the preponderance of the evidence and the decision should be reversed. No further appeals were taken. (PX 1 & 2)

Following the hearing on January 16, 2015. and the Commission affirming and adopting the Decision of the Arbitrator, Petitioner continued to treat with Dr. Baker. On December 14, 2015, Petitioner reported to Dr. Baker that cold weather causes pain, "fire, burning." Dr. Baker noted that Mr. Adams had ulnar blood flow in his left and no major swelling. His left hand was warm. There were no treatment recommendations included with Dr. Baker's office note. (PX 3)

On January 28, 2016, Petitioner presented for a second Section 12 examination by Dr. Kiran Chekka at Premier Pain Specialists. Dr. Chekka opined that Petitioner suffered a traumatic laceration of the soft tissues of his wrist. Dr. Chekka believed Petitioner may have thoracic outlet syndrome, but that it would not be causally related to his work accident. Dr. Chekka opined that Petitioner does not meet the Budapest criteria for a diagnosis of CRPS. Dr. Chekka opined that Petitioner also has other inexplicable pathology, particularly Petitioner's motor deficits. Dr. Chekka opined Petitioner's Waddell signs were positive. (RX 1)

On March 2, 2016, Petitioner sought follow up care with Dr. Baker. Dr. Baker noted that Petitioner was wearing a thick glove and reporting that the cold really hurts. He did not have any withdrawal to light touch. He had good ulnar fill. There were no treatment recommendations included with Dr. Baker's office note. (PX 3)

On August 4, 2016, Dr. Baker authored a plastic surgery progress report recommending Petitioner undergo an exploration of the continued dysfunctional left ulnar nerve in the distal arm. He opined that the complex regional pain syndrome may be helped by operative interventions on the ulnar nerve or may require the use of medications, contrast baths, transcutaneous electrical nerve stimulation, desensitization, or various types of

nerve blocks. Dr. Baker's diagnoses were left ulnar nerve injury with continued loss of sensation and moderate Type II complex regional pain syndrome. Dr. Baker noted that Petitioner was unable to work at the times of his December 2015 and March 2016 appointments due to cold intolerance. (PX 3)

On October 5, 2016, Petitioner sought follow up care with Dr. Baker for his left hand and arm. He reported no change from his last visit of August 22, 2016. Dr. Baker's assessment and plan was "same." Petitioner had good sudomotor function of the left ulnar. Dr. Baker could touch Petitioner's left arm and fingers without withdrawal. Petitioner had fairly symmetrical wrist movement bilaterally. There were no treatment recommendations included with Dr. Baker's office note. (PX 3)

On January 9, 2017, Petitioner sought follow up care with Dr. Baker for his left hand, wrist and arm. He reported no changes and the "cold really hurts." Dr. Baker found Petitioner's left arm, shoulder and elbow to have good range of motion. Petitioner's wrists were fairly symmetrical. Petitioner did not have any withdrawal of the left distal ulnar scar. There were no treatment recommendations included with Dr. Baker's office note. (PX 3)

On March 29, 2017, Petitioner sought follow up care with Dr. Baker for his left upper extremity. Petitioner reported his hand is not as tender as the weather warms. Dr. Baker noted "better sudomotor." Dr. Baker recommended a FCE to be performed by Safeworks or ATI Therapy to determine what Petitioner can do with his left arm. (PX 3)

Dr. Baker was deposed a second time on June 28, 2017. Dr. Baker is a board certified plastic surgeon. Dr. Baker testified he first re-examined Petitioner after the Commission decision on December 14, 2015. He was asked what his treatment recommendations were at that time and he testified, "I wanted to do some treatment for complex regional pain syndrome and see how he responded. And depending upon that finding, possibly exploring the ulnar nerve to see if there could be anything simply done to improve the condition of the nerve function." He testified this treatment was not authorized. He failed to explain what "treatment for complex regional pain syndrome" was. (PX 4)

Dr. Baker testified that he continued to treat Petitioner on March 2, 2016. He testified Petitioner continued to complain, "the cold really hurt. He had to wear a thick glove all the time on his left hand." Dr. Baker testified his office was continuing to try to get okay from the workers' compensation to try some interventions. He failed to explain what some interventions were. Dr. Baker testified he next saw Petitioner on August 22, 2016, and Petitioner was reporting, "any cool exposure hurt. Even light touch on the hand itself was quite painful." Dr. Baker testified he saw Petitioner in October 2016 and his complaints remained the same. Dr. Baker testified that on January 9, 2017, Petitioner was continuing to report he "still wore a glove all the time in the left hand." Dr. Baker testified he last saw Petitioner on March 29, 2017. Petitioner was continuing to report to him that he still wore a glove. Dr. Baker testified he believed Petitioner had improved. Dr. Baker testified he recommended a functional capacity evaluation to determine how much work Petitioner is able to do. (PX 4)

Dr. Baker did not believe Petitioner has been able to work due to his reported left hand pain. He testified he did not expect Petitioner could use his left hand to work. Dr. Baker testified that he believes Petitioner should undergo a psychological or psychiatric evaluation. He testified that he believes Petitioner has convinced himself that his condition will never improve. He testified surgery is no longer an option. (PX 4)

On cross-examination, Dr. Baker reiterated his testimony that Petitioner reported to him that he always wore a thick glove on his left hand and that cold caused him pain. Dr. Baker testified that Petitioner reported only being able to perform limited activities and most things he tried to do hurt. Dr. Baker testified he was unsure whether Petitioner would be able to ride a bicycle with only his left hand. Dr. Baker testified he believed Petitioner might have difficulty riding a bicycle. He testified that Petitioner was reporting to him that most things he would do hurt. Dr. Baker testified Petitioner was consistently reporting to him throughout his treatment that he wore a glove on his left hand, that air current caused him discomfort and light touch hurt. Dr. Baker testified he did not know whether Petitioner would be capable of riding a bicycle in November 2016 and would have to be there to see it. (PX 4)

Dr. Baker testified a bone scan was one of the four criteria for diagnosing complex regional pain syndrome. He testified he would have liked to perform a triple phase bone scan, but it was never approved. Dr. Baker testified he did not believe Petitioner could perform fine activities with his left hand. Dr. Baker testified that none of his opinions would change if he had an opportunity to review videos of Petitioner riding a bicycle with only his left hand on the handle bars without any glove on his left hand over a period of several months. Dr. Baker testified that there are three types of complex regional pain syndrome. (PX 4)

Dr. Chekka was deposed on August 30, 2017. Dr. Chekka is a double board certified physician in anesthesiology and pain medicine. Dr. Chekka has been the principle investigator on three different clinical trials with regards to complex regional pain syndrome and has worked on close to 20 clinical trials regarding this syndrome diagnosis. Dr. Chekka's practice is 90% treating patients and 10% research. He performs IMEs in his spare time, consisting of one or two a month. (RX 1)

Dr. Chekka testified he examined Petitioner and found him to display all positive Waddell signs. He did not appreciate any rashes; masses; color changes; atrophic changes to the hair, skin or nail beds; no regions of allodynia; no tremulousness or loss of range of motion in the joints; no abnormal sudomotor activity; equal temperature in both hands; no diffuse edema, swelling, clubbing, or cyanosis; and range of motion through the wrist, elbow and shoulder were intact. Dr. Chekka testified it was virtually impossible for someone to have all of the diagnoses suggested by his examination at once. (RX 1)

Dr. Chekka testified that Petitioner does not meet the Budapest Criteria for a diagnosis of complex regional pain syndrome. He testified the Budapest Criteria is the only established and recognized criteria to make a diagnosis of complex regional pain syndrome. It was established back in the 1990's. Knowledge of the Budapest Criteria is critical to being board certified in Dr. Chekka's specialties. Dr. Chekka testified there are only two types of complex regional pain syndrome, Type I and Type II. He has never heard of a Type III. Dr. Chekka testified that the majority of diagnosing and treating complex regional pain syndrome is done by a board-certified pain management physician such as himself. Dr. Chekka has a primarily referral practice for complex regional pain syndrome patients. (RX 1)

Dr. Chekka testified that at the time of his IME, Petitioner did not have complex regional pain syndrome. He testified he may have had thoracic outlet syndrome and, for thoroughness purposes, recommended Petitioner be evaluated by a neurologist for this possible condition. He testified that this diagnosis would not be related to Petitioner's work accident. Dr. Chekka believed Petitioner could return to work without restrictions following his January 28, 2016, IME. (RX 1)

Dr. Chekka had an opportunity to review additional medical records and surveillance videos, and drafted a supplemental report (RX 1; Dep. X 3). Dr. Chekka testified he also reviewed additional surveillance videos after his supplemental report and prior to his deposition. He testified the surveillance videos revealed Petitioner

standing without any substantial distress; being extremely left-hand dominant with the way he utilizes his hands; and having no loss of fine motor skills, no loss of dexterity and no loss of grip. Dr. Chekka testified the surveillance video showed Petitioner with an extremely high level of fine motor skill; extremely high level of comfort control and strength with his hand; and excellent grip such that he was able to ride a bicycle in narrow spaces and maneuver deftly with only his left hand at times. Dr. Chekka testified that he saw Petitioner reach and use his left hand to hold up his pants for extended periods of time. (RX 1)

Dr. Chekka testified that he saw Petitioner in video surveillance from March, May, September, October and November 2016 without any glove on his left hand, despite Petitioner representing to him at the time of his IME that he wore a glove on his left hand. Dr. Chekka testified Petitioner did not display any signs of weakness in his left arm, hand or upper extremity in the surveillance videos. Dr. Chekka opined that Petitioner did not have any existing deficit or disease that needs to be treated. Dr. Chekka opined that Petitioner could work without restrictions. He addressed several of Dr. Baker's opinions and disagreed with his findings. Dr. Chekka testified that Dr. Baker's examination findings and records are inconsistent with Petitioner's abilities displayed in the surveillance videos. (RX 1)

On cross-examination, Dr. Chekka testified that he had to examine Petitioner extensively because he tested positive for all provocative testing. He went through several possible diagnoses as a secondary work up to determine why he may be testing positive for so many conditions. Dr. Chekka testified that Petitioner tested positive for all five Waddell signs. Dr. Chekka testified that at times while reviewing the surveillance video he had to confirm that Petitioner was alleging a left arm and hand condition since he uses his left limb more than his right in the majority of the videos. (RX 1)

Respondent's investigator, Matt Porzel of Frasco Investigation Services, testified to his surveillance efforts of Petitioner. Mr. Porzel testified that Respondent requested his services in March 2016 and he videotaped Petitioner several times through March and May 2016. He testified that surveillance video was taken by other investigators at Frasco in September, October and November 2016. He testified that the dates and times indicated on the video were accurate representations of when the videos were taken. He did not alter the videos in any way.

Respondent's regional manager, Jenn Brown of Frasco Investigation Services, testified to the surveillance reports prepared after the surveillance efforts. Ms. Brown testified that the investigators dictate the reports that are then transcribed. She reviewed the transcribed reports and surveillance videos to ensure they accurately reflect each other. She reviewed the completed reports for accuracy and prepared a brief summary. The reports are dictated by the surveillance investigators, but if there is an error that needs to be addressed regarding either the investigation summaries or videos, she will correct it. Ms. Brown testified that she reviewed all of the surveillance videos and reports and that the reports accurately reflect the videos.

Respondent introduced surveillance videos from March 26, 2016; March 29, 2016; April 22, 2016; May 6, 2016; May 11, 2016, May 13, 2016; September 27, 2016; October 1, 2016; November 8, 2016; and November 17, 2016. The videos show Petitioner outside many times without any glove on his left hand, being able to ride a bicycle and steer in traffic with only his left hand on the handle bars, pulling up his pants with his left hand and general everyday activities with his left hand without any noticeable guarding or hesitation regarding the left hand. (RX 4)

On March 26, 2016, he is seen outside without any glove on his left hand. On March 29, 2016, Petitioner is seen riding his bicycle without any glove on his left hand. He is seen gripping the bicycle handle bars with his left hand and starting the bicycle from a stopped position without any difficulty. He is seen riding

his bicycle with only his left hand on the handle bars while he talked on a phone in his right hand and rode in and out of traffic. He is seen riding up a hill with only his left hand gripping the handle bars while he rode. Petitioner is seen turning on his bicycle with only his left hand on the handle bars. The majority of the time Petitioner is seen riding his bicycle on March 29th is with only his left hand on the bicycle's handle bars. (RX 4)

On April 22, 2016, Petitioner is seen outside without a glove on his left hand. He was wearing a sweatshirt and pants. He is seen cleaning his bicycle on his front porch with his left hand. He is seen starting his bicycle from a stopped position with no difficulty and then riding with only his left hand on the handle bars. He is seen riding his bicycle slowly and turning with only his left hand on the handle bars. He was not wearing a glove on his left hand in any of the videos. (RX 4)

On May 6, 2016, Petitioner is seen outside without a glove on his left hand. He is seen putting his left hand in his pants pocket without difficulty, hesitation or pain. (RX 4)

On May 11, 2016, Petitioner is seen outside. The arbitrator cannot tell whether he was wearing a glove on his left hand. He is seen pulling up his pants with his left hand. Petitioner is seen riding his bicycle with only his left hand on the handle bars while he talked on a cell phone in his right hand. Petitioner is seen steadying himself with his left hand on a staircase as he sat down on it. (RX 4)

On May 13, 2016, Petitioner is seen outside without a glove on his left hand. Petitioner is seen riding his bicycle through down and turning down the streets with both hands gripping the handle bar. (RX 4)

On October 1, 2016, Petitioner is seen outside without a glove on his left hand. He was wearing a sweatshirt and pants in the video. He was seen holding up his pants just his left hand. He was seen holding an aluminum can with only his left hand while sitting outside. The aluminum can did not appear to cause Petitioner any discomfort in his left hand. (RX 4)

On November 8, 2016, Petitioner is seen outside without a glove on his left hand. He was wearing a sweatshirt and pants in the video. (RX 4)

On November 17, 2016, Petitioner is seen outside without a glove on his left hand. He was wearing a sweatshirt and pants in the video. He is seen walking his bicycle with only his left hand on the handle bars. Petitioner is seen riding his bicycle with only his left hand on the handle bars. He is seen turning on the bicycle with only his left hand on the handle bars. At one point, Petitioner is seen starting to ride his bicycle from a stopped position with only his left hand on the handle bars when he starts to ride. He is seen gripping the handle bars with only his left hand and turning on his bicycle with only his left hand on the handle bars. The majority of the time Petitioner is seen riding his bicycle on this date is with only his left hand on the bicycle's handle bars. (RX 4)

Petitioner testified that that he cut his left wrist on flex tube while cleaning a reactor with another coworker on August 9, 2013. He testified that since his last appointment with Dr. Baker in March 2017 he cannot be in the rain or air conditioning and cannot touch steel. He has difficulty sleeping and pain almost everyday. He cannot do what he used to do, including fishing and playing basketball. He testified that he is seeking authorization of a FCE and psychological treatment. He reported he has not had any change in his symptoms since the first arbitration hearing. He testified that he will ride his bicycle for exercise, but cannot grip the handlebars with his left hand. The only time he would take his right hand off the bicycle's handle bars would be to take his cell phone out of his right pocket. He testified that riding a bicycle takes a firm grip. Prior

to his work at Respondent he had performed various jobs including dry walling and operating heavy equipment. He testified he wears a glove on his left hand because cool air irritates it.

On cross-examination, Petitioner testified that he reported to Dr. Baker on March 2, 2016, that he always wore a glove on his left hand. He testified that it was likely cold in Decatur in March 2016 which is why he was wearing hooded sweat shirts and pants in the surveillance videos. He testified it was also likely cold in November 2016 when he was seen again riding his bicycle and wearing a hooded sweatshirt and pants. Petitioner testified that he has had multiple felony convictions for marijuana and cocaine and has been incarcerated multiple times for these crimes. When asked whether he did not wear a glove on his left hand sometimes, he testified that he always has it on. He denied being videotaped on numerous occasions without it on. Petitioner was asked to take his glove off of his left hand and point to any difference between his two hands, but he was unable to point the Arbitrator to any difference between his left and right hands. Petitioner testified that Dr. Baker is continuing to recommend surgery, as well as a psychological evaluation.

CONCLUSIONS OF LAW:

In support of the Arbitrator's Decision relating to (F), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

It is undisputed that Petitioner sustained a left wrist laceration as a result of his August 9, 2013, work accident. On October 23, 2015, the Illinois Workers' Compensation found that Petitioner's current condition of ill-being in his left arm and diagnosis of complex regional pain syndrome was causally related to his work injury. Respondent issued payment of all benefits prior to October 23, 2015, and authorized the awarded treatment with Dr. Baker. Following the initial awarded treatment with Dr. Baker on December 14, 2015, when Dr. Baker did not provide any treatment recommendations, Respondent obtained an IME with Dr. Chekka on January 28, 2016.

While the Arbitrator notes the opinions of Dr. Baker, the Arbitrator finds the opinions of Dr. Chekka to be more reliable, credible, and persuasive in the instant matter. As discussed below, the Arbitrator bases his finding on Dr. Chekka's expertise in the field of diagnosing and treating complex regional pain syndrome, his objective examination findings, or lack thereof, and his initial findings and opinions concurring with Respondent's video surveillance that was obtained shortly after his January 28, 2016, IME and through the remainder of 2016, as well as Dr. Baker's opinions testified to on June 28, 2017, being inconsistent, contradicting, uninformed and not supported by the surveillance videos.

Dr. Chekka testified he reviewed additional surveillance videos after his supplemental report and prior to his deposition. He testified the surveillance videos revealed Petitioner standing without any substantial distress; being extremely left-hand dominant with the way he utilizes his hands; and having no loss of fine motor skills, no loss of dexterity and no loss of drip. Dr. Chekka testified the surveillance video showed Petitioner with an extremely high level of fine motor skill; extremely high level of comfort control and strength with his hand; and excellent grip such that he was able to ride a bicycle in narrow spaces and maneuver deftly with only his left hand at times. Dr. Chekka testified that he saw Petitioner reach and use his left hand to hold up his pants for extended periods of time. Dr. Chekka's initial examination findings and opinions are corroborated by the numerous surveillance videos.

On the other hand, Dr. Baker testified he did not believe Petitioner could perform fine activities with his left hand. Dr. Baker's ongoing diagnosis of complex regional pain syndrome is based upon the Petitioner's credibility. The Petitioner, during his office visits since the earlier Commission decision, consistently

complained of a fire-like pain of a constant nature in his left hand. The video surveillance does not corroborate those complaints. In fact, it refutes them. Dr. Baker testified that none of his opinions would change if he had an opportunity to review videos of Petitioner riding a bicycle with only his left hand on the handle bars without any glove on his left hand over a period of several months.

Dr. Chekka testified he examined Petitioner and found him to display all positive Waddell signs. He did not appreciate any rashes; masses; color changes; atrophic changes to the hair, skin or nail beds; no regions of allodynia; no tremulousness or loss of range of motion in the joints; no abnormal sudomotor activity; equal temperature in both hands; no diffuse edema, swelling, clubbing, or cyanosis; and range of motion through the wrist, elbow and shoulder were intact. Dr. Baker never had any objective findings consistent with a diagnosis of CRPS. Dr. Baker's diagnosis is based on Petitioner's subjective complaints of his hand being on fire and his pain being out of proportion to stimuli. Dr. Baker noted in his records and testified that Petitioner had some inconsistencies with his examinations. Dr. Baker's primary reliance on Petitioner's subjective complaints causes the Arbitrator concern due to Petitioner's credibility.

Dr. Baker testified a bone scan was one of the four criteria for diagnosing a complex regional pain syndrome. He testified he would have like to perform a triple phase bone scan but it was never okayed. There were no medical records or prescriptions introduced at trial indicating that Dr. Baker ever prescribed a triple phase bone scan. The first mention of such was during his June 28, 2017, deposition. Respondent was authorizing his treatment in December 2015, but there is no evidence Dr. Baker ever prescribed any such treatment before mentioning it in his June 2017 deposition.

The Arbitrator also finds that Petitioner has serious credibility issues. Petitioner has reported conflicting complaints to his treating physicians and Respondent's IME physician. Dr. Baker also noted some inconsistencies during his examinations and testified to such on October 29, 2014. Petitioner testified at trial that he always wore a glove on his left hand, despite being confronted with many days of video surveillance where he is clearly not wearing any glove on his left hand. Petitioner testified that it takes a firm grip to ride a bicycle and he is clearly seen riding his bicycle with only his left hand on the handle bars while he rode in and out of traffic on multiple occasions through 2016.

Based on the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that Petitioner failed to prove that he continued to suffer from a symptomatic complex regional pain syndrome after January 28, 2016 work injury.

In addition to diagnosing CRPS, Dr. Baker has continued to diagnose the Petitioner with an ulnar nerve injury. The earlier decision of the Arbitrator, affirmed by the Commission, causally related the condition of ill being, "including the diagnosis of complex regional pain syndrome," to his work related accident. The decision implies that the ulnar nerve injury was causally related as well. Dr. Baker has consistently noted some weaknesses of the ulnar intrinsic muscles during his examinations since that decision became final. While the obvious inconsistencies with that diagnosis seen on the surveillance videos cause question as to the nature and extent of that condition, the arbitrator believes the consistency of Dr. Baker's examination findings support a finding of causation of that condition.

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

The findings and conclusions of the Arbitrator with regard to causal connection are adopted and incorporated herein.

Petitioner offered into evidence only one unpaid bill which was for an office visit with Dr. Baker on March 29, 2017. Dr. Baker testified concerning that visit and it is clear that it involved treatment for ulnar nerve dysfunction. (PX 4 at 14) Accordingly, Respondent is ordered to pay said bill of $85.91, to the extent allowed under the Fee Schedule.

In support of the Arbitrator's Decision relating to (K), Is Petitioner entitled to any prospective medical care, the Arbitrator finds and concludes as follows:

The findings and conclusions of the Arbitrator with regard to causal connection are adopted and incorporated herein.

As the Arbitrator has found that the Petitioner's CRPS is no longer symptomatic, the request for psychological treatment is denied. The request for an FCE is also denied as well, based upon the negative inferences drawn from the surveillance videos.

In support of the Arbitrator's Decision relating to (L), Is Petitioner entitled to temporary total disability, the Arbitrator finds and concludes as follows:

The findings and conclusions of the Arbitrator with regard to causal connection are adopted and incorporated herein.

The Arbitrator has adopted the findings and opinions of Dr. Chekka in regards to Petitioner's condition of ill-being. Dr. Chekka testified that Petitioner was able to work without restrictions as of January 28, 2016. The parties stipulated that Respondent has paid all temporary total disability benefits up to this date. Therefore, there is no additional temporary total disability awarded.

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

Gary Scott Walton,
Petitioner,
vs.

NO: 14WC 13596

18IWCC0626

Southern Wine & Spirits,
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, benefit rates, medical expenses, notice, temporary total disability, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 19, 2017 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 23 2018

Kevin W. Lamborn

Michael J. Brennan

Thomas J. Tyrrell

o101618
KWL/jrc
042

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SCOTT WALSTON, GARY
Employee/Petitioner

Case# **14WC013596**

SOUTHERN WINE & SPIRITS
Employer/Respondent

18IWCC0626

On 12/19/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.48% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0355 WINTERS BREWSTER CROSBY ET AL
THOMAS F CROSBY
111 W MAIN PO BOX 700
MARION, IL 62959

0481 MACIOROWSKI SACKMANN & ULRICH
ROBERT E MACIOROWSKI
105 W ADAMS ST SUITE 2300
CHICAGO, IL 60603

18IWCC0626

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

GARY SCOTT WALTON
Employee/Petitioner

v.

SOUTHERN WINE & SPIRITS
Employer/Respondent

Case # 14 WC 13596

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Cellini**, Arbitrator of the Commission, in the city of **Herrin**, on **December 16, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **November 19, 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, as no accident was proven.

Petitioner's current condition of ill-being *is not* causally related to the accident, as no accident was proven.

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

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

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

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

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

Respondent is entitled to credit for any awarded medical expenses paid via Respondent's group health plan under Section 8(j) of the Act.

ORDER

The Arbitrator finds, for the reasons set forth below, that the Petitioner has failed to prove that he sustained accidental injuries arising out of and in the course of his employment with the Respondent on November 19, 2013.

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

December 5, 2017
Date

DEC 19 2017

STATEMENT OF FACTS

Petitioner's Testimony and other Evidence

A 15 year employee of the Respondent, the Petitioner was employed as their District manager for the south region, covering approximately 14 counties in Southern Illinois. The supervisor of sales reps and merchandisers in his territory, he testified that he only had one merchandiser/material handler under his control, Kevin Murphy.

The Respondent is a liquor distributor. The Petitioner testified that in this capacity, the Respondent would sell and deliver liquor and wine to hundreds of various grocery stores, liquor stores and larger department stores like Wal-Mart and Sam's Club. This would also include point-of-sale and display items designed to display the sold products, which had to be delivered and set up. A route truck would generally deliver the liquor and wine, but the Petitioner testified that the merchandiser would deliver "point-of-sale" items, which involve items for store displays or other manufacturer/customer special offers. Petitioner would personally deliver liquor and wine that would be considered "fast bills", and which did not make it onto the route truck. He noted that sales reps are not allowed to perform these fast bills and point-of-sale set ups in any "excessive" fashion per union contract, i.e. anything over 15 to 30 cases. If a merchandiser was not available to do store set ups, the Petitioner himself would perform the tasks.

The Petitioner testified that he would pick up and unload a lot of the point-of-sale merchandise into his personal garage on a weekly basis so it would be easier for himself and his merchandiser to access for delivery. The merchandiser would set up the point-of-sale materials to display in the stores, and would stock store shelves. The Petitioner identified various photos of examples of the boxes stored in his garage and loaded onto his pick-up truck, as well as photos of a wide variety of liquor displays at various retail locations. (Px12). The Arbitrator reviewed these photos and notes that the sizes of the noted boxes vary widely, from medium to very large, and the displays look like those which one would typically see in a liquor or grocery store at the ends of aisles to feature those products.

Petitioner submitted numerous photos of examples of boxes, liquor cases and point-of-sale products that he would transport as part of his job, as well as the types of liquor display set-ups that would be used in stores. There are also photos of his pick-up truck fully loaded with these items. (Px12).

Because one material handler was not sufficient to handle the work in his territory, the Petitioner testified he regularly had to perform material handling duties, both working with Murphy as well as separate from him, in 2012 and 2013. This would include stocking stores, creating displays and moving liquor products.

Petitioner is a union member, and his pay is dictated by the union contract. (Px4). Rank and incentive payout are governed by the contract, based on productivity including meeting quotas and goals. The Petitioner testified that he paid some out of pocket expenses for his medical care and medications (Px2 & 3), and that otherwise his medical expenses were paid through his group health care coverage (Px1).

Petitioner testified he first sought treatment for his low back in April 2013 from chiropractor Dr. McGuire. He testified that he had not previously been diagnosed with any lumbar injury. He complained to Dr. McGuire of low back pain that sometimes radiated into his legs, reporting that he first experienced the radiating pain in his legs when he awoke on 2/28/13.

Prior to this, on 11/20/12, Petitioner had undergone right rotator cuff repair surgery and was still recovering from that in February 2013. He testified that he requested a return to work just six days after surgery, on 11/26/12, and he returned to work with a restriction of 10 pounds lifting below the shoulder, which he was still working under in February 2013. He also remained in shoulder therapy in February 2013. At the time he noticed the onset of low back pain, the Petitioner was still taking prescription pain medications related to his shoulder. The shoulder problem resulted in what Petitioner described as an inability to lift away from his body at chin level. He was instructed in how to lift as close to his body as possible in therapy. He testified that this impacted his ability to do material handling, and that "The more I lift, the more my back hurts." The Petitioner testified he discussed this and his job duties with Dr. McGuire, noting they "are social friends anyway, and he understands what I do for a living."

The Petitioner testified that his position requires him to take care of his region to the Respondent's standards, and thus if the people under him don't or can't do their jobs, he is the "safety net" who has to cover things. The Petitioner testified that while working with Kevin Murphy as is merchandiser, he himself would move on average 250 to 300 cases of liquor or wine per day at customer locations, which does not include readjusting previously shelved product or constructing point-of-sale displays. A case of liquor weighs 40 to 45 pounds on average. In order to build end cap displays, Petitioner testified he has to repeatedly bend to stock the liquor.

The Petitioner testified he also had to travel throughout his territory on average anywhere from 900 to 1200 miles per week. Since April 2013, driving has been very uncomfortable, and he stops to get out and move around every 70-80 miles.

The Petitioner testified his leg symptoms worsened during his treatment with Dr. McGuire. He continued to see his primary provider Dr. Davis for pain medications that had been continued since the time he started taking them for the shoulder. He testified that in July 2013, Kevin Murphy went on vacation, and then went off work due to knee surgery, so he was without a merchandiser from late July until he went off work in 11/19/13, so Petitioner had to do he merchandiser's work at that time. Petitioner testified he requested help from the Respondent multiple times but never obtained a replacement. The Petitioner did report to Dr. McGuire in July 2013 that he was lifting upwards of 350 cases per day.

The Petitioner testified that over 40% of the Respondent's business was done from September to December during the holiday season, and stores load up on inventory during that period, so the work greatly increases at that time of year. Suppliers also survey the market more during this time, so store displays have to be up to par.

The Petitioner testified that his symptoms increased when Murphy was not working. The more activity he did, the worse he got and the more pain he had, and the pain and numbness started to radiate down to his toes. He thus was referred to Dr. Kennedy on 9/24/13, at which time Kennedy referred him to Dr. Feinberg for injections. Petitioner testified the epidurals helped only temporarily, and each one provided shorter relief.

Petitioner testified he explained his increased workload to Dr. Feinberg, as well as his increasing symptoms, and Dr. Feinberg restricted him to lifting no more than 10 pounds on 11/18/13. Because the Respondent was not going to allow him to work with the restriction, Petitioner called Feinberg and begged him to change the restriction to 25 pounds, as he felt he would still be able to do his job. Dr. Feinberg made the change, but the Respondent would not accommodate this or allow the Petitioner to return to work until he had a full duty release. As a result, the Petitioner then remained off work through the time he underwent a two-level fusion and laminectomy with Dr. Kennedy on 3/17/14. Just over a month after surgery, the Petitioner requested a full duty release from Dr. Kennedy, who released him on 4/24/14, noting he promised Dr. Kennedy he wouldn't overdo it.

Upon the Petitioner's return to work, Kevin Murphy had already returned. The Petitioner testified he didn't go back to handling materials normally "right out of the gate", and when he did after about a month, it was very hard. He was unable to do what he used to do, and he was afraid of reinjuring himself.

In June 2014, the Petitioner testified that Dr. Kennedy determined that he didn't have a complete fusion, and a bone stimulator was prescribed, along with physical therapy. Shortly thereafter the Respondent sent Petitioner to see Dr. Fletcher. In July 2014, Dr. Kennedy prescribed more therapy as well as joint injections.

The Petitioner testified he has ongoing pain in his back and left buttock near the hip. He noted that he had two broken screws in the fusion, but Dr. Kennedy advised against removing them. He still has numbness and pain down both legs, left greater than right, as well as spasms, for which he takes a muscle relaxer. He also takes Oxycontin on a daily basis, but testified he is able to function. He is not currently scheduled to see Dr. Kennedy or Dr. Feinberg. He's had no lost time due to his back since 2014.

The Petitioner testified regarding a number of emails contained in Px12 between himself and his supervisors regarding his requests for help while Murphy was gone, and the fact that he had increasing pain because of it. They tried to send an operations person down to help, but because of that person's inferior performance, the Petitioner still had to do the work himself.

The Petitioner testified that he no longer rides his 4-wheeler or plays organized softball. He gets uncomfortable sitting and playing poker, and while he can play golf, it gets uncomfortable after 13 or 14 holes.

On cross examination, the Petitioner agreed that he has remained on Oxycontin since it had been initially prescribed during his shoulder treatment, but on redirect indicated the dose was increased in the summer of 2013. He also agreed that he had previously testified in 2014 during hearing for his shoulder injury that he was already limited in softball and 4-wheeling due to the shoulder at that time, and added that he had sold his four wheeler in 2012.

The Petitioner testified that his job duties have essentially remained the same since he began with the Respondent and its predecessor, Romano Brothers, fifteen years ago, and that he has always been in the same territory and never had more than one merchandiser/material handler. In 2013, he was still treating for his shoulder and attending therapy, and he weighed 315 to 320 pounds at that time. He currently weighs 265 to 270 pounds. He has been a smoker for at least 25 years, and currently smokes about ½ pack per day.

On further cross, the Petitioner testified that he first saw Dr. McGuire in 2013, and reported that he awoke one morning with discomfort. He agreed he completed an intake form for McGuire on 4/3/13, indicating his pain started 4 weeks prior and that he had difficulty sitting and lying down. Nothing was indicated as to an accident. The Petitioner also acknowledged the reports of Dr. McGuire noting he had to sleep at rest stop while on vacation and that his back pain was much worse, as well as that in June 2013 he played 36 holes of golf and had increased back pain.

The Petitioner agreed he had not reported any specific injury to Dr. McGuire, Dr. Kennedy or Dr. Fletcher, and that "I didn't have a specific point in time where I knew something just hurt me" and it was a gradual pain. The Petitioner agreed that he chose to see Dr. Kennedy based on his own research, and that he last saw Kennedy on 2/16/16. He testified that he is currently lifting more at work than he had before, but that he did the most lifting when Murphy was off work.

The Respondent submitted a job description for Petitioner as Rx1. The physical demands indicated include occasional standing, reaching with the hands and arms, climbing or balancing, stooping, kneeling, crouching or crawling, and lifting or moving more than 100 pounds. In addition, he was to recruit sales representatives and merchandisers, analyze and report results in his region, manage/coach subordinates, interviewing and training, conduct meetings, communicate with personnel and customers, complete paperwork, perform sales duties in open territories, and cultivate relationships with key buyers. (Rx1).

Medical Evidence

Petitioner saw his primary care provider, Dr. Dennon Davis, on 3/21/13 for anxiety, diabetes and low testosterone, but also at that time reported a one month history of back problems. He noted he had undergone shoulder surgery and post-surgical therapy, that two tendons could not be repaired, and that he had a lot of difficulty with lifting. Dr. Davis stated: "He is not sure what he has done to aggravate this again." Petitioner also indicated he had only been off work for two days following shoulder surgery, and that he had right thigh pain that had resolved but since had pain in the left buttock and thigh. Exam noted tenderness over the lumbosacral spine. Norco and Soma were prescribed, and Petitioner was provided with back exercise and was advised to "follow up with his chiropractor" for low back pain and spasm. On 3/29/13, Petitioner called to report he had not heard anything on his referral to a chiropractor, and that he wanted to see Dr. McGuire, not Dr. Moffet. (Px7).

The Petitioner treated with chiropractor Dr. McGuire from 4/3/13 through 8/7/13 (approximately 32 visits). The Arbitrator notes that Petitioner testified that he and Dr. McGuire are social friends. A form in this exhibit indicates Petitioner was referred there from Dr. Davis. Dr. McGuire's initial report notes the "date of this condition" as 2/28/13: the Petitioner "woke up on 2/28/13 with pain in his left low back pain that has gradually gotten worse." The pain started shooting into his left buttocks and left posterior thigh, and he had difficulty with bending, lifting and sitting, including driving, due to the pain, as well as disrupted sleep. Petitioner reported he had to lift, shelve and stack alcohol in his job. The report does reflect any indication of a specific accident or of pain during work activities. Two other forms within these records ask if the Petitioner's condition was due to an accident: in one this entire section is left blank, and in the other the word "no" is circled. A separate section of the report notes Petitioner reported moderately severe numbness in the right thigh. Dr. McGuire diagnosed a left SI joint sprain and a lumbar sprain/strain, with a differential diagnosis of a lumbar disc bulge. (Px6; Rx3).

Petitioner was generally treated by Dr. McGuire with chiropractic manipulation, cold laser therapy, electrical muscle stimulation, heat and myofascial release. Also generally, the records indicate that he would get improvement with treatment, but only on a temporary basis with no real lasting improvement. (Px6; Rx3). The Petitioner's testimony supported only temporary relief with this treatment.

On 4/12/13, Petitioner reported he had to sleep at a rest stop while on vacation, and had a severe worsening of his back pain. On 4/22/13, Dr. McGuire ordered a lumbar MRI. The 4/23/13 MRI films were reported by Dr. Fulk to show: 1) narrowing of the left lateral recess at L4/5 predominantly due to facet joint arthropathy with possible compression of the descending left L5 nerve; 2) a left paracentral L5/S1 disc protrusion along with degenerative changes about the descending left S1 nerve in the lateral recess; 3) moderate left neuroforaminal narrowing at L4/5 and L5/S1; 4) mild to moderate spinal canal narrowing at L4/5; 5) disc desiccation from L3 to S1 with mild to moderate L5/S1 disc height loss; and, 6) red marrow conversion indicating a hypoxic state of body with differential considerations including smoking, obesity and anemia. (Px6; Rx3; Rx4).

On 4/26/13, after reviewing the MRI, Dr. McGuire diagnosed L3 to L5 disc bulges with left L5 nerve impingement and an L5/S1 disc herniation with left S1 nerve impingement. On 5/1/13, Dr. McGuire noted: "His

condition is complicated by his obesity and job that requires him to drive several hours a day." On 5/13/13, he gave a history of playing golf this weekend and was stiff but his pain did not increase. On 5/16/13, Petitioner gave a history of being on his feet all day the day before without any increased pain. On 5/24/13, Petitioner reported that missing a week of treatment had increased his pain. On 6/7/13 Petitioner reported improvement with his best week in months, and then on 6/10/13 reported playing 36 holes of golf and feeling really sore. On 6/14/13, Petitioner reported being able to drive further, lift more and sleep better. On 6/24/13, Petitioner reported pulling 100 yards of weeds yesterday and reinjuring his low back. On 6/28/13, Petitioner reported aggravating his low back when he bent over to pick up a case of beer. On 7/5/13 he was worse after weedeating. On 7/8/13, Petitioner reported playing golf with no pain on Friday and Saturday, but that weeding on Sunday increased his low back pain. On 7/24/13, Petitioner reported his back pain had gradually worsened over the past two weeks, and Dr. McGuire indicated he would be referred to a spine surgeon "once his schedule clears." At the last visit of 8/7/13, the Petitioner reported lifting 350 cases of liquor a day for the past two weeks, as he had lost an employee and had to do some of his work in addition to his own, and of his back pain being worse. Dr. McGuire opined Petitioner was "surgical" and should see a neurosurgeon. In a 9/11/13 note, McGuire states that Petitioner had been unable to come in for treatment due to his work schedule and was referred to Dr. Kennedy. (Px6).

On 9/20/13, Dr. Davis issued a light duty return to work note. However, there was no progress note from this date in the evidentiary record. (Px7).

The Petitioner initially visited neurosurgeon Dr. Kennedy on 9/24/13. The Petitioner complained of several months of pain in the lower lumbar area and left buttocks. The history to Dr. Kennedy was: "He notes that has been doing a lot more lifting during that time when he developed the pain as a result of work demands." He also reported his lifting technique had been "necessarily compromised" due to bilateral shoulder reconstructions. He was noted to be a 25 year smoker and was 5' 10" and weighed 304 pounds. Dr. Kennedy's review of the MRI indicated multilevel degenerative changes, most notably L4/5 and L5/S1. The diagnosis was chronic lumbar dysfunction. Dr. Kennedy did not believe Petitioner needed surgery at that time, and recommended injections with Dr. Feinberg adjunct to chiropractic treatment, allowing the Petitioner to work "as tolerated." (Px8).

With Dr. Feinberg, Petitioner reported on 10/30/13 that his pain began in July as a "slight burn." In an intake form, both "accident at home" and "accident at work" are circled. The Petitioner complained of constant left low back pain into the buttocks, between 1/10 and 7/10, normally 5/10. While Dr. Feinberg appears to indicate that he performed 3 epidurals, the records appear to indicate one epidural at left L5/S1 on 10/30/13, and three epidurals at right L4/5 on 11/4/13, 11/14/13 and 12/12/13. Following the initial injection at L5/S1, Petitioner reported 20-30% improvement on the left, but that he then had right buttocks pain and an increase in right calf pain. Following the first L4/5 injection, Petitioner reported 90% improvement for 4 days, after which his symptoms slowly returned. He again reported pain on the right from the buttocks to the knee. On 12/19/14, Petitioner reported he still had low back pain radiating into the right leg as well as partial right foot numbness. (Px9).

On 1/23/14, Dr. Kennedy notes Petitioner reported no improvement with injections and ongoing significant pain. A myelogram was prescribed, which on 1/28/14 noted L4/5 disc pathology contributing to spinal canal stenosis, and that bilateral L5 nerve root impingement was suggested, with the findings being more prominent in the standing position versus supine. Flexion and extension x-rays reflected instability at L4/5. Post-myelogram CT scan reportedly showed moderate degenerative changes at L4/5 with a broad-based disc extrusion and severe bilateral facet osteoarthritis, with the combination of these factors contributing to mild/moderate central canal stenosis. At L5/S1, there was noted degenerative disc disease at L5/S1 with moderate bilateral facet osteoarthritis and a left subarticular osteophyte abutting the left S1 nerve root sheath. (Px8; Rx5; Rx6; Rx7).

In an addendum to the 1/23/14 report. Dr. Kennedy noted his review of the films and opined that there was more significant instability than had been indicated with flexion/extension. and that Petitioner would need to undergo bilateral laminectomy with facetectomy for decompression and. because this would cause further instability. fusion from L4 to S1. (Px8).

The surgery was performed on 3/17/14. involving bilateral lumbar laminectomies, facetectomies and foraminotomies from L4 to S1. and posterolateral fusion with autograft and internal fixation from L4 to S1. The diagnosis was spinal stenosis and segmental instability with foraminal stenosis at L4/5 and L5/S1. (Px8). Dr. Hart saw the Petitioner that same day for post-operative nausea and vomiting. Post-surgical x-rays noted one of the screws entering L4 was somewhat low in position and its projection outside the pedicle could not be excluded. (Px8).

The Petitioner was seen by Dr. Kennedy on 4/24/14 with x-rays showing evidence of fusion. Petitioner had excellent range of motion and intact strength, and was released to return to work without restrictions as of 4/28/14. On 6/4/14, Petitioner reported increased fatigue ever since he returned to work. He also reported "random" symptoms, noting pre-operatively it was all on the right while he now was having left thigh numbness and left calf cramps. He was taking hydrocodone and flexeril, and oxycodone when pain is severe. Examination was essentially normal and x-rays were satisfactory per Dr. Kennedy. Petitioner was advised to attend aqua therapy and then advance to land-based therapy. He was to continue his medication, use of a bone stimulator and to quit smoking. He was continued on unrestricted duty. On 8/26/14, Petitioner reported having a hard time at work, as he was working extra hours because he needed assistance he was not able to get, and it involved a lot of bending and twisting in restocking shelves. He had ongoing left lower extremity symptoms, as well as intermittent tingling in the right toes. He indicated he was getting his medications at that point through Dr. Davis. Instead of oral prednisone, he was advised to obtain a left SI joint injection with Dr. Feinberg and to continue therapy. X-rays at that point noted an S1 pedicle screw was broken near its junction with a rod, which appeared to be on the right, so there was concern for incomplete fusion, and a CT scan was recommended. (Px8).

On 8/14/14, Dr. Feinberg noted complaints of left buttocks pain, and that he had returned to work in April "because he needed to." He noted Petitioner had been referred by Dr. Kennedy to try to identify an axial pain generator, and so the left SI joint was injected. Dr. Feinberg listed diagnoses including low back pain, sacroiliitis and postlaminectomy syndrome. (Px9). The 9/5/14 CT showed the right S1 screw fracture and incompletely fused bone graft material. (Px8).

1/14/15 repeat CT scanning showed some fusing "without convincing solid fusion as of yet." On 1/15/15, Petitioner reported some "crushing" back pain, and that he was continuing to smoke 7-8 cigarettes per day. Neurologic exam was normal. Given no "toggling" of the screws, evidence of fusion and no disabling pain, Dr. Kennedy deferred further surgical intervention, and Petitioner was to follow up on 4/16/15. Films on 4/16.15 noted the fractured screw but that there was no evidence of loosening or malalignment. Petitioner reported he wasn't having much pain and was sleeping better. He was to follow up on 7/16/15, but there is no evidence of a return until 10/27/15. At that time, the Petitioner reported doing well until 3 to 4 weeks prior, when he developed intense cramping in his legs, and he reported his legs were numb. He initially thought he had a left knee problem as well. He reported that his symptoms were the same as they had been before surgery. He was continuing to take oxycodone since surgery, as well as MS Contin and Soma. Dr. Kennedy's assistant ordered left knee x-ray and updated lumbar CT scan. On 11/19/15, Petitioner reported he was to undergo left knee surgery with an orthopedic surgeon, and Dr. Kennedy noted updated CT indicated there was a fusion with no lucency, and thus that a repeat surgery was not needed. At the last visit of 2/16/16, the Petitioner indicated his

lumbar symptoms were "tolerable", but he was taking 3 to 4 Percocet's per day because he could not tolerate prolonged twisting, bending or stooping. Physical exam noted significantly reduced forward flexion, and neurologic exam was normal. Dr. Kennedy noted the low back was stable, and that his pain might be in part due to his other knee conditions. He noted 10/27/15 CT showed osteophytic encroachment at L5/S1 on the left, but that it was not severe enough to perform surgery, though it could in the future if symptoms warrant. Possible revision surgery was also noted, but not recommended at that time. (Px8).

On 8/10/15, Petitioner followed up with his PCP Dr. Davis and reported he was playing golf routinely and walking up to 15 miles per week, and that he was losing weight, but that his back pain is "the same." (Px7).

On 10/29/15, Petitioner reported to PCP Dr. Davis that he had developed knee pain, and also that he had seen Dr. Kennedy for his back and underwent CT scanning. He had right sided back pain that radiated to the thigh and knee. Chronic back pain was diagnosed. (Px7).

On 12/15/15, Dr. Davis noted Petitioner reported seeing Dr. Kennedy and that no further surgery was recommended and he thought the pain was coming from his knee. Petitioner indicated he was not exercising due to knee and back pain. He reported intermittent left lower extremity pain and numbness, worse with prolonged standing. Pain medications were prescribed.

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that the Petitioner has failed to prove that he sustained accidental injuries arising out of and in the course of his employment on 11/19/13.

An employee's injury is compensable under the Act only if it "arises out of" and "in the course of" the employment. University of Illinois v. Industrial Comm'n, 365 Ill. App. 3d 906, 851 N.E.2d 72, 303 Ill. Dec. 174 (2006); O'Fallon School District No. 90 v. Industrial Comm'n, 313 Ill. App. 3d 413, 729 N.E.2d 523, 246 Ill. Dec. 150 (2000). A claimant bears the burden of proving by a preponderance of the evidence both of these elements. Baldwin v. Illinois Workers' Compensation Comm'n, 409 Ill. App. 3d 472, 949 N.E.2d 1151, 351 Ill. Dec. 56 (2011); First Cash Financial Services v. Industrial Comm'n, 367 Ill. App. 3d 102, 853 N.E.2d 799, 304 Ill. Dec. 722 (2006). The phrase "in the course of" refers to the time, place, and circumstances of the injury. Illinois Institute of Technology Research Institute v. Industrial Comm'n, 314 Ill. App. 3d 149, 731 N.E.2d 795, 247 Ill. Dec. 22 (2000). Injuries sustained on an employer's premises or at a place where the employee might reasonably have been while performing his or her duties, and while the employee is at work, are generally deemed to have been received "in the course of" one's employment. Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n, 407 Ill. App. 3d 1010, 944 N.E.2d 800, 348 Ill. Dec. 559 (2011). For an injury to "arise out of" one's 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. Caterpillar Tractor Co. v. Industrial Comm'n, 129 Ill. 2d 52, 541 N.E.2d 665, 133 Ill. Dec. 454 (1989).

The Petitioner is claiming a repetitive injury to the lumbar spine as the result of his work duties, and there has been no evidence presented of any specific injury arising out of and in the course of Petitioner's employment.

The first indication of a back problem in the contemporaneous medical records submitted into evidence comes from the initial report of Dr. Davis on 3/21/13, at which time the Petitioner noted an approximate one month history of low back pain. While he noted a lot of difficulty with lifting following a shoulder surgery, Dr. Davis also specifically states: "He is not sure what he has done to aggravate this *again*" (emphasis added). Thus, the Arbitrator notes that the Petitioner not only indicated that he did not know what caused an aggravation of back pain, the use of the word "again" also infers that the Petitioner may have had prior low back problems. He also advised the Petitioner to follow up with "his chiropractor", and a phone note shortly thereafter indicated Petitioner would not be seeing Dr. Moffat, but would see Dr. McGuire. This infers a prior relationship with Dr. Moffet. A lack of evidence in this regard makes it unclear whether such relationship involved the treatment of low back pain or not.

The Petitioner testified that he requested a release to return to work on 11/26/12, just 6 days after undergoing shoulder surgery. The Petitioner therefore had been back to work during one of his busiest months through the end of 2012 without evidence of a back problem. He continued to work until late February before he indicated the onset of symptoms. Petitioner testified that only 60% of Respondent's business in his area took place between January and August. The Petitioner also testified that in February 2013 he remained under a 10 pound lifting restriction. There was no testimony as to when this ended. Then, on 4/3/13, chiropractor Dr. McGuire notes on Petitioner's initial visit that he reported he "woke up on 2/28/13 with pain in his left low back pain that has gradually gotten worse." At no point in this report did the Petitioner report pain with work activities, nor did he report any onset of pain during work activities.

Thus, it appears to the Arbitrator that at least in the months leading up to February 2013, the Petitioner either was not lifting anything of great weight, or he was working in excess of his work restrictions. While he indicated difficulty lifting due to his shoulder, the Petitioner did not testify as to his work duties while on light duty between December 2012 and February 2013.

Taking the evidence as a whole, the Arbitrator finds that the Petitioner has not proven a compensable work accident. A large portion of the Petitioner's testimony and evidence alleges that he had an increase in work duties when his merchandiser, Kevin Murphy, went off work for his own injuries. This appears to be the basis for why 11/19/13 is the claimed accident date. Based on the emails the Petitioner submitted into evidence (Px12), Murphy did not go off work for his own work injury until October 2013, which is well after the Petitioner's February 2013 onset of symptoms. By the time Murphy went off work, the Petitioner had been experiencing symptoms for months, and had been treating for months. That the Petitioner may have felt pain while performing his work activities in mid to late 2013 does not equate to proof of an accidental injury. By that time, he had already had an initial onset of back pain that had not ended. It was during his treatment with Dr. McGuire that Petitioner reported pain that was radiating into both legs. By 9/24/13 he had been referred to neurosurgeon Dr. Kennedy. There is no objective evidence that his condition changed between the February 2013 onset and the claimed 11/19/13 date of accident/manifestation date, or that there was any acute change of condition after February 2013. There was no indication in the medical records that the Petitioner's lumbar condition ever resolved after February 2013. Dr. McGuire's notes do indicate some waxing and waning symptoms, but there is no point where the symptoms resolve, and McGuire's records note flare ups of pain due to personal activities including golf, weeding and sleeping in his car while on vacation.

The evidence in this case clearly indicates that the Petitioner's lumbar condition is significantly due to a degenerative condition. Dr. Kennedy admitted that the degenerative findings found on the MRI on April 23, 2013 pre-dated the alleged injury and that there was nothing in the diagnostic study or his evaluations to determine what brought about or caused his pain. He admitted that there was nothing in the treating records to establish that his pain began at work. Activities can aggravate or accelerate a preexisting condition and result in

compensability under the law. Here, however, the preponderance of the evidence does not support such an aggravation of acceleration occurred as a result of repetitive work duties. While the Petitioner testified to moving a large number of liquor and wine cases, he also testified that he has to drive fairly significant distances weekly, and also that he has a number of administrative duties as a manager of a large territory. While a repetitive trauma does not have to be something akin to an assembly line to qualify as a compensable accident, it appears that Petitioner's total job duties involve a large variety of tasks, and in this case he has failed to prove the time periods or percentages of his day that he performed significant sustained lifting activities on a regular basis.

The Petitioner did not testify to the frequency with which he lifted during the day versus other activities. He offered very little evidence of his other job duties outside of staging liquor and liquor displays at stores, while the job description offered into evidence by Respondent reflects numerous other activities. The Petitioner's testimony appeared to indicate that he would be harried during his shifts to complete many tasks. As this was the case prior to Murphy going off work, it is unclear how he would have been able to essentially perform both jobs at that point, given he expressed difficulty completing tasks before this occurred.

The Petitioner also has medical records which reflect activities such as sleeping in his car overnight with an increase of pain, playing 36 holes of golf and multiple references to weeding his lawn. The picture the evidence in this case paints is one of a claimant who had ongoing lumbar degeneration who one day woke up with pain that then worsened enough to lead him to seek medical treatment. There is no indication of pain occurring during work, and this is supported by the initial report of Dr. Davis, who while he notes the Petitioner had more difficulty with lifting due to his shoulder surgery, and then in the same report specifically notes the Petitioner did not know what could have caused his back to act up *again*.

The simple fact that a person performs lifting during their job does not equate to a finding that, where a claimant develops symptoms off the job, an accident must have occurred while on the job. Here, there was no evidence presented which indicates the Petitioner developed pain at work prior to February 2013. The evidence, as noted above, instead reflects that he was working under a 10 pound work restriction from 11/26/12 through February. The Petitioner also remained in physical therapy during that time. Even in a repetitive trauma claim, a claimant must still prove an accident occurred under the Act, and the Petitioner failed to prove this in this case by the preponderance of the evidence.

While the Arbitrator found the Petitioner's testimony was reasonably credible, it also seems that the Petitioner is a somewhat poor historian. For example, the records of Dr. Feinberg indicate a history of symptoms which began in July 2013. Feinberg's records also appeared to note varying left and right sided complaints. The Petitioner testified that Kevin Murphy went on vacation in July 2013 and that he basically had to cover for Kevin through the time he himself went off work on 11/19/13. However, the email submitted by the Petitioner indicate that Murphy didn't go off work until what appears to be October at the earliest, so unless Murphy was on vacation for months, he had to have returned to work for most of that period of time. No real testimony was elicited as to what route drivers did in terms of moving the liquor, or what percentage of merchandising activities were performed by Kevin Murphy. The Petitioner testified that when Murphy was off work, he was moving/lifting 350 cases per week, and while Murphy was there it was 250 to 300 cases. This makes it appear that Murphy, the actual merchandiser, was thus only moving/lifting 50 to 100 cases per week that was added to the Petitioner's load, which does not really make sense given this was Murphy's specific job. Additionally, the amount of driving the Petitioner testified he performed would have taken up to 17 hours per week, which adds to the uncertainty of exactly how much time the Petitioner spent lifting or moving liquor cases on a daily basis. The Petitioner appears to be a very hard worker who is passionate about doing his best for his employer.

However, it also appears that the Petitioner's mind moves quickly and he may not recall things as accurately as he believes at times.

The Petitioner's claim is denied based on his failure to prove a compensable accident. The Arbitrator finds that the greater weight of the evidence, particularly the contemporaneous medical, supports the finding that the Petitioner's lumbar condition of ill-being started after he woke up on 2/28/13. There was no testimony or other evidence which supports the Petitioner's work activities prior thereto were a cause or contributing factor. Rather, the greater weight of the evidence reflects a degenerative condition that was likely continuing to progress, with no break in symptoms or treatment from 2/28/13 through the date of surgery.

WITH RESPECT TO ISSUE (E), WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the Arbitrator's finding that the Petitioner failed to prove a compensable accident, this issue is moot.

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

Based on the Arbitrator's finding that the Petitioner failed to prove a compensable accident, this issue is moot.

WITH RESPECT TO ISSUE (G), WHAT WERE THE PETITIONER'S EARNINGS, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the Arbitrator's finding that the Petitioner failed to prove a compensable accident, this issue is moot.

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

Based on the Arbitrator's finding that the Petitioner failed to prove a compensable accident, this issue is moot.

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

Based on the Arbitrator's finding that the Petitioner failed to prove a compensable accident, this issue is moot.

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

Based on the Arbitrator's finding that the Petitioner failed to prove a compensable accident, this issue is moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JESUS AYALA,

Petitioner,

vs. NO: 12 WC 32880

ELGILOY SPECIALTY METALS,

Respondent.

18IWCC0627

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 "Motion to Reinstate Denied," affirms the Arbitrator's denial of reinstatement.

A hearing on Petitioner's Motion to Reinstate was held before Arbitrator Flores on November 29, 2016, in DuPage County, Illinois, and a record was made. The Arbitrator summarized the history of this case.

On January 28, 2013, Petitioner's prior counsel was dismissed. T.*6, Motion to Dismiss Attorney of Record.*

On January 31, 2013, a Stipulation to Substitute Attorneys was filed, with James Ellis Gumbiner entering his appearance. *T.6, Stipulation to Substitute Attorneys.*

On December 15, 2014, a previous arbitrator recused himself from the case. *T.6.*

On March 7, 2016, Arbitrator Flores (hereafter "Arbitrator") dismissed the case for want of prosecution. *T.4.* She had no independent recollection but stated that it would have been dismissed if nobody responded when the case number was called, and a dismissal notice was issued. *Id.*

On April 11, 2016, an attorney (hereinafter "first handling attorney") appeared along with an attorney on Respondent's behalf. The Arbitrator was informed by the first handling attorney that the Commission's call sheets and mainframe do not reflect the law firm (hereinafter "the firm") as representing Petitioner. As a result, there were issues with service and receipt of the dismissal notice. *T.5.* The Arbitrator noted, to her knowledge, this was the first time the case was dismissed. Over Respondent's objection, the Arbitrator granted the reinstatement but informed the first handling attorney, even if the firm was not receiving notices and was unable to correct the Commission's records, it was still the responsibility of the attorney to keep track of the case. *T.6.*

On June 9, 2016, the Arbitrator received an e-mail requesting the case by returned to the call by agreement of the parties. *T.7.*

The Commission notes that Respondent filed a Notice of Motion and Order on July 14, 2016, to request a hearing on a Motion to Dismiss for Want of Prosecution to be presented before Arbitrator Flores on September 8, 2016.

In his Petition to Reinstate, Petitioner's attorney acknowledged receipt of Respondent's Motion. At the September 8, 2016 status call before Arbitrator Flores, the matter received a trial date of September 22, 2016.

On September 22, 2016, Respondent's attorney appeared before the Arbitrator for the assigned trial date. *T.7.* The Arbitrator understood Petitioner failed to appear for an evaluation pursuant to Section 12 of the Act for the fifth time. *Id.* By 9:35 a.m., neither Petitioner nor an attorney for Petitioner had appeared, therefore the Arbitrator dismissed the matter for want of prosecution for a second time.

On October 7, 2016, Petitioner filed a timely Petition to Reinstate. *T.10, ArbX1.* On November 2, 2016, Respondent filed its Response objecting to the same. *T.10, ArbX2.*

On November 29, 2016, counsels for both Petitioner and Respondent appeared before the Arbitrator on Petitioner's Petition. The Arbitrator noted the Commission's mainframe failed to identify any attorney as representing Petitioner. *T.7.* The Arbitrator understood from Petitioner's current attorney (hereinafter "current attorney") from the firm, two prior attorneys who handled the case had left the firm, and this was his initial appearance on Petitioner's behalf. *T.7-8.*

The Arbitrator stated in April of 2016, she advised the first handling attorney who appeared at that time on Petitioner's behalf that it was the attorney's responsibility to monitor the case as well as to contact the Commission to update its records accordingly. *T.8.*

Petitioner's current attorney explained the firm utilizes a clerking service which relies on the call to determine which of the firm's cases receive trial dates. As the firm was not listed as representing Petitioner, the clerking service did not obtain the trial date. *T.8.* Addressing the missed evaluations pursuant to Section 12, Petitioner's current attorney advised Petitioner failed to receive appropriate notice as one letter was received by Petitioner after the examination date and another letter failed to provide the date of the evaluation. *T.9.* Petitioner's current attorney

stated Petitioner was willing to attend a re-scheduled evaluation, and the firm would ensure his attendance and provide transportation fees. *Id.* Petitioner's current attorney also indicated the firm would credit Respondent with the claimed fees of $1700.00 at the time of settlement or award. *Id.*

The Arbitrator reiterated it was the attorney's responsibility to monitor his case not a clerking service's, and further, on April 11, 2016, she advised the first handling attorney of her responsibility even if the Commission's records were inaccurate. *T.10-11.* The Arbitrator stated the five missed Section 12 evaluations were relevant factors, and as for a credit, the preliminary issue to be addressed was the viability of Petitioner's case. *T.11-12.* The Arbitrator noted if the Commission's records do not indicate an attorney of record on Petitioner's behalf, then notices would be sent directly to Petitioner. The Arbitrator inquired of Petitioner's current attorney if he attempted to contact Petitioner. Counsel answered in the affirmative, but Petitioner did not respond. *T.12-13.*

Respondent's attorney advised when the case was reinstated in April of 2016, it was done so to allow Respondent to schedule and Petitioner to attend an evaluation pursuant to Section 12. *T.13.* Respondent's attorney stated she confirmed Petitioner's address with the first handling attorney for Petitioner who also confirmed Petitioner's attendance at the previously scheduled evaluation. *T.14.* Respondent's attorney also advised a few days prior to the September 2016 status call, she spoke with a different handling attorney (hereinafter "second handling attorney") for Petitioner and confirmed Respondent's intention to request a trial date on September 8, 2016. *Id.*

The Arbitrator denied Petitioner's Petition to Reinstate at the conclusion of the hearing and noted the same on the Order.

Conclusions of Law

Rule 9020.90 of the Rules Governing Practice before the Illinois Workers' Compensation Commission dictates the form and substance of Petitions to Reinstate. Subsection (c) states, in part: "The Arbitrator shall apply standards of fairness and equity in ruling on the Petition to Reinstate and shall consider the grounds relied upon by Petitioner, the objections of the Respondent, and the precedents set forth in Commission decisions."

In the present matter, Petitioner's current attorney explained he was recently assigned the case and was not the handling attorney on the two prior occasions the case was dismissed. Petitioner's current attorney also explained the Commission's records did not appropriately note the firm as representing Petitioner, therefore the clerking service employed by the firm did not advise of the assigned trial date of September 22, 2016. As for the missed evaluations, Petitioner's current attorney advised he would ensure Petitioner's attendance at re-scheduled evaluation and credit the $1700.00 in fees to any eventual settlement or award.

In response, Respondent objected stating Petitioner's first handling attorney was aware of Respondent's Motion and request for a trial date in September of 2016 at which time the case was dismissed for a second time. Respondent also noted the repeated missed evaluations four

(not five) in total with the most recent being July 5, 2016. Respondent noted Petitioner's first handling attorney confirmed Petitioner's receipt of notice of the evaluation as well as his attendance at the same. Petitioner failed to attend. Respondent also argued Petitioner's second handling attorney was aware of Respondent's Motion to be presented on September 8, 2016 as the attorneys discussed via telephone available trial dates for both parties.

Applying the standards of fairness and equity, we find the Arbitrator's denial of the Petition to Reinstate was proper. It is the duty of Petitioner's counsel to monitor his case despite the Commission's failure to identify the firm as counsel of record. (*See Mitchell v. Fiat-Allis, Inc.*, 158 Ill. 2d 143, 151 (1994) "...even if caused by clerical oversight, does not excuse counsel's failure to monitor his case closely enough to become aware that the circuit court had ruled.")

The case was initially dismissed on March 7, 2016. (We note Respondent alleges the case was dismissed on two prior occasions, September 1, 2015 and December 1, 2015 which would be consistent with Rule 9020.60(b)(2)(D)(i)- cases three years or older must be set for trial absent a continuance request or dismissed- but no written documents exist in the Commission's file. Regardless, the case was dismissed on two documented occasions thereafter.) When Petitioner's first handling attorney presented the initial Petition to Reinstate on April 11, 2016, the Arbitrator reminded the attorney of her responsibility to monitor the case. As Rule 9020.60(b)(2)(D)(ii) states: "Failure of the Petitioner or the Petitioner's attorney to request or answer a request for a continuance in accordance with subsection (b)(2)(D)(i) and to appear at the monthly status call at which the case appears shall result in the case being dismissed for want of prosecution." Moreover, Petitioner's second handling attorney was contacted prior to the September 8, 2016 status call and advised by Respondent's counsel a trial date would be obtained.

Lastly, Respondent has attempted on numerous occasions since 2013 to schedule an evaluation pursuant to Section 12 of the Act, and Petitioner has repeatedly failed to comply. The most recent request for the evaluation, May 12, 2016, contained a typographical error. Such error was obviously cured when Petitioner's first handling attorney confirmed with Respondent's attorney that Petitioner was aware of the date and time of the evaluation, and Petitioner would attend the same. Despite this assurance, Petitioner failed to attend. Such actions by Petitioner indicate his clear unwillingness to pursue his own case.

Based on the above, we affirm the Arbitrator's denial of reinstatement.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's denial of reinstatement is affirmed.

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 2018

Joshua D. Luskin

SE/
O:
49

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

Dissenting Opinion

I must respectfully dissent. Although multiple missed Section 12 examinations and failures by Petitioner and/or his attorneys to appear at hearings are not to be taken lightly, I would grant Petitioner's Motion to Reinstate in this case. It appears that this case had only been dismissed and reinstated once before, by Arbitrator Flores. Respondent's Response to Motion to Reinstate states that Arbitrator Hegarty had previously dismissed this case on September 1, 2015 and December 1, 2015. However, no evidence of these dismissals was introduced by Respondent, there is no record of these in the Commission file, and they do not appear on the mainframe.

That first dismissal by Arbitrator Flores occurred because Petitioner's attorney was not listed in the Commission's mainframe. Despite having filed a Stipulation to Substitute Attorneys on January 31, 2013, which included Petitioner's attorney's address, the Commission mainframe still did not reflect Petitioner's attorney as of the November 29, 2016 hearing, almost four years later. I note that the mainframe currently reflects that this error has been corrected.

Petitioner's attorney did have a duty to monitor the case and not merely rely on notices from the Commission, especially after being made aware of the problem with the Commission's records. The turnover of associates at Petitioner's attorney's firm is, likewise, not an "excuse" but this is a factor in explaining how this case was missed by the clerking service and why Petitioner's attorney's firm did not appear on September 22, 2016. However, I believe that denying reinstatement in this case would be a harsh result for a potentially meritorious claim.

As for Respondent's claim of prejudice, it is understandably frustrating that Petitioner missed several Section 12 examinations. However, I find it significant that Respondent's May 12, 2016 letter to Petitioner did contain a typographical error, which on its face indicated that the examination had already passed as it was scheduled for July 5, 2015. I also note that Respondent did not dispute that there was another occasion when Petitioner was sent a Section 12 examination letter, which did not contain a date for the examination.

Given all of these factors, while not condoning the actions of Petitioner or his attorneys, I would reinstate this case to give Petitioner one last opportunity to diligently pursue his claim and attend the Section 12 examination.

Charles J DeVriendt

Charles J DeVriendt

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANNETTE COLEMAN,

Petitioner,

vs. NO: 15 WC 18254

HOLY CROSS HOSPITAL,

18IWCC0628

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, causation, medical expenses, temporary total disability, nature and extent, and "(1) Whether the Arbitrator exceeded his authority under Section 19(f) when issuing the 11/29/16 corrected decision, thus voiding the 8/25/16 decision. (2) Whether the Arbitrator erred in denying Respondent's section Motion to Correct Clerical Error", and being advised of the facts and law, vacates the Corrected Decision of the Arbitrator as stated below and reinstates the original Decision of the Arbitrator, issued on August 25, 2016, which is attached hereto and made a part hereof, with the removal of the "Alternative Findings" on pages 5 through 10, as explained below.

Procedural History

On August 10, 2016, Arbitrator Carlson held a hearing in this matter. On August 25, 2016, a decision was issued. The "Findings" section found no accident and no causation. The "Order" section denied benefits. An attached "Addendum to Illinois Workers' Compensation Commission Arbitration Decision" found Petitioner not credible and found no accident so all other issues were moot. However, an "Alternative Findings" section found Petitioner credible, found accident, notice, and causation, and awarded medical bills, no temporary total disability, and permanency of 1% of the person-as-a-whole for Petitioner's right shoulder.

On September 6, 2016, Respondent filed a "19(f) Motion to Correct Clerical Errors," arguing that "Pages 5 through 10 of the Arbitrator's Conclusions of Law contain alternative findings that are unnecessary based on the Arbitrator's finding that Petitioner did not sustain an accident that arose out of and in the course of employment."

On September 8, 2016, Petitioner filed a Petition for Review of the Arbitrator's decision.

On October 18, 2016, The Arbitrator issued an Order granting Respondent's Section 19(f) motion.

On November 29, 2016, a notice was issued by the Commission to the parties recalling the decision, dated August 25, 2016, "for the Purpose of correcting a clerical error which now exists in said Decision."

On November 29, 2016, the Arbitrator issued a Corrected Decision. The "Findings" section found accident, notice, and causation. The "Order" section awarded $6,070.67 in medical bills, nine weeks of temporary total disability, and permanent partial disability of 3% of the person-as-a-whole for the right shoulder. The "Findings of Fact" and "Conclusions of Law" sections were consistent with these awards.

On December 1, 2016, Petitioner filed a "Motion to Withdraw Review," which states:

4. A corrected decision was issued by Arbitrator Carlson on November 30, 2016 following an agreed Motion to Correct.
5. The Petitioner does not wish to pursue an appeal of the decision of the Arbitrator.

Petitioner's motion was granted on January 10, 2017, by Commissioner DeVriendt.

On December 13, 2016, Respondent filed a second Section 19(f) motion arguing:

6. On September 6, 2016, the Respondent timely filed a Motion to Correct Clerical Error under Section 19(f), requesting only that the Arbitrator address pages 5 through 10 of the Conclusions of law, as they were unnecessary based on his award denying benefits. …

…

14. Because the corrected decision represented a complete reversal of the original decision rather than a correction of a clerical or computational error, the Arbitrator lacked jurisdiction to reverse the decision, making his corrected decision void and, pursuant to Section 19(f), and the first corrected decision should be recalled, set aside and a second corrected decision should be entered correcting only the clerical error outlined in paragraph 6 above.

On December 18, 2016, the Arbitrator issued an "Order Under Section 19(F)," which stated, "DENIES SAID MOTION. THE ORIGINAL DECISION WAS INTERNALLY INCONSISTENT." (*Capitalization in original.*)

On December 21, 2016, Respondent filed a Petition for Review of the corrected decision, which included the issue of "Whether the reversal of an award is proper under Section 19(f)."

On or about January 18, 2017, as reflected by the Proof of Service date, Respondent filed an Amended Petition for Review but it is not file stamped. This amended Petition includes the issues of "(1) Whether the Arbitrator exceeded his authority under Section 19(f) when issuing the 11/29/16 corrected decision, thus voiding the 8/25/16 decision. (2) Whether the Arbitrator erred in denying Respondent's second Motion to Correct Clerical Error."

On August 14, 2017, Commissioner DeVriendt's Administrative Assistant e-mailed the attorneys stating, we "have found the Amended Petition for Review, which was not filed [sic] stamped by us" and an extension to the briefing schedule was granted.

Analysis

We focus on two appellate court cases in our analysis of this case. First, in *McDuffee v. IC*, 222 Ill.App.3d 105 (2nd Dist., 1991), an arbitrator issued two decisions finding no accident and denying benefits in both cases. On review, the Commission issued one combined decision affirming and adopting the arbitrator but its decision included remand language "for further proceedings...." This was inconsistent because if the petitioner had failed to prove accident then no additional proceedings would be necessary. The issue in *McDuffee* was whether the Commission's recall under Section 19(f) and subsequent corrected decision, which removed the remand language, was proper. The court wrote:

> The case law has held that the Commission retains jurisdiction until the Commission decides whether to correct its decision, and it is only after the Commission decides on the petition for recall that the Commission's decision in a case becomes final and appealable. (Menozzi v. Industrial Comm'n (1983), 96 Ill. 2d 468, 451 N.E.2d 853, 71 Ill. Dec. 699.) However, it has also been held that a petition for recall under **section 19(f) is not a vehicle for reconsideration of the case's merits** and for the presentation of further evidence, and if that is what is sought, the petition for recall is a nullity and the time for appeal to the circuit court commences running from the issuance of the Commission's initial decision. Wilson-Raymond Constructors Co. v. Industrial Comm'n (1980), 79 Ill. 2d 45, 402 N.E.2d 584, 37 Ill. Dec. 582.

In *Menozzi,* the supreme court stated as follows:

> "A party who is convinced that an order of the Industrial Commission contains a substantial error or inconsistency should be allowed to request a correction, as the statute plainly allows him to do. Such corrections serve the purpose of reducing the number of issues that will be urged for review in the courts, and remove the need for having the circuit court perform the trier of fact's job of deciding what the error was or how an inconsistency should be resolved. To permit review to go forward before the Industrial Commission acts on such a request frustrates this purpose; we see no reason why the Industrial Commission should not be required to consider and respond to such requests." (Menozzi, 96 Ill. 2d at 473-474, 451

N.E.2d at 856.)

> This reasoning in *Menozzi* was subsequently applied in Kelly v. Industrial Comm'n (1990), 203 Ill. App. 3d 626, 561 N.E.2d 327, 149 Ill. Dec. 49, where this court held that **a petition under section 19(f) is a proper procedure for seeking clarification of an inconsistency in the Commission's decision, and that an error in the Commmission's [sic] decision is not limited by whether the error was characterized as "clerical" or "substantive."**

Here, the respondent has characterized the claimant's petition for recall as a petition for rehearing or reconsideration of the merits. Our reading of the claimant's petition for recall does not lead us to this conclusion. There was sufficient confusion in the arbitrator's decisions and the Commission's subsequent decision to create an inconsistency in the Commission's decision. A reading of the arbitrator's decisions leads to the conclusion that the claimant was denied benefits on both of her claims because she failed to prove that her injuries arose out of and in the course of her employment, but the Commission's decision contained the remand language which implied that the arbitrator granted benefits. **The claimant did not seek to have a reconsideration of the merits and did not ask to present further evidence but sought clarification of what she was being granted or denied. Therefore, while her petition for recall was not technically a request to correct a "clerical error," but sought clarification of an inconsistency, her petition was not a nullity, and her request for summons was properly and timely filed after receipt of the Commission's corrected decision.** *Id. at 110-11 (Emphases added).*

Second, in *Kelly v IC*, 2013 Ill.App.3d 626 (4th Dist., 1990), the appellate court stated:

> Next, the petitioner argues that the respondent's motion to recall did not allege a clerical error and therefore that motion was a nullity. He relies on Wilson-Raymond Constructors Co. v. Industrial Comm'n (1980), 79 Ill. 2d 45, 402 N.E.2d 584, in support of his position.
>
> We find that the petitioner's reliance on *Wilson-Raymond Constructors Co.* is misplaced. In that case, the petition to correct requested reconsideration of the merits and presentation of further evidence. In contrast, in the instant case, the petition to correct drew attention to the inconsistency between the predecision memo and the actual decision and requested that the Commission resolve that inconsistency.
>
> As such, the instant case was similar to Menozzi v. Industrial Comm'n (1983), 96 Ill. 2d 468, 451 N.E.2d 853, and International Harvester v. Industrial Comm'n (1978), 71 Ill. 2d 180, 374 N.E.2d 182, in which the courts found that section 19(f) of the Act was applicable regardless of whether the error was technically characterized as "clerical" or "substantive." In *International Harvester*, the error urged for correction was the failure to credit an earlier payment of nonoccupational benefits against an award of workers' compensation benefits. In *Menozzi*, the petition to correct alleged that the amount of bond bore no relationship to the amount of the award. **The *Menozzi* court found that a party**

> **who is convinced that an order of the Commission contains a substantial error or inconsistency should be allowed to request a correction, as the statute plainly allows him to do. We find that the *Menozzi* rationale is controlling here.** *Id. at 630-31 (Emphasis added).*

Based on the above case law, the Commission's authority under Section 19(f) is not limited to the correction of strictly "clerical" errors but also allows for the correction of substantial errors or inconsistencies. However, Section 19(f) may not be used as a vehicle for reconsideration of the merits of the case.

We note two Commission decisions as examples of the limits of an arbitrator's authority under Section 19(f). In *Liberty v. Fort Poli Millwork*, 2009 IWCC 966, the arbitrator issued a corrected decision due to a clerical error in the number of temporary total disability weeks awarded. However, the arbitrator also reduced the amount of permanent partial disability from 12.5% to 8% of the person-as-a-whole. The Commission found:

> The Arbitrator erred in reducing the permanent partial disability award. The initial decision clearly reflected his findings of the nature and extent of Petitioner's permanent partial disability and then, as on an after thought with the recall, he made a substantive change with the reduction which is contrary to the plain reading of the Act. It would be in the province of the Commission to decide if the 12.5% MAW was excessive and to then reduce the award accordingly. The Arbitrator was without authority to make a substantive change as if acting on Review with the plain reading and interpretation of the section clearly being to recall to "correct a clerical error" which could not be interpreted as making a substantive change as the permanency did not contain a "clerical error".

In *Lizon v. Post General Contractors*, 2016 IWCC 6751, the arbitrator issued a decision awarding maintenance benefits from December 4, 2012 through August 21, 2015, but later in the decision denied maintenance for the period of May 8, 2015 through August 21, 2015 because petitioner had failed to offer any job search logs for that period. Both parties filed Section 19(f) petitions due to the inconsistency. The arbitrator granted those petitions and issued a corrected decision, which stated:

> Maintenance benefits were stopped after the Petitioner was evaluated by Dr. Kevin Walsh. Petitioner seeks fifteen (15) additional weeks of maintenance benefits from May 8, 2015 through the date of trial, August 21, 2015. Petitioner testified that he continued to search for work after May 8, 2015. The Arbitrator concludes that Petitioner is entitled to maintenance benefits from December 4, 2012 to August 21, 2015.

The Commission found (emphasis added):

> There is no question that the original decision contained an anomaly in the form of contradictory statements regarding maintenance benefits. **In correcting that anomaly, the Arbitrator changed her reasoning and, as such, substantially changed her decision beyond the correction of a clerical or computational error.** However, while

the Commission finds that the Arbitrator exceeded the bounds of Section 19(f) of the Act, the Commission finds, after a complete review of the record, that Petitioner is entitled to maintenance benefits through August 21, 2015 and modifies the Arbitrator's Corrected Decision to reflect as such.

In the case at bar, the Arbitrator's original decision was clearly inconsistent in that it both denied and granted benefits. We find that it was within the Arbitrator's authority to recall that decision due to the internal inconsistencies contained therein. However, the Arbitrator's corrected decision went beyond correcting clerical errors or inconsistencies. Instead, it reflects analysis and additional judicial reasoning to come to a different conclusion, which is a reconsideration of the merits of the case. Not only did the Arbitrator find accident, notice, causation, and award medical expenses, as had been found in the confusing Alternative Findings of the first decision, the Arbitrator's corrected decision also awarded temporary total disability and increased the permanency from 1% to 3% of the person-as-a-whole.

In response to Respondent's second Section 19(f) petition, the Arbitrator's "Order Under Section 19(F)", dated December 18, 2016, stated:

> DENIES SAID MOTION. THE ORIGINAL DECISION WAS INTERNALLY INCONSISTENT. (*Capitalization in original.*)

This is undoubtedly true but, without a clear explanation from the Arbitrator in his Order as to what caused the internal inconsistency, we are left to speculate as to how such an inconsistency might have happened or whether a "clerical error" was involved. Based on the evidence before us, we find that the corrected decision reflects a reconsideration of the merits. Therefore, we find that this was an improper application of the Section 19(f) process and find that the Corrected Decision is void.

The above notwithstanding, we also find that Petitioner was induced into voluntarily withdrawing his Petition for Review of the first decision due to the Arbitrator's issuance of the improper corrected decision. Therefore, we are *sua sponte* reinstating Petitioner's Petition for Review of the first decision, and find that we have jurisdiction to proceed on that Petition.

After a thorough review of the evidence, we find Petitioner has failed to prove she sustained an accident arising out of and in the course of employment. We affirm the Arbitrator's original decision, issued on August 15, 2016, with the removal of the "Alternative Findings" on pages 5 through 10.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Corrected Decision, issued on November 29, 2016, is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's original decision, issued on August 25, 2016, is affirmed and adopted with the removal of the "Alternative Findings" on pages 5 through 10.

18IWCC0628

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 24 2018

Charles J. DeVriendt

Joshua D. Luskin

Kevin W. Lamborn

SE/
O: 8/29/18
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

COLEMAN, ANNETTE
Employee/Petitioner

Case# **15WC018254**

HOLY CROSS HOSPITAL
Employer/Respondent

18IWCC0628

On 11/29/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.61% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1067 ANKIN LAW OFFICE LLC
JOSHUA E RUDOLFI
10 N DEARBORN ST SUITE 500
CHICAGO, IL 60602

2461 NYHAN BAMBRICK KINZIE & LOWRY
KATIE LONZE
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

18IWCC0628

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED DECISION

Annette Coleman
Employee/Petitioner

v.

Holy Cross Hosital
Employer/Respondent

Case # **15** WC **18254**

Consolidated cases: -----

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **August 10, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **2/14/2015**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$33,468.60**; the average weekly wage was **$643.62**.

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

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

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

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

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

ORDER

Medical benefits

Respondent shall pay reasonable and necessary medical services of $6,070.67, as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $5,786.00 to Advocate Christ Medical Center, $200.00 to Petitioner for Out of Pocket payments to MidAmerica Orthopedics, and $84.67 to Petitioner for Out of Pocket Prescription costs, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay reasonable and necessary medical services of $6,070.67, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $0.00 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.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $429.08/week for 9 weeks, commencing 2/14/2015 through 4/3/2015 and 4/8/2015 through 4/23/2015, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 2/14/2015 through 4/3/2015 and 4/8/2015 through 4/23/2015, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $0.00 for temporary total disability benefits that have been paid.

Permanent Partial Disability

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a patient care technician at the time of the accident and that she *is* able to return to work in his prior capacity as a result of said injury. The Arbitrator notes that Petitioner's job appears to be heavy in nature. Petitioner testified that the pain in her shoulder is still present but that she is able to perform her essential job duties. Because of Petitioner's ability to perform her essential job duties, the Arbitrator therefore gives *lesser* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 56 years old at the time of the accident. Because of Petitioner's advanced age, the Petitioner is likely at a permanent state and will not continue to improve, the Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner has been able to return to her regular work. Because of the fact that there is no wage loss in this case, the Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner was diagnosed with right shoulder impingement and bursitis. Petitioner's medical records indicate that she continued to have pain complaints documented as recently as January 2016. Further, Petitioner's credible testimony establishes that she continues to have pain as of the date of trial and continues to take Naproxin when she has pain. Because of Petitioner's documented continued pain complaints, continued pain prescriptions, documented lack of range of motion and multiple pain injections, the Arbitrator therefore gives *greater* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 3% loss to the Person as a Whole pursuant to §8(d)2 of the Act.

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

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

Signature of Arbitrator

10-18-16
Date

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Annette Coleman,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 15 WC 18254**
	)	
Holy Cross Hospital,	)	
	)	
Respondent.	)	

STATEMENT OF FACTS

Testimony of Petitioner, Ms. Annette Coleman

Petitioner has worked for the Respondent as a patient care technician for ten and one half years. Transcript of Arbitration, hereinafter referred to as "R.", at 7. As a patient care technician her responsibilities include lifting patients, passing trays, picking up heavy trays, and transporting patients. R. at 7-8. Petitioner works 12-hour shifts, three to four days per week. R. at 8. Petitioner testified that toward the end of 2014 and the beginning of 2015 she began to notice pain in her right arm/shoulder while working for the Respondent. R. at 8-9. Petitioner did not seek medical treatment immediately as she felt the pain would "go away" and she continued working full duty. R. at 9.

On February 14, 2015 Petitioner sought medical care for her right shoulder at Advocate Christ Hospital. R. at 10. Petitioner's medical records indicate that she presented with right sided arm, shoulder pain while doing heavy lifting over the last three days. PX 2, pp. 116. Petitioner was placed off work until February 21, 2015. *Id.* at pp. 114. Petitioner did not work on February 14, 2015. R. at 23. Petitioner testified that on February 15, 2015 she called her employer and was transferred to the night supervisor to report her injury. R. at 11. On February 16, 2015 Petitioner testified that she spoke with her supervisor, Ms. Zara Porter, and reported

that she had injured her right arm from lifting patients over time. R. at 12-13. Petitioner also testified that she spoke with Ms. Elaine Yarling on February 18, 2015 and indicated that her injury had come from work. R. at 24.

On February 20, 2015 Petitioner saw Dr. James Moravek at MidAmerica Orthopedics. PX 3, pp. 11. Dr. Moravek noted a history that Petitioner had been working and developed tenderness in her right shoulder and pain. *Id.* Petitioner received a subacromial injection to her right shoulder. *Id.* at 12. Petitioner was placed off work. PX 4, pp. 1. Petitioner testified that she did not received temporary total disability benefits while she was off work. R. at 14.

On March 20, 2015 Petitioner followed up with Dr. Moravek. PX 3, pp. 10. Dr. Moravek diagnosed Petitioner with right shoulder impingement and bursitis. *Id.* He prescribed physical therapy. *Id.* Petitioner was also released to return to work on April 3, 2015. PX 4, pp. 2. Petitioner had a course of physical therapy performed at Advocate Christ Hospital from April 7, 2015 through May 13, 2015. R. at 15. On April 8, 2015 the Petitioner was given light duty restrictions by Dr. Moravek and released to return to work full duty effective April 23, 2015. PX 4, pp. 3. Petitioner testified that Respondent did not offer a light duty position. R. at 16. Petitioner next saw Dr. Moravek on May 1, 2015. PX 3, pp. 9. Dr. Moravek noted that Petitioner was doing well and working full duty. *Id.*

Petitioner testified that she completed her physical therapy and continues to have pain in her right shoulder. R. at 17. Petitioner last saw Dr. Moracek on January 29, 2016. PX 3, pp. 8. Dr. Moravek noted continued pain in her right shoulder, performed an injection, and released Petitioner PRN. *Id.* Petitioner testified that she continues to have pain in her shoulder as of the date of trial. R. at 18. She continues to take Naproxen for her pain. *Id.*

Petitioner testified that she previously had problems with her left shoulder in 2011 and received an injection which helped her. R. at 17-18. She testified that her medical bills have not been paid except for what she personally paid out of pocket. R. at 19-20.

Testimony of Ms. Anita Lewandowski

Respondent called Ms. Anita Lewandowski to testify at trial. R. at 31. Ms. Lewandowski works as a nurse for Mount Sinai Hospital and occasionally at Holy Cross Hospital. R. at 31. She testified that she worked with Petitioner on one occasion in February 2015. R. at 32. During that occasion, Petitioner reported to her that she had hurt herself, but was not positive that Petitioner reported that it was work related or not. R. at 34. On cross-examination Ms. Lewandowski testified that Petitioner was attempting to have her injury covered under workers' compensation. R. at 35. She further testified that Petitioner was claiming a work related injury to her in February 2015. R. at 36.

Testimony of Ms. Elaine Liechti-Yarling

Respondent called Ms. Elaine Liechti-Yarling to testify at trial. R. at 37. Ms. Liechti-Yarling testified that she is an employee health nurse for Respondent. R. at 38. Her job duties include ensuring that employees receive medical attention and collection paperwork for workers' compensation claims. R. at 38. She testified that typically is notified by the supervisors for new workers' compensation claims. R. at 39. She testified that she spoke with Petitioner over the telephone on February 18, 2015 at which time Petitioner reported that she had hurt her arm but never answered whether it was work-related or not. R. at 40-41. During that conversation Petitioner requested a form in order to apply for workers' compensation benefits. R. at 41. Ms.

Liechti-Yarling testified that she spoke to Petitioner again over the telephone on February 19, 2015, and that Petitioner relayed to her that her insurance would cover her ER bill and that she wanted workers' compensation to cover it as well. R. at 42. Ms. Liechti-Yarling testified that she spoke to Petitioner over the phone again on February 26, 2015 and Petitioner indicated that she was not going to complete the workers' compensation forms. R. at 42.

On cross-examination Ms. Liechti-Yarling testified that light duty was never offered to Petitioner. R. at 46-47. She testified that Petitioner was applying for workers' compensation benefits to have her medical bills paid. R. at 45. She also testified that she was able to review Petitioner's employee file in order to ascertain the dates of conversations but that she did not bring the file with her to court. R. at 47. She testified that all workers' compensation claims go through her and that she received Petitioner's work status notes. R. at 46.

CONCLUSIONS OF LAW

Accident

The Arbitrator finds that Petitioner was injured in an accident that arose out of and in the course of her employment by Respondent. Petitioner has alleged a repetitive injury to her right shoulder from the stresses of her physical job duties. Petitioner testified that she has worked for Respondent for over 10 years as a patient care technician. This job requires her to lift and assist in transporting patients. It was while performing these job duties at the end of 2014 that Petitioner began experiencing pain in her right shoulder. R. at 8. Petitioner did not initially seek medical care as she felt the pain would subside. When the pain became too much to handle, she sought medical care. There does not appear to be any dispute as to Petitioner's job duties with Respondent.

The difficulty in this case is determining the date of accident. While it is undisputed that Petitioner was not working on her February 14, 2015 date of accident that is not the determinative inquiry. In repetitive trauma cases the Illinois Supreme Court has held that courts considering various factors have typically set the manifestation date (date of "accident") on either the date that Petitioner sought medical treatment or the date on which the employee can no longer perform their work functions. Durand v. Indus. Comm'n., 224 Ill.2d 53, 72, 862 N.E.2d 918, 929 (2006) In the present case, Petitioner continued to work despite the pain in her shoulder until February 2014. On February 14, 2015 she first sought medical care. Following that date she was medically unable to perform her job duties. "...To deny an employee benefits for a work-related injury that is not the result of a sudden mishap penalizes an employee who faithfully performs job duties despite bodily discomfort and damage." Id. at 66, 925. On February 14, 2015 Petitioner first sought medical care at Advocate Christ Medical Center and thus, her date of accident is correct and proper. Accordingly, the Arbitrator finds that the Petitioner sustained a work-related accident, as defined under the Act, on February 14, 2015.

Notice

The Arbitrator finds that notice was provided to the Respondent within the 45 day time limit prescribed by the Act. Petitioner testified credibly that she contacted her employer on February 15, 2015 and February 16, 2015 to report her work injury. Respondent witness, Ms. Anita Lewandowski, testified that Petitioner reported to her in February 2015 that she was claiming a work-related injury. Further, Respondent witness Ms. Elaine Liechti-Yarling testified that on February 18, 2015 Petitioner reported to her that she had hurt her arm, but did not indicate that it was work related. It was during that conversation that Petitioner requested

workers' compensation forms. The Arbitrator finds that Petitioner provided sufficient information to the Respondent to indicate that she had a work related injury. According, timely notice was provided.

Causation

The Arbitrator finds that the Petitioner current condition of ill-being is causally related to her work related accident. Petitioner's credible testimony in conjunction with her contemporaneous medical records establishes Petitioner's work for Respondent as the cause of her right shoulder condition. Further, proof of prior good health and change immediately following and continuing after an injury may establish that an impaired condition was due to the injury. Land and Lakes Co. v. Indust. Comm'n., 359 Ill.App.3d 582, 593 (2d Dist. 2005). This is known as the "chain of events" analysis. *Id.* Petitioner testified that she was able to perform her full duty work and continued to do so throughout the end of 2014 and beginning of 2015 until the pain grew to be too much to handle. She then sought medical care and was unable to perform her work as previous. The Arbitrator further finds that there is no evidence in the record to establish any other mechanism of injury, nor any medical opinions contrary to those of Dr. Moravek, Petitioner's treating orthopedic doctor. Accordingly, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to her work accident.

Medical Bills

The Arbitrator finds that the Petitioner's medical care has been reasonable and necessary and that Respondent has not paid all appropriate charges. The Petitioner was diagnosed with right shoulder impingement and bursitis. As a result of these conditions the Petitioner underwent

cortisone injections, physical therapy, had doctor's appointments was prescribed medication. These constitute a course of reasonable and necessary, conservative management. Further, the Petitioner produced evidence that her medical bills have not been paid except for payments specifically made by her. *See Generally* PX 1. Accordingly, the bills contained within Petitioner's Exhibit #1 are hereby awarded, along with all documented out of pocket expenses.

TTD

The Arbitrator awards the Petitioner a period of 9 weeks of TTD benefits, representing benefits from February 14, 2015 through April 3, 2015 and from April 8, 2015 through April 23, 2015. On February 14, 2015 Petitioner was placed off work for one week after her ER visit to Advocate Christ Medical Center. On February 20, 2015 Petitioner was placed off work by Dr. Moravek. Petitioner was released to return to work as of April 3, 2015. On April 8, 2015 Dr. Moravek placed Petitioner on work restrictions. Petitioner's testimony and the testimony of Ms. Liechti-Yarling establish that Petitioner's light duty restrictions were not accommodated by Respondent. Accordingly, Petitioner is awarded 9 weeks of TTD benefits, representing her periods off work from February 14, 2015 through April 3, 2015 and from April 8, 2015 through April 23, 2015.

Nature and Extent

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a patient care technician at the time of the accident and that she *is* able to return to work in his prior capacity as a result of said injury. The Arbitrator notes that Petitioner's job appears to be heavy in nature. Petitioner testified that the pain in her shoulder is still present but that she is able to perform her essential job duties. Because of Petitioner's ability to perform her essential job duties, the Arbitrator therefore gives *lesser* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 56 years old at the time of the accident. Because of Petitioner's advanced age, the Petitioner is likely at a permanent state and will not continue to improve, the Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner has been able to return to her regular work. Because of the fact that there is no wage loss in this case, the Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner was diagnosed with right shoulder impingement and bursitis. Petitioner's medical records indicate that she continued to have pain complaints documented as recently as January 2016. Further, Petitioner's credible testimony establishes that she continues to have pain as of the date of trial and continues to take Naproxin when she has pain. Because of Petitioner's documented continued pain complaints, continued pain prescriptions, documented lack of range of motion and multiple pain injections, the Arbitrator therefore gives *greater* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 3% loss to the Person as a Whole pursuant to §8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WILLIAM J. HALPIN,

Petitioner,

vs. NO: 11 WC 32154

ARLINGTON HEIGHTS MEMORIAL LIBRARY, 18IWCC0629

Respondent.

DECISION AND OPINION ON PETITIONS UNDER §§8(a), 19(l), 19(k), and 16

This case comes before the Commission on Petitioner's §8(a) Petition, filed on October 23, 2014, claiming additional medical expenses, along with penalties under §19(l) and §19(k) and attorney's fees under §16 of the Act. A hearing was held on March 7, 2017, before Commissioner Charles DeVriendt in Chicago, Illinois, and a record was made.

Findings of Fact and Conclusions of Law

The issues before us are:

1) The Commission's jurisdiction in this matter;
2) Whether Petitioner's cervical condition had reached maximum medical improvement (MMI);
3) Whether his left cubital tunnel syndrome and treatment, including surgery, is causally related to his cervical condition;
4) Respondent's liability for medical expenses related to the left cubital tunnel;
5) Respondent's liability for medical expenses incurred prior to the arbitration hearing but not submitted into evidence at that time; and
6) Whether Petitioner is entitled to penalties and/or attorney's fees.

Procedural History

Petitioner, a maintenance worker for Respondent, sustained an injury at work on May 12, 2011 when he was pushing a chair, slipped, and struck his chest against a nearby stage. Petitioner developed gait and balance problems, which were attributed to severe cervical spinal cord compression and he ultimately underwent a C3 through C6 fusion on September 22, 2011. A Section 19(b) hearing was held on January 19, 2012 before Arbitrator Kelmanson. The

Arbitrator issued a decision on February 6, 2012, which found that Petitioner's cervical condition was not causally related to the accident and he reached MMI from his chest wall contusion by June 14, 2011. On Review, the Commission issued a decision on November 19, 2012, which found that Petitioner's work accident aggravated his pre-existing cervical condition and awarded temporary total disability (TTD) through the date of hearing and all of the claimed medical bills contained in "Petitioner's Exhibit 6."

On August 14, 2014, a settlement contract was approved by Arbitrator Simpson for $255,000.00 but Section 8(a) medical was left open pending Respondent's funding of a Medicare Set-Aside Account ("MSA").

On October 23, 2014, Petitioner filed a Motion Pursuant to Section 8(a) of the Workers' Compensation Act, which alleged that Petitioner "has neuropathy which causes numbness in his hands and interferes with his balance and gait" and that Respondent has refused to approve the physical, occupational, and gait therapy prescribed by Dr. Williams. Petitioner also filed an Amended Petition for Assessment of Penalties Pursuant to Section 19(k), 19(l), and Attorney's Fees Pursuant to Section 16 of the Illinois Workers' Compensation Act. This petition claims that Respondent "has refused to authorize or pay for prescribed physical therapy and occupational therapy."

On February 5, 2015, Petitioner filed another Section 8(a) motion and another amended petition for penalties, alleging that Dr. Williams performed a cubital tunnel release on November 11, 2014, but Petitioner "continues to experience extensive problems in his hands and with his gait which are affected by his cervical neuropathy" and Respondent has "refused to authorize or pay for prescribed surgery, physical therapy, gait therapy and occupational therapy ordered by Petitioner's treating physician Dr. Williams."

On July 31, 2015, Respondent filed its Response to Petition for Penalties alleging that Respondent had preauthorized, on April 14, 2014, the occupational therapy as prescribed by Dr. Williams but that the Illinois Bone & Joint Institute charges were for "ulnar nerve lesion" and "muscle weakness in general", which are conditions that "were never alleged or awarded." Respondent also stated that it obtained a Section 12 examination of Petitioner with Dr. Theodore Suchy to address these conditions and that it had a reasonable basis to dispute these charges.

The Commission file contains another Section 8(a) motion, which is not file stamped but was noticed for March 7, 2017, that contains a much longer list of the bills that Respondent has allegedly refused to pay, including ones incurred prior to the original Section 19(b) arbitration hearing.

A hearing was held before Commissioner DeVriendt on March 7, 2017 and a record was made.

Jurisdiction

Respondent argues the Commission "lacks jurisdiction to consider Petitioner's request to include additional conditions under his claim." *R-brief at 17.* It argues that, pursuant to the settlement contract, Petitioner waived his rights under Section 19(h) and "Petitioner specifically

agreed that his settlement included 'any and all results, developments or sequelae, fatal or non-fatal, resulting from such injuries' sustained on May 12, 2011." *Id.* The settlement contract states:

> Date of accident 5/12/2011
> How did the accident occur? Trip and fall
> What part of the body was affected? Chest, cervical spine, man as a whole
> What is the nature of the injury? Aggravation of cervical spine arthritis, surgery

It further provides:

> 3. Respondent agrees to pay and Petitioner agrees to accept the lump sum of $255,000.00, **plus an additional amount to be determined for an "MSA Fund"**, in full and final settlement of any and all claims under the Illinois Workers' Compensation Act for all injuries, known or unknown, allegedly incurred on May 12, 2011 including any and all results, developments or sequelae, fatal or non-fatal, resulting from such injuries. **Issues exist between the parties as to whether Petitioner has incurred has incurred injuries to the degree alleged and whether or not such injuries are compensable. This settlement is based on Petitioner's present condition and includes any other accidents, injuries aggravation, repetitive trauma or other onset of symptoms or any other conditions or injuries which occurred as a result of the events of May 12, 2011.** This settlement is entered into to resolve all issues and litigation between the parties including, but not limited to, TTD, TPD, PPD, PTD, Surgical and Hospital expenses, wage differential and vocational rehabilitation benefits. All rights under Section 19(h) are specifically waived. Respondent reserves and does not waive its rights under Section 5(b) of the Illinois Workers' Compensation Act. No interest is due for any medical bill pursuant to Section 8.2(b).
>
> This settlement represents:
> (1) a LUMP SUM of $255,000.00, comprising a stipulated wage-loss differential, plus
> (2) Either:
> a. petitioner's Section 8(a) rights to medical treatment kept open, or
> b. funding, at Respondent's sole option, of a self-administered MSA as determined appropriate by CMS (see below).
>
> ...
>
> 5. **Respondent agrees that it will pay**, pursuant to the Illinois Workers' Compensation Act Fee Schedule, all reasonable, necessary and **causally-related** medical, hospital, physical therapy, surgical and authorized vocational rehabilitation **expenses** that are **properly tendered** to Respondent, **until such time as Petitioner's Section 8(a) rights have been extinguished as described herein below**.
>
> 6. Respondent further agrees that its obligations, and **Petitioner's rights, under Section 8(a)** of the Illinois Workers' Compensation Act, as now or hereafter interpreted by the IWCC or any Court of valid jurisdiction, **remain open, viable and enforceable until such time Respondent, at its sole option and expense, establishes and funds a**

> **Medicare Set-aside Account** ("MSA") acceptable to and approved by the Social Security Administration's Centers for Medicare and Medicaid Services ("CMS") as set forth below. **Upon approval of the MSA by CMS, all of Petitioner's rights under Section 8(a) are waived.** Petitioner agrees to fully cooperate with the MAS process, provide all necessary information and execute any necessary releases. *Settlement Contract (8/14/14), Emphases in bold added.*

There is no evidence that Respondent funded an MSA, pursuant to the settlement contract, so Petitioner's Section 8(a) rights remain open. Respondent's argument is misplaced because Petitioner is not claiming additional benefits under Section 19(h) for a change in condition. He is claiming benefits under Section 8(a), based on the open medical provision of the settlement contract. The only question is whether Petitioner's left cubital tunnel syndrome is causally related to his previously awarded cervical condition and surgery or whether it is a completely distinct, separate and unrelated condition of ill-being.

However, although not mentioned by Respondent, there is a jurisdictional issue related to some of Petitioner's claims. The parties entered into a settlement contract, which was approved by Arbitrator Simpson on August 14, 2014. Neither party sought judicial review of this agreement within 20 days so it became final.

The Appellate Court in *Millennium Knickerbocker Hotel v. IWCC* stated, "the Commission has no power to enforce payment of its own award" and "the only method to enforce a final award of the Commission is in the circuit court pursuant to section 19(g) of the Act." 412 Ill. Dec. 759 at 767 (First Dist., as corrected 6/2/17). However, the Commission "is authorized to assess penalties and attorney fees under the Act against a party who fails to comply with the terms of a final settlement contract approved by the Commission" and "the Commission could not decide if the assessment of penalties and attorney fees was proper without first interpreting the terms of the settlement contract to determine if the respondent was liable for the reimbursement amount." *Id.* at 770.

Therefore, since the Commission does not have jurisdiction to enforce its own award, Petitioner would have to file a claim under Section 19(g) in the circuit court for any allegedly unpaid bills pursuant to the settlement contract that were incurred prior to the date of the settlement contract. However, the Commission does have jurisdiction to determine whether penalties and fees are appropriate. And, since Section 8(a) medical benefits were left open, the Commission retains jurisdiction to consider Petitioner's Section 8(a) petition relating to medical expenses incurred after the date of the settlement contract.

Causation Regarding Left Cubital Tunnel

Petitioner testified via deposition taken at his home on November 17, 2016, because he was on oxygen and "cannot walk a block without getting exhausted and having to rest." *Px13 at 4.* On September 22, 2011, Petitioner underwent a C3 through C6 cervical fusion performed by Drs. Bauer and Mardjetko. *Id. at 5, Px4.* Petitioner testified that, after that, he experienced total left hand numbness and, six months later, he started to experience right hand numbness as well. *Id.* He testified that ever since he woke up from the surgery, he's experienced continuous pain in the neck, which shoots down the shoulders, and problems with his balance, gait, and ability to

walk. *Id. at 6.* On cross-examination, Petitioner reiterated that he developed symptoms in his left hand as soon as he woke up from this surgery. *Id. at 20.* He never really had symptoms in his elbows but it was mainly his hands and his left little finger became completely numb. *Id. at 21.*

We find that this is supported by the medical records. On September 24, 2011, while Petitioner was still in the hospital, the records show that he complained of weakness and decreased grip strength in his left upper extremity and that his hand felt swollen. *Px4.* Examination by Roxanne Horwath, PAC, revealed decreased grip strength and swollen dorsum of the left hand. *Id.* The next day, Petitioner was examined by Dr. Press who noted that Petitioner's left wrist swelling and soreness had improved but the examination showed continued weakness compared to the right. *Id.* On September 26th, Dr. Press noted that Petitioner was doing well and had minimal swelling on his left wrist but he still had weakness in the left upper extremity, which was "improving slowly." *Id.* Petitioner was discharged from the hospital "in satisfactory condition." *Id.*

On October 10, 2011, Dr. Mardjetko wrote that, at three weeks post-op, Petitioner had improved clinically. On that same day, Dr. Bauer wrote that Petitioner had residual signal change and atrophy of the spinal cord. *Px6.*

On November 7, 2011, Dr. Mardjetko noted Petitioner's pain was improved but he continued to have some left upper extremity numbness. A physical therapy evaluation on November 14th indicates Petitioner had 5/10 neck pain along with decreased sensation in his left hand and difficulty grabbing items. *Id.*

On December 14, 2011, a physical therapy progress note indicates that Petitioner's neck pain had not changed significantly and he was experiencing radiating pain from his neck down into the shoulder and shoulder blade region, but not into the arm. However, there was no change in the numbness into the left hand. This record states that Petitioner had made the biggest improvement in his gait and balance. *Id.*

On December 19th, Dr. Mardjetko noted Petitioner complained of "continued left hand numbness which has been present and stable since surgery." That same day, Dr. Bauer wrote Petitioner still had mild spasticity of his lower extremities as well numbness of his left hand. *Id.*

The previous Section 19(b) hearing was held on January 19, 2012.

On January 30, 2012, Drs. Mardjetko and Bauer noted Petitioner was continuing to improve. However, physical therapy records from January through March 2012 still reflect that Petitioner had decreased sensation in his left fingertips. *Id.*

On April 9, 2012, Dr. Mardjetko wrote that Petitioner's upper extremity pain is "much less" but he "still has a little numbness and paresthesias down the left arm into the left hand in radial, ulnar, and median nerve distributions." *Id.*

Petitioner's testimony that his right hand symptoms began about six months after his surgery (*Px13 at 16*) is consistent with the September 24, 2012 record of Dr. Mardjetko who

wrote, Petitioner "continues to have bilateral hand numbness and this seems to have increased somewhat on the right side" and "I suspect we are dealing with carpal tunnel syndrome superimposed upon a residual cervical myelopathy." *Px6.* That same day, Dr. Bauer wrote, "He has been doing well with some residual of spasticity and some numbness in his left hand. For the last month he has had numbness in his right hand." Dr. Bauer ordered an MRI, CT scan, and EMG. *Id.*

On September 27, 2012, Dr. Rechitsky performed an EMG/NCV and wrote a letter to Dr. Mardjetko stating:

> Interestingly, at no point prior to surgery has he experienced any significant sensory symptoms in the pain, cervicalgia, cervical-brachial pain, grip weakness. Following surgery, he gradually developed persistent numbness (not clearly pain or paresthesia) in the left hand, and within last 4-5 months similar symptoms emerged in the right hand. He could not clearly describe a particular anatomical distribution. … He thinks his grip is slightly weakened and he has difficulty manipulating small objects.

Dr. Rechistky opined:

> [Petitioner's] sensory symptoms in the hands seem to be really multifactorial. I certainly agree with you in that sequelae of cervical myelopathy might be contributing. Interestingly, sensory examination suggest predominant deficit in proprioception, vibration, with slight dysmetria in the left hand, and I wonder if there is a particular involvement of fasciculus cuneatus accounting for such sensory dissociation. …
> Despite obvious clinical suspicion, I could not demonstrate the presence of carpal tunnel syndrome on the right or on the left. However, [the tests] strongly suggest the presence of left-sided cubital tunnel syndrome. …

Petitioner underwent a cervical MRI on September 28, 2012, which showed "Resolution of canal stenosis present in 08/2011 as a result of interval surgery. Residual cord abnormalities. No new findings of concern." *Px6.*

On October 15, 2012, Dr. Mardjetko found that cervical x-rays showed Petitioner's spinal cord was "beautifully decompressed" but Petitioner demonstrated significant myelomalacia and cord atrophy. He recommended Petitioner be seen by Dr. Williams for his upper extremity complaints "as some of these appear to be localized and orthopedic in nature and not neurologic." *Px6.*

Dr. Bauer, also on October 15th, wrote Petitioner "has noticed a recent set of numbness of his hands bilaterally. He feels this is a new numbness." Dr. Bauer opined, "My sense is that at least some of the numbness can be accounted for the residual myelomalacia at C4-5." *Px6.*

Petitioner underwent an ultrasound on October 17, 2012 and Dr. Rechitsky's letter to Dr. Mardjetko on October 29th indicates that it showed bilateral nerve subluxation more pronounced on the left. He recommended they continue discussing issues of cervical myelopathy as well as left ulnar decompression. He wrote Petitioner "understood preventive nature of such surgical

treatment and the possibility of residual sensory and motor symptoms in the hand despite successful decompression of the ulnar nerve at the elbow."

The Commission's decision was issued on November 19, 2012.

On January 28, 2013, Dr. Bauer wrote Petitioner "has numbness in both his hands which I believe is related to his cervical spinal cord injury and not to an ulnar nerve condition. He has no Tinel's sign. He does not have a Froment's sign. There are no findings of ulnar neuropathy. All his fingers have a sense of numbness without differential to his medial fingers. He does have spasticity of his gait with hyperactive reflexes especially in his lower extremities." *Px6.*

On April 15, 2013, Dr. Mardjetko wrote a letter to Dr. Bauer stating, "He has had a very, very good overall response from a neurologic perspective but he continues to have numbness in his hands, though in my view this is in the left ulnar nerve distribution and it may very well be related to ulnar neuropathy over residual spinal cord pathology." He stated that Dr. Rechitsky's EMG/NCV documented left ulnar neuropathy and Dr. Mardjetko had referred Petitioner to Dr. Williams for this. *Id.*

Petitioner saw Dr. Williams on May 10, 2013. His record contains a history of Petitioner's injury in May 2011 along with the following:

> He ultimately underwent surgery with Dr. Mardjetko and Dr. Bauer with a multiple level cervical fusion. **When he awoke, he had new symptoms of numbness in all of his digits of the left hand. ... This has been constant and unchanging since that point in time.** There has really been no improvement, and 6 months later he developed similar findings on the right side. ... He notes weakness in both hands which has been present since his surgery on the left and since the onset of symptoms on the right side. *(Emphasis added.)*

Dr. Williams opined:

> I think clinically his cubital tunnel syndrome does not explain his complaints and reported numbness in his hands, and while a cubital tunnel release could be contemplated based upon the electrical findings on his EMG, I am not certain at this point in time how well that would serve him.
> ... He is inclined to do nothing for his cubital tunnel syndrome unless there is compelling evidence suggesting progression or worsening. I would tend to agree with him. I am not certain that there is a single identifiable cause for his bilateral hand numbness, nor do I believe that there is likely a clearly treatable cause. I do certainly want to make sure that there is no progress of weakness in the left ulnar nerve distribution that could be prevented with operative treatment.

Dr. Rechitsky performed another EMG/NCV on August 28, 2013 and, in his letter to Dr. Williams, wrote:

> I reiterated the multifactorial nature of sensory symptoms in the hands to [Petitioner] and indicated that in all likelihood sequelae of cervical spondylitic myelopathy accounted for

> numbness in the hands mostly. I emphasized preventive nature of decompressive surgery to [Petitioner] (to avoid quadriplegia), and he understood there was little we could offer to treat residual numbness in the hands. To some degree, left-sided cubital tunnel syndrome could be contributing to that. From the ultrasonic study performed last year, we know there is also a subluxation of the left ulnar nerve at the elbow, and therefore there is a possibility of gradual progression of left ulnar neuropathy that could potentially contribute to worsening weakness and numbness in the left hand in the future. From the preventative standpoint, surgical decompression of the left ulnar nerve at the elbow could be certainly considered, and [Petitioner] wanted to further discuss pros and cons of such surgery with you. Even though ultrasonic neurography detected right ulnar nerve subluxation at the elbow also, it doesn't seem that [Petitioner] is symptomatic in the right ulnar territory or has electrodiagnostic evidence of right-sided cubital syndrome.

Dr. Rechitsky also ordered bloodwork to test for potentially treatable conditions contributing to numbness in the hands such as B12 deficiency, diabetes, etc. On September 5, 2013, Dr. Rechitsky discussed those lab results with Petitioner and, in a letter to Dr. Williams, wrote:

> Otherwise, [Petitioner] was re-explained that numbness in the hands resulted most likely from sequelae of previously treated cervical myelopathy. He will follow with you shortly to discuss management for cubital tunnel syndrome.

On September 6, 2013, Dr. Williams wrote:

> **Dr. Rechitsky's impression was that he has a stable mild ulnar neuropathy on the left side. He does not believe that there is a significant relationship between his ongoing numbness and his left cubital tunnel syndrome. Dr. Rechitsky believes that this is a residual from his cervical spine compression, even post surgery. Dr. Rechitsky did indicate that doing a cubital tunnel release...due to his subluxing nerve on the left side would be more of a prophylactic procedure [than] a procedure which is likely to give him substantial clinical benefit. ... I told [Petitioner] that while one could certainly proceed with a cubital tunnel release, I do not think he would really achieve tangible clinical benefit from this, as I do not think his numbness is specifically related to this.** This is really his most bothersome residual complaint. I told him, however, it is possible that the cubital tunnel could progress over time resulting in weakness of his left hand. While one could consider [surgery] at this point in time, I do not see the definite need for this. *Px6, Emphases added.*

Dr. Williams recommended observation for motor weakness and that Petitioner be seen every six months. He also wrote:

> Unfortunately, I do not think, given his numbness in his hands, that we can rely on him developing obvious clinical signs to prompt re-evaluation of his ulnar nerve in a timely fashion. **It is clear that he does have permanent numbness in both his hands and this is not going to change. This is residual of his neck and cervical issues.** *Id.*

Petitioner returned to Dr. Mardjetko whose October 28, 2013 record indicates Petitioner had excellent cervical range of motion but had ulnar neuropathy on the left side, for which he

was asking for occupational therapy. Dr. Mardjetko recommended Petitioner see Dr. Williams for an occupational therapy evaluation.

On November 22, 2013, Dr. Williams recorded that Petitioner continued to have a constant degree of numbness in both hands. He had undergone a prior EMG which showed some cubital tunnel on the left side but has had excellent strength in the hand but difficulties with fine motor tasks due to absence of sensation in the hand. Dr. Williams prescribed upper extremity strengthening and opined:

> While he does have a component of cubital tunnel on the left side, he continues to have excellent intrinsic strength. We would have him avoid prolonged elbow flexion and avoid prolonged direct pressure over the medial elbow so as to not aggravate the nerve at the elbow. We will see him back for his regular scheduled visit in 03/2014 for repeat strength exam. We will get him into therapy also for some gait training and balance training.

On December 2, 2013, Petitioner began therapy at BodyWerks. On December 19th, Petitioner saw Dr. Singh for pain management. Dr. Singh wrote Petitioner had cervical pain that radiates to the bilateral shoulders with associated bilateral hand numbness. He diagnosed opioid dependence and cervicalgia and recommended an EMG to assess the bilateral hand numbness. *Px10.*

A BodyWerks Re-Evaluation on January 29, 2014 reflects complaints of constant cervical pain and associated paresthesia and numbness in the bilateral hands, but it was less intense. This record indicates, "States that immediately after his surgery his left hand was numb and 6 months later his right hand became numb. He states that the pain began after his surgery." *Px6.*

> On March 7, 2014, Petitioner returned to Dr. Williams who wrote:
>
> He has undergone some therapy, but this has been primarily for his neck, and while he is making some progress with his neck, he still has some outstanding issues with his neck that seem to have promise in terms of improvement and progressing in therapy. … Unfortunately, his occupation therapy for his hands for primarily compensatory help with his ADLs was denied for reasons that are unclear to me. He noted no strength loss in his hand.

Examination showed diminished light touch sensibility to Petitioner's his hands but no evidence of intrinsic wasting and Petitioner had good motor strength to his hands. Dr. Williams' impression was "**residual findings from the cervical myelopathy related to his work injury.**" He recommended continued therapy for his neck and for balance and:

> In addition, he has residual deficits in his hand which are primarily related to the numbness, which makes performance of many activities of daily living somewhat challenging and difficult.
>
> …

> I certainly believe this is reasonable and appropriate for this [occupational therapy] as the need for the [occupational therapy] is a result of his residual myelopathy related to his work injury; therefore, this, in my opinion, clearly should be covered under his original [workers' compensation] injury.

On April 14, 2014, Respondent's attorney sent an e-mail to Petitioner's attorney authorizing occupational therapy. *Rx3.* Petitioner began therapy at Athletico on April 28, 2014. This evaluation noted "significant sensory processing impairments in bilateral hands which **adversely affect the motor coordination and functional use of both hands.**" The therapy records through June 2014 reflect consistent complaints of numbness in both hands and weakness in the left hand. *Px6, Px9.*

On June 20, 2014, Dr. Williams recommended additional therapy for gait training, postural training, and balance. He wrote:

> This is due to ongoing residual issues from his cervical myelopathy for which he was previously treated by Dr. Mardjetko. As I am **actively treating him for his UE issues and he has ongoing gait and balance disturbance as a residual from his cervical spine pathology**, I have written this referral for him. *Px6.*

The parties entered into a settlement contract, which was approved by the Arbitrator on August 14, 2014.

On September 12, 2014, Dr. Williams noted, "basically he has been status quo without much change in his symptoms. However, within the last week or so, he woke up with increased numbness in the small finger of his left hand." He ordered another EMG/NCV because:

> He does have a change in condition of the left hand where he has a known, but up till now stable cubital tunnel syndrome. He does have weakness compared to the last noted strength evaluation on 11/22/13. He also has a new onset increased numbness in the ulnar nerve distribution. *Px6.*

Dr. Rechitsky performed a third EMG/NCV on September 24, 2014 and, in a letter to Dr. Williams, wrote:

> **Numbness and minimal loss of dexterity in the hands have been very stable until about 3 weeks ago, when he experienced worsening numbness, near-complete loss of sensation in the left hypothenar area and little finger of the left hand.** … Right hand has been stable in terms of minimal clumsiness, diffuse non-anatomical numbness. …

His impression was:

> interval progression, worsening of the left ulnar neuropathy at the elbow. By electrodiagnostic criteria, left ulnar neuropathy at the elbow is presently severe, chronic, with features of both demyelination and axonal loss. Again, inching across the elbow suggests entrapment from 1 cm below through 1 cm above the cubital groove. Similar to previous evaluations, there is no evidence of cervical radiculopathy, polyneuropathy,

> carpal tunnel syndrome, and **diffuse numbness in both hands results, in all likelihood, from sequelae of previously treated cervical spondylotic myelopathy.** *Px6, Emphasis added.*

Dr. Williams recommended a left ulnar decompression and transposition at the elbow. *Id.*

On September 26, 2014, Dr. Williams opined, "given the deterioration and his symptoms in the small finger numbness and weakness, I am concerned that in spite of the fact that we cannot really distinguish between his residual cervical myelopathy and symptoms from his left cubital tunnel syndrome deterioration and his current complaints of his left small finger weakness make me concerned that he is at significant risk for progressive deterioration of function of his only innervated muscles."

Dr. Williams' records contain a October 3, 2014 note summarizing a phone conversation with Petitioner:

> We again reviewed the surgery and what our expectations were including preventing further deterioration of the left hand in terms of the ulnar motor component of this as well as the potential for some improvement of this. I told him again he may experience some improvement in the numbness as well. He again asked me about the origin of the compression of the ulnar nerve, and **I told him that given that he became aware of the numbness in the left hand immediately postoperatively, given the presence of the left hand numbness postoperatively, this would be characterized as postoperative ulnar neuritis.** I told him again that this is something that can occur following a variety of surgeries and **is related to the surgical procedure, but in an indirect fashion in a sense, it is not coming from the neck. I think the next surgery certainly creates a little bit of overlap and uncertainty.** The biggest concern I have is the progression of the ulnar neuropathy, which seems stable, which was stable last year and now shown progression this year, which is the indication for surgery, but **I do believe the need to proceed with operative treatment for his left ulnar nerve is related to a cervical spine surgery, which was previously performed.** *Px6, Emphases added.*

Dr. Williams performed a left cubital tunnel release and anterior subcutaneous transposition on November 11, 2014. The operative report reflects that the indication for this surgery was "residual numbness following cervical spine surgery. He has progressive cubital tunnel syndrome and presents for cubital tunnel release." *Px4.*

Petitioner testified that before the cubital tunnel surgery his little finger was "completely dead. It didn't move. Now it moves. I have no feeling in it but it moves as good as it did in the beginning." *Px13 at 24.*

The post-surgery physical therapy records support an improvement in Petitioner's symptoms. On December 1, 2014, Petitioner reported his left hand was improving and was able to button his jeans with his left hand, which he was unable to do prior to surgery. *Px9.* The December 11th note reflects that Petitioner's left hand functioning and numbness improved to 75% of prior level and he was able to grip a steering wheel. However, Petitioner had new tingling in the dorsal aspect of his left hand for approximately two weeks. *Px6.* By December

22, 2014, Petitioner reported his left hand strength improved to the point of being able to manipulate keys, which he was unable to do prior to surgery, but he only reported slight improvement in his left small finger numbness. *Px9*. On February 6, 2015, Dr. Williams noted that Petitioner was definitely better than he was preoperatively but there had not been much progress since his last visit on November 21, 2014. *Px6*. At his last visit to Dr. Williams on August 28, 2015, Petitioner reported that his numbness and tingling was unchanged but he felt like the strength was "pretty good" in the hand. Dr. Williams noted very good intrinsic strength in the left hand and excellent digital range of motion. He wrote, "We would consider him to be at MMI at this point and while he does have some degree of persistent neuritis complaints, his strength certainly is improving." *Id.*

Prior to that last visit with Dr. Williams, Respondent's Section 12 physician, Dr. Theodore Suchy, reviewed records and examined Petitioner on Marcy 30, 2015. Dr. Suchy, who is board-certified in general orthopedic surgery, testified via deposition on May 19, 2015. *Rx7*. Dr. Suchy testified that Petitioner told him that he had cervical surgery in September 2011. Dr. Suchy was then asked:

Q: Did he give you any history of any upper extremity complaints or conditions?
A: Not at that time, not to my recollection.
Q: Did he tell you anything about developing numbness or tingling?
A: Yes. He eventually at a period of about six months after surgery developed some numbness and tingling in his hands and eventually underwent a second surgery by Dr. Williams where an ulnar nerve decompression and transposition of his left elbow was performed. *Id. at 9.*

Dr. Suchy testified that, at the time of his examination, Petitioner complained of some pain into his shoulder with numbness into both hands bilaterally. He also had some numbness and tingling in his feet, and he felt that his gait was abnormal. He couldn't sit and drive for more than three hours, and he stated that he had not worked since the date of injury. *Id. at 10.* Dr. Suchy testified that he reviewed approximately six inches of Petitioner's medical records. *Id. at 11.* On examination, Petitioner exhibited an ataxic gait. Dr. Suchy also found hyperreflexic, hypertonic, and abnormally responsive reflexes in the upper and lower extremities, which he testified denoted a problem with the long tracks of the spinal cord. Dr. Suchy opined that Petitioner had a significant spinal cord problem with his neck secondary to central canal stenosis, and he had myelopathy which persisted and caused these hyperreflexia in both the upper and lower extremities. *Id. at 16-17.* Dr. Suchy performed a two-point discrimination test for fine sensation to the fingertips. He testified that Petitioner's responses were varied and he could not determine a "diagnostic sense" of what his fingertip sensation was so Dr. Suchy referred to it as an "inappropriate response." *Id. at 18.*

Dr. Suchy's impression was status-post multi-level cervical decompression for severe spinal stenosis secondary to chronic cervical spondyloses with resultant persistent and chronic cervical myelomalacia as well as status post left cubital tunnel decompression with ulnar nerve transposition. *Id. at 20.* He described myelomalacia as a degenerative process in which the myelin coating, which covers the central and peripheral nervous system, is softening secondary to compression seen in spinal stenosis, and that's where there is a narrowing of the spinal

A: It is my opinion…that cubital tunnel syndrome is not related to a chest contusion. *Id. at 26.*

On cross-examination, Dr. Suchy stated that he does not perform spinal surgeries. *Id. at 28.* It was his opinion that Petitioner had preexisting myelomalacia because he had an abnormal gait prior to May 2011. *Id. at 54-55.* However, he admitted that Petitioner had no other symptoms of myelomalacia prior to May 12, 2011. *Id. at 56.* Petitioner did not relate to him or any other medical provider any tingling in his feet prior to that date. *Id.* He did not previously have any problem driving more than three hours. *Id.* He worked full time and did not have any restrictions prior to his accident. *Id. at 58.* Dr. Suchy did not know if Petitioner had any problems with tingling hands or manipulating small objects prior to his accident. *Id. at 60.* He did not remember Petitioner mentioning any problems with his upper extremities prior to the accident and does not know of any medical records that indicate any hand problems prior to May 2011. *Id. at 61.* He testified:

Q: When in relation to the surgery that [Petitioner] had on his neck did hand symptoms begin to appear?
A: I believe he started developing numbness and tingling three to six months after the surgery.
Q: What did Williams tell [Petitioner] about the cause of the problems in his hands?
…
A: This is Dr. Williams speaking. "I told him again he may experience some improvement in the numbness as well. He again asked me about the origin of the compression of the ulnar nerve, and I told him that given that he became **unaware** of the numbness in his left hand immediately post-operatively and given the presence of left-hand numbness post-operatively, this would be characterized as post-operative ulnar neuritis. I told him again this is something that can occur following a variety of surgeries and is related to the surgical procedure from an indirect fashion in a sense. It is not coming from his neck."

And then also the neurologist who evaluated him for his upper problems felt that in his opinion it was multifactorial, and that was Dr. Rechitsky.
Q: The "unaware" in Williams – your quote of Williams, is that your typo or his?
A: I believe it's his. I read that several times.
Q: That's fine.
A: I think I understand what he is saying, but I'm not sure.
Q: At least on [10/3/14] Dr. Williams…said, "I told him again that this is something that can occur following a variety of surgeries and is related to the surgical procedure from an indirect fashion in a sense. It is not coming from his neck." Do you agree with that?
A: That's what he said, yes.
Q: Is it your opinion that [Petitioner's] hand tingling is an artifact of the surgery, caused by the surgery?
A: No.
Q: What causes his tingling?
A: It's interesting to note. I agree with the neurologist. It's probably multifactorial.

The reason I say that is because he had a correct surgery for cubital tunnel performed by a very good surgery, and yet he had no improvement of the symptomology whatsoever. So, therefore, is it caused by compression of the ulnar nerve? The ulnar nerve compression was released. So what is still giving his numbness and tingling? Could it be central? Could it be a canal problem? Could it be a problem with the cervical spine? Maybe.

Q: Do you have an opinion about that?

A: **My opinion is...that it is multifactorial. There probably was some cubital tunnel.** It is documented on an ultrasound that he had subluxing of both ulnar nerves which is an imminent cause of ulnar neuritis and that to some extent based on the clinical examination of Dr. Williams he did have ulnar neuritis, but **the surgery that was performed was the correct surgery albeit did not relieve all of the symptomology; therefore, I believe that there also is some cervical issues causing his numbness and tingling of the fourth and fifth fingers.**

Q: Do you agree with Williams that the numbness and tingling appeared immediately after the surgery?

A: I think he is saying it didn't.

Q: Okay. You agree with Williams that the numbness is something that can occur following a variety of surgeries and is related to the surgical procedure? Do you agree with Williams there?

A: It may. *Id. at 61-65.*

Dr. Suchy was asked for the basis of his opinion that Petitioner experienced only a temporary exacerbation of symptoms following his May 12, 2011 injury:

Q: What do you mean by "temporary exacerbation"?

A: Well, based on my opinion and the mechanism of injury, I think he has no question a preexisting problem, and that's well documented objectively by his MRIs and CAT scans, and that since he had an exacerbation of his symptomology after the incident, specifically his gait problems and the development of upper extremity problems, that caused an exacerbation of a preexisting problem.

The reason I say "temporary" rather than "permanent" is because the natural course of spinal stenosis myelomalacia is a degenerative one which causes progressive problems down the road, even if released surgically such as he had done. *Id. at 70-71.*

However, Dr. Suchy admitted that Petitioner's surgery was related to his work accident:

Q: Do you accept that [Petitioner] aggravated – on [5/12/11] aggravated his preexisting degenerative cervical condition which was a contributing factor in his development of severe symptoms related to myelomalacia, including the gait instability and ataxia for which [Petitioner] required surgery and was taken off work?

A: Yes. *Id. at 73.*

Dr. Suchy could not point to any medical record that states Petitioner's symptoms returned to pre-May 2011 levels. *Id.*

Regarding Petitioner's current hand problems, he testified:

Q: Are some of those problems that you might expect after a cervical fusion of the kind that [Petitioner] had – he could have hand problems?
A: From the surgery procedure?
Q: Yes.
A: Unless there is some type of complication, but more likely than not, the hand problems are a progressive nature of his neurological problem. *Id. at 75.*

Dr. Suchy testified that, after his injury, Petitioner had focal atrophy of the spinal cord of about 1.5 cm at C4-5 and spinal cord compression at C4-5 and C5-6, which would account for his symptoms. *Id. at 78.* He testified that Petitioner did not have these symptoms before May 2011 and he didn't know if Petitioner had the cord compression or focal atrophy before May 2011. *Id.* He said that symptoms of focal atrophy of the spinal cord at C4-5 could manifest as numbness and tingling in both hands, weakness, gait disturbance, or it could be asymptomatic. *Id. at 79.*

Dr. Suchy stated that his opinion that Petitioner had reached maximum medical improvement (MMI) one year after his surgery was based on when a person "usually" has reached MMI. *Id. at 80.* He testified:

Q: So [Petitioner's] maximum medical improvement in this case is tingling in the hands and the gait that you saw him with which you described as ataxic, wide stance ataxic?
A: Yes. I saw him two years after this, after that maximum medical improvement.
Q: That's his maximum medical improvement after his surgery, isn't it?
A: I believe it's become worse and as he admits to me, but that was probably his maximum medical improvement, correct. He had definite permanent impairment. *Id.*

Dr. Suchy admitted that Petitioner never returned to work, his symptoms have not resolved, and MMI doesn't mean "all better." *Id. at 81.* He opined that gait training is a reasonable and necessary approach to address Petitioner's spinal cord problems and he would not disagree that Petitioner needs it. *Id. at 82.* Dr. Suchy testified that Petitioner's cervical surgery was reasonable and necessary. *Id. at 83.* Regarding the elbow surgery:

Q: And you don't disagree that the elbow surgery was a reasonable approach to the problems he was having. It just wasn't successful?
A: Correct.
Q: That's an accurate description of your opinion, I take it?
A: That's fair. *Id.*

Dr. Suchy had no criticism of the physical therapy Petitioner underwent or the medications he was prescribed after the surgeries. *Id.*

Dr. Suchy testified that Petitioner had abnormal reflexes which were never documented before May 2011 and a positive Romberg sign, which he did not have prior. *Id. at 88-89.* Dr. Suchy admitted that his opinion about Petitioner being at MMI was based on how patients with this kind of surgery typically do and not on how Petitioner was actually doing. *Id. at 88.*

On redirect examination, Dr. Suchy testified that Petitioner's presentation was consistent with a progressive degenerative condition and that he saw no documented evidence of any complications from Petitioner's neck surgery. *Id. 90-91.* However, on re-cross examination, Dr. Suchy admitted that there were medical records documenting that Petitioner had numbness and paresthesias into his fingers post-operatively, which were not present before the surgery. *Id. at 91.* He testified:

Q: Did you read in Dr. Williams' records that he attributed the hand symptoms and tingling to the surgery?
A: It may.
Q: Do you disagree with him?
A: No. *Id.*

Causation Analysis

There are two causation questions presented by Dr. Suchy's opinions. First, in general, whether Petitioner's cervical condition and symptoms remain causally related to his work injury or whether he had reached MMI and they are now related solely to a pre-existing degenerative condition. Second, more specifically, whether Petitioner's left cubital tunnel surgery is causally related to his cervical condition.

The Commissions' prior Section 19(b) decision determined that Petitioner's preexisting degenerative cervical condition was aggravated by his work injury and necessitated surgery. Even Respondent's Dr. Suchy agreed that Petitioner's preexisting cervical condition was exacerbated by the work injury and necessitated surgery. *Rx7 at 22.* The question is whether Petitioner's exacerbation/aggravation was temporary and if Petitioner reached MMI one year after his surgery such that any remaining symptoms are no longer causally related to his work injury. Dr. Suchy believed that Petitioner's current symptoms are "related to the chronic nature of his preexisting problem which is a degenerative process which has with its normal course progression." *Id. at 23.* However, Dr. Suchy could not point to any medical record that states Petitioner's symptoms returned to pre-May 2011 levels. *Id. at 73.* He also admitted that Petitioner never returned to work, his symptoms have not resolved, and MMI doesn't mean "all better." *Id. at 81.*

Dr. Suchy testified that Petitioner's hand tingling was not caused by the work accident or the cervical surgery on September 22, 2011. *Rx7 at 25-26, 63.* He was under the impression that Petitioner developed numbness and tingling in his hands about six months after the surgery. *Id.* at 9. However, the medical records indicate that Petitioner began complaining of left hand weakness, decreased strength, and swelling within a couple of days of the surgery, while he was still in the hospital. Petitioner continued to have, and was continuously treated for, left upper extremity complaints and hand numbness since that time. Dr. Suchy testified that Dr. Williams wrote, Petitioner "became *unaware* of the numbness in his left hand immediately

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postoperatively" (*Rx7 at 62*) and that Dr. Williams "is saying it didn't" appear immediately after the surgery. *Id. at 65.* However, Dr. William's October 3, 2014 record states the exact opposite: Petitioner "became *aware* of the numbness in the left hand immediately postoperatively, given the presence of the left hand numbness postoperatively, this would be characterized as postoperative ulnar neuritis." *Px6, Emphasis added.* Based on the above, we find that Dr. Suchy did not have an accurate understanding of the temporal relationship between Petitioner's cervical surgery and the onset of his left upper extremity and hand symptoms.

Dr. Suchy also testified that Petitioner "had no improvement of the symptomology whatsoever" after the cubital tunnel surgery. *Id. at 64.* He then testified that Dr. Williams performed the correct surgery but it "did not relieve all of the symptomology; therefore, I believe that there also is some cervical issues causing his numbness and tingling of the fourth and fifth fingers." *Id.* However, Petitioner testified that before the cubital tunnel surgery his little finger was "completely dead. It didn't move. Now it moves. I have no feeling in it but it moves as good as it did in the beginning." *Px13 at 24.*

Based on all of the above, we find the opinions of Dr. Bauer, Dr. Williams, and Dr. Rechitsky more persuasive than that of Dr. Suchy. Petitioner has proven, by a preponderance of the evidence, that his continuing symptoms are related to his surgically treated cervical condition. This includes his left hand numbness, which developed within days of his surgery. Although Petitioner's left ulnar condition may be "multifactorial," his cervical condition is clearly a contributing cause of his symptoms. Even Dr. Suchy agreed with this but, based on his misunderstanding of the onset of Petitioner's hand symptoms, we find his opinion to be not persuasive on the issue of causation and whether Petitioner had reached MMI. Petitioner has treated continuously for his cervical condition and symptoms since his accident. He has not returned to his pre-injury condition and, instead, developed "postoperative ulnar neuritis." We find that Petitioner did not reach maximum medical improvement and his conditions remain causally related to his work injury and sequalae of his cervical surgery.

Section 8(a) Medical Petition

Based on our jurisdiction analysis above, we find that Petitioner's Section 8(a) Petition only applies to medical expenses incurred after the settlement contract was approved on August 14, 2014. Since we have found that Petitioner's cervical and left ulnar conditions remain causally related to his work injury and/or sequalae of his cervical surgery, we award the following post-8/14/14 bills subject to the medical fee schedule in Section 8.2 of the Act:

Illinois Bone and Joint Institute (Px12b)

Dr. Craig Williams:

9/12/14	Office visit	$74.00
9/26/14	Office visit	$74.00
11/11/14	Neuroplasty	$3,023.00
8/28/15	Office visit	$93.00

We note that there are two "Post Op" visits on 11/21/14 and 12/12/14 at no charge. A 2/6/15 Office visit was initially charged for $74.00 but this was later reversed on 4/8/15 as "Post Op" so there was no actual charge for that date of service.

Jonathan Garrett, PA:

11/11/14	Neuroplasty	$1,101.00

Dr. Igor Rechitsky (Px12c)

9/24/14	Three (3) charges related to the EMG/NCV	$1,700.00

Athletico (Px12d)

Occupational Therapy Services from 11/13/14 through 12/22/14	$3,615.60

Advocate Lutheran General Hospital (Px12e)

Charges related to the left cubital tunnel surgery on 11/11/14	$11,649.00
Total claimed medical expenses incurred after 8/14/14:	$21,329.60

We also note, however, that only the Athletico and Advocate Lutheran General Hospital bills appear to have an outstanding balance. At the original Section 19(b) hearing, the parties stipulated that Respondent was entitled to credit under Section 8(j) for payments made by its group health carrier. This credit was also ordered by the Commission in its decision on November 19, 2012.

At the current Section 8(a) hearing, Petitioner testified that when he was "forced out of the job," he became covered as a dependent under his wife's group insurance policy. *Px13 at 28-29*. However, his wife also works at Respondent so it is the same Blue Cross/Blue Shield insurance and Respondent pays part of the premium. *Id.* Petitioner has not specifically argued nor cited any authority which would preclude Respondent from getting Section 8(j) credit for the bills paid by its group carrier on behalf of Petitioner. Therefore, we find that Respondent is entitled to credit for all amounts paid under Section 8(j). Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit.

Penalties and Attorney's Fees

Petitioner claims penalties and attorney's fees on an outstanding balance of $65,888.60 from Center for Brain and Spine Surgery related to the cervical fusion performed by Dr. Bauer on September 22, 211. This expense was incurred prior to the Section 19(b) arbitration hearing on January 19, 2012, but this charge was not included on the bill submitted into evidence. At that hearing, Petitioner introduced Px6, which were the bills he was claiming. This exhibit

contained Dr. Bauer's Notice of Lien letter, dated October 21, 2011, and an account statement dated October 13, 2011. The last entry on this statement was October 10, 2011 for "Postop Followup Visit" with no charge listed. Significantly, this bill does not contain any charges for the cervical surgery on September 22, 2011. The Commission, on November 19, 2012, awarded all of the bills contained in Petitioner's Exhibit 6. At the current Section 8(a) hearing, Respondent introduced Rx2 which indicates that it paid the Commission's award in January 2013. While we defer to the circuit court on whether this bill was somehow revitalized and enforceable under the terms of the settlement contract, we find that Respondent had a good-faith basis for denying liability for this bill and did not act unreasonably or vexatiously. Penalties and attorney's fees related to this bill are denied.

Petitioner also claims penalties and fees for the bills from Illinois Bone and Joint Institute, Dr. Igor Rechitsky, Athletico, and Advocate Lutheran General Hospital.

The Illinois Bone and Joint Institute billing summary (*Px12b*), dated November 16, 2016, shows there is no balance due. This summary contains charges from multiple physicians and some are from prior to the arbitration hearing. Many of these bills have been paid by Respondent's group insurance carrier. Respondent's Exhibit 2 also shows that payments were made to Illinois Bone and Joint Institute by its workers' compensation carrier. Since Section 19(k) requires us to consider whether the employer has made payments under Section 8(j), we find that Respondent has not acted unreasonably or vexatiously regarding these bills. Therefore, attorney's fees under Section 16 are also not warranted. As for Section 19(l) penalties, there is insufficient evidence to show when "written demand for payment" was made or to prove that Respondent did not have "good and just cause" regarding its handling of these expenses.

The billing statement of Dr. Igor Rechitsky (*Px12c*), dated October 12, 2016, also shows no balance due. The supporting documentation for this exhibit indicates that payment was made by Respondent's group insurance carrier. For the same reasons, we decline to award penalties and attorney's fees.

The Athletico bill (*Px12d*), dated June 10, 2016, shows charges from April 28, 2014 through June 27, 2014, which were incurred prior to approval of the parties' settlement contract on August 4, 2014. The remaining charges, from November 13, 2014 through December 22, 2014, were incurred after the settlement contract. One of the problems with this case is that there apparently was a dispute regarding the causal relationship between Petitioner's cervical condition and his left hand symptoms even before the settlement contract was approved, and this dispute was not definitively resolved by the contract. Although Respondent had pre-authorized occupational therapy on April 14, 2014 (*Rx3*), the Athletico charges from the beginning of 2014 were denied (*Rx4*) because they were related to a diagnosis of "ulnar nerve lesion," which Respondent did not consider to be a condition which had been awarded by the Commission. *Rx8*.

The Commission notes page one of the settlement contract reflects that Respondent "has" paid all medical bills at the time it was approved. In the section where the parties are instructed to "List unpaid bills in the space below," it states, "Please see *Terms of Settlement*". However, there are no unpaid bills listed in the attached Terms of Settlement & Medicare Rider. Under Paragraph 5, Respondent was obligated to pay "all reasonable, necessary and **causally-related**

medical, hospital, physical therapy, surgical and authorized vocational rehabilitation expenses that are **properly tendered** to Respondent...." (*Emphases added.*)

When Petitioner filed his motion for penalties and fees on October 23, 2014, after the settlement contract was approved, it was based on the allegation that Respondent "has refused to authorize or pay for prescribed physical therapy and occupational therapy." This seems to be a reference to the Athletico charges in early 2014.

After Petitioner's left ulnar surgery, he filed another motion on February 5, 2015, alleging that Dr. Williams performed a cubital tunnel release on November 11, 2014 but Petitioner "continues to experience extensive problems in his hands and with his gait which are affected by his cervical neuropathy" and Respondent has "refused to authorize or pay for prescribed surgery, physical therapy, gait therapy and occupational therapy ordered by Petitioner's treating physician Dr. Williams."

Respondent then scheduled a Section 12 examination of Petitioner with its physician, Dr. Suchy, which took place on March 30, 2015. On July 31, 2015, Respondent filed its Response to Petition for Penalties alleging that it had preauthorized, on April 14, 2014, the occupational therapy as prescribed by Dr. Williams but that the Illinois Bone & Joint Institute charges were for "ulnar nerve lesion" and "muscle weakness in general", which are conditions that "were never alleged or awarded." Respondent also stated that it obtained a Section 12 examination with Dr. Suchy to address these conditions and it had a reasonable basis to dispute these charges.

For the purpose of determine penalties and fees, we find that there was not a "meeting of the minds" regarding Petitioner's left ulnar condition at the time of the settlement contract. If there had been no dispute about the unpaid Athletico bill, it should have been listed on the settlement contract.

We find Respondent's dispute about whether Petitioner's left ulnar condition was causally related was not unreasonable or vexatious. Although it did not obtain the Section 12 exam until March 30, 2015, we note that there was also a disagreement among the treating medical doctors about the cause of Petitioner's condition; namely, the opinion of Dr. Mardjetko on April 15, 2013 that Petitioner's hand numbness "may very well be related to ulnar neuropathy over residual spinal cord pathology." Furthermore, despite our finding that Dr. Suchy's opinion was less persuasive on the issue of causation, Respondent's reliance upon it appears to have been in good faith.

Based on the above, we decline to award penalties and attorney's fees on any of the outstanding bills.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition under §8(a) is hereby granted as outlined above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $21,329.60 for medical expenses under §8(a) of the Act, subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit under §8(j) of the Act for payments made by its group insurance carrier; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's petitions for penalties under §19(l) and §19(k) and attorney's fees under §16 of the Act are denied.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $21,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 24 2018

Charles J. DeVriendt

SE/
O: 8/29/18
49

Joshua D. Luskin

Kevin W. Lamborn

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Angela Carlson,

Petitioner,

vs. NO: 10WC 4813

Advocate South Suburban Hospital,

18IWCC0630

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 2, 2017 is hereby affirmed and adopted.

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

18IWCC0630

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 25 2018
o102318
KWL/jrc
042

Kevin W. Lamborn

Michael J. Brennan

Thomas J. Tyrrell

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

CARLSON, ANGELA
Employee/Petitioner

Case# **10WC004813**

ADVOCATE SOUTH SUBURBAN HOSPITAL
Employer/Respondent

18IWCC0630

On 6/2/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.06% 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:

1836 RAYMOND M SIMARD PC
205 W RANDOLPH ST
SUITE 815
CHICAGO, IL 60606

2461 NYHAN BAMBRICK KINZIE & LOWRY
KAREN A HAARSGAARD
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

ANGELA CARLSON,
Employee/Petitioner

Case # 10 WC 04813

v.

Consolidated cases:

ADVOCATE SOUTH SUBURBAN HOSPITAL,
Employer/Respondent

18IWCC0630

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **GARY GALE**, Arbitrator of the Commission, in the city of **CHICAGO**, on11/14/16, 11/18/16 and 12/7/16 . After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. Was there an employee-employer relationship?

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

D. What was the date of the accident?

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

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

G. What were Petitioner's earnings?

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

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

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

K. Is Petitioner entitled to any prospective medical care?

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

M. Should penalties or fees be imposed upon Respondent?

N. Is Respondent due any credit?

O. Other

FINDINGS

On the date of accident, , Respondent operating under and subject to the provisions of the Act.

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

On this date, Petitioner 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 $24,624.08; the average weekly wage was $473.54.

On the date of accident, Petitioner was 30 years of age, with 1 dependent child.

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

ORDER

Denial of benefits

No further benefits are awarded.

Temporary Total Disability

Respondent shall pay Petitioner temporary partial disability benefits of $315.69 /week for 148 3/7 weeks, commencing 10/23/10 through 8/27/13, as provided in Section 8(a) of the Act. Respondent shall thereafter pay maintenance benefits beginning on 9/17/13 until 10/8/2015 for an additional 107 1/7 weeks for a total of $80,726.44.

Credits

Respondent shall be given a credit of $81,811.40 for temporary total disability and maintenance benefits that have been paid since commencing on 10/23/10, the date following the preceding hearing.

Medical benefits

Respondent shall pay reasonable and necessary medical services of $0 as provided in Sections 8(a) and 8.2 of the Act.

As this matter was heard as a 19(b), in no instance shall this award be a bar to subsequent hearing and determination as to permanent partial 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.

KSSteffen — May 30, 2017

Signature of Arbitrator Ketki Shroff Steffen — Date

ICArbDec19(b)

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Angela Carlson	)	
	)	
Petitioner,	)	
	)	
	)	No. 10 WC 04813
	)	
vs.	)	
	)	
Advocate South Suburban Hospital	)	
	)	
Respondent.	)	

Procedural History

This 19b) petition was tried before Arbitrator Gary Gale on11/14/16, 11/18/16 and 12/7/16. The Parties have agreed to have the decision rendered by a different Arbitrator Arbitrator Ketki Steffen has examined the transcript and submitted records and evidence in rendering her opinion.

On October 22, 2010, a prior 19(b) petition was litigated in front of Arbitrator Robert Lammie. He found that Petitioner sustained accidental injuries arising out of and in the course of her employment on August 3, 2009 and that a causal connection existed between the accident and Petitioner's current condition of ill-being in her cervical spine. Arbitrator Lammie further authorized surgery to the cervical spine as recommended by Dr. Chang and further found that Petitioner was entitled to TTD for this period. Neither party sought Commission review of this award and the Arbitrator acknowledges the ruling and findings of Arbitrator Lammie.

FINDINGS OF FACT

Petitioner Angela Carlson was employed by the Respondent, Advocate South Suburban Hospital as a transporter since 10/10/2001. She was 30 years old at the time of her accident/injury of 8/3/09. Her primary job duties included transporting patients from their rooms for diagnostic treatments. Her job involved lifting patients and

transporting them to wheelchairs and carts. Petitioner did not have any on-going physical restrictions on the day of her injury and was employed in full-duty capacity.

Angela Carlson

The Petitioner testified on her behalf and stated that she was terminated from her employment on January 12, 2011. She testified that after Arbitrator Lammie's favorable findings from the October, 2010 hearing, she decided to resume her treatment with Dr. Chang. On April 11, 2011, she underwent surgery at South Suburban hospital. (T. 25) She then underwent physical therapy and rehabilitation. On July 7, 2011, she had an MRI. (T. 26-27)

Petitioner reported feeling sad around July, 2011 due to the pain following her treatment. (T. 28) She met with Dr. Joseph Beck and underwent a functional capacity exam on November 3, 2011 at Accelerated Rehabilitation. Petitioner was given permanent restrictions. (T. 30-31)

Petitioner continued treating with Dr. Beck and was prescribed Cymbalta and Neurontin. (T. 32) She testified that she started taking Ambien and then Lunesta for help with sleeping. (T. 39)

On September 27, 2011, she was referred her to Dr. Robinson and Dr. Brown, a pain psychologist. (T. 34-35) Petitioner testified that she began seeing Dr. Scott Glaser for pain management. (T. 31-32)

On April 3, 2012 and September 17, 2013, she was examined by IME, Dr. Candido (T. 36, 40)

Petitioner reentered vocational rehabilitation on January 8, 2014 with Edward Steffan. (T. 40)

On May 30, 2014, she was evaluated by IME, Dr. Obolsky (T. 41)

After the IME, on July 1, 2015, Petitioner was examined by Dr. Charles Slack at the behest of her attorney. (T. 42)

On November 24, 2015, she met with Dr. Candido (T. 46)

She then visited with Dr. Beck for the last time Dr. Beck on July 7, 2015. (T. 46)

Petitioner testified that she started seeing Dr. Glaser on August 28, 2012. He provided treatment (injections) and gave her drug screens. (T.50- 53) Petitioner testified that she

was not improving with treatment with Dr. Glaser and saw him for the last time on October 10, 2014. (T. 54-55)

Petitioner explained the issues regarding her vocational rehabilitation as follows: She stated that she met regularly with Mr. Steffan every two weeks, and did not miss any meetings. She completed her job logs to the best of her ability. She testified that vocational rehabilitation stopped on October 8, 2015. (T. 59)

In regards to her current medical condition, Petitioner states that she continues to suffer pain in her neck, upper back and had numbness and tingling in her left arm and three fingers (middle through pinky). She describes the feeling as bugs crawling up and down her spine and states that she is hypersensitive to touch. (T. 62) She still suffers from anxiety, depression and has anger problems. (Id.) Petitioner testified that her condition causes her to be house bound and that she has anxiety and panic attacked. She testified that she takes Advil and pain medicine. She claimed that she stopped taking prescription medications for the last thirty to sixty days. (T. 64)

Regarding her treatment, Petitioner testified Dr. Glaser's treatment (particularly injections) and the surgery or physical therapy did not help her with her pain. (T. 70-71, 78) Petitioner acknowledged that she resumed smoking as of August of 2013 and that she smokes less than a pack a day. (T. 73-74)

In regards to her vocational rehabilitation Petitioner acknowledged that she has to continue the same if she wants to continue receiving her checks. (T. 79) Petitioner acknowledged that she was offered a change to change vocational counselors but she does not adjust well to change. (T. 81-82) Petitioner also acknowledged several issues in following up with the vocational program. Specifically, she did not prepare for her T J Max interview as guided by her counselor (T. 92) She also failed to follow up with T J Max (T. 93)

Petitioner testified that during the vocational program she looked for work, mailed her job logs every Friday and complied with the requirements. (T. 104-105) Petitioner stated that she was no longer looked for any work since vocational services ceased and aso due to her medical issues. (T. 102) She cannot understand why she had to do a job search against her doctor's advice as they had told her she could not work. Petitioner testified that she currently does not feel capable of working but that she did her best

with the job search. She looked for work every day, followed up on every job lead and turned in her job logs every Friday. She would have accepted a job within her restrictions had one been offered.

In regards to her mental health issues, Petitioner stated that her anxiety is caused by fear of reinjuring herself. She also stated she is not aware of who is coming up behind her. (T. 84) As to depression, Petitioner testified that she always got through adverse life events, such as the passing of her two dogs, before the accident. Petitioner testified that she is anxious whenever she has to leave the house because she is not in her usual routine in the house. She goes out with her boyfriend to get something to eat on his days off but is in the house on the other five days.

Physically she has gained twenty pounds since 2009, and currently weighs 300 pounds. She is no longer able to do her exercise regime of walking. She does not exercise at all.

Petitioner testified that she was at the Hancock Center in approximately November of 2014. (T. 91) Petitioner testified she went to lunch once with her boyfriend on the 96th floor of the Hancock building. When cross-examined regarding her Facebook post, Petitioner stated that she has never been there at 1:30 a.m. and she did not take the picture posted on her Facebook page.

Petitioner was questioned regarding insurance and treatment. She testified that after her termination at Advocate she accepted COBRA, but did not utilize same for payment of any of her medical expenses. (T. 87-88) Petitioner testified that the symptom of bugs crawling up her spine has been an issue since 2011 or 2012. She testified that she has hypersensitivity everywhere. (T. 97) Petitioner testified that she is uncomfortable when it is not in her usual routine of watching TV and taking her dogs out in the yard. (T. 101) Petitioner indicated that it is not presently her intent to find work. (T. 106) Petitioner acknowledged that she advised Ed Steffan that she was contemplating suicide, and was provided information relative to additional care for same. She further acknowledged she never took advantage of either of the two programs provided. (T. 114) Petitioner testified that she is presently taking medications that were previously prescribed by Dr. Beck. They were not at the same strength. (T. 124) Petitioner testified that she needs to save her Xanax pills for when she knows she

is going to be leaving the house. (T. 125) Petitioner testified that she was never made aware of the fact that there were medications from which she needed to be weaned. (T. 128)

On re-direct examination, Petitioner testified that she never had any thoughts of harming herself prior to August 3, 2009 or because her dogs passed away. She considered suicide after the accident because she was tired of being in pain and wondering if her doctor visits or medication would be authorized.

Dr. Glaser/Pain Specialist of Greater Chicago

Dr. Glaser first evaluated the Petitioner on August 28, 2012 obtaining a history of pain beginning three years prior when transferring a patient. She also had an onset of left low back pain and left shoulder pain two years prior due to a slip and fall. She indicates activities of daily living present 9/10 with home activities, 7/10 with passive recreational activity, 10/10 with physical activity, 5/10 self-care, sleep 10/10, sexual behavior 2/10 and thinking 5/10 and social 7/10. She noted that pain interferes with sleep and she is awakened one to two times per night. She was treated with various medications, physical therapy and injections as well as surgery, all of which she reports there was no improvement. She has a history of migraine headaches, high blood pressure and irregular heartbeat. Current medications included Dilaudid for pain control, Alprazolam, Ambien, Trazadone, Zoloft, Neurontin, Hydroxyzine and Bystolic. He notes that she has a history of depression, anxiety and memory loss, but denies history of mental disturbance, suicidal ideation, hallucinations or paranoia. She states she is a former smoker but quit in 2011. She drinks wine socially and has a history of marijuana use. Clinical exam demonstrates moderate tenderness to the facets, unlimited flexion but reproducing bilateral neck pain, extension was limited and reproduces bilateral neck pain, rotation and extension was limited and produced ipsilateral neck pain. Clinical exam of the right upper extremity was normal but for decreased sensory response from C7-C8, and of the left upper extremity demonstrated normal muscle testing, with decreased sensory response left C7-C8. Dr. Glaser diagnosed her with cervical post laminectomy syndrome, headache, facet syndrome without myelopathy and cervical radiculopathy. He added Dilaudid and Soma. On September 4, 2012, Dr. Glaser records that the Petitioner sleeps twelve hours per night,

sleeps one to four hours during the day and pain interferes with sleep. She reports using her breakthrough pain medication around the clock. Clinical exam on this date demonstrated no tenderness in the right facet region, with left sided tenderness only mildly tender in the mid region facet and moderate tenderness in the left lower region. Flexion and extension continued to be limited and produced pain. She was referred for facet injections. On October 12, 2012, she noted that her neck pain and right shoulder pain had resolved since her last visit, but the frequency of pain had stayed the same. She indicates she did not smoke. She approximated 40% relief with opioids which last for three hours. Exam of the cervical spine demonstrated upper region facets mildly tender, moderately tender mid region and lower region facets. On October 25, 2012, she underwent left C5 through C7 through T1 facet joint injections. She was re-evaluated by Dr. Glaser on November 9, 2012, again indicating she did not smoke, indicating her neck and right shoulder pain increased since her cervical facet injections. Clinical exam demonstrated no tenderness to facets on the right with left mid region and lower region moderately tender. Extension and rotation continued to produce neck pain. She was ordered to undergo a medial branch block from C5 through C8 which was completed on December 20, 2012. On January 18, 2013, Petitioner reported no change since the medial branch block. She notes she sleeps seven to ten hours per night, one to two hours during the day. Clinical exam demonstrates no tenderness of the right facets, moderate tenderness to the mid and lower region of the facets. Dr. Glaser indicated that she did not have significant facet mediated neck pain based on the diagnostic aspect of the medial branch block. He recommended an epidural injection.

On January 29, 2013, Petitioner reported that her pain had not changed. On January 26 or 27, 2013, she stated she lost some of her Dilaudid as she takes some with her when she goes out. She indicates it was in her purse at dinner on January 26, 2013, called the restaurant, pet store and aquatic store that she had gone to and could not locate it. On March 8, 2013, Petitioner indicates she has had no change in her pain levels, she does not smoke, although she was using less Dilaudid. She now notes she sleeps five hours per night. She reports reducing her pain score by 80%. She continued to list her pain score as 8/10. Clinical exam is now significant for right facet tenderness as well as left. She was referred for an epidural. She notes that her pain

medication reduced her pain score by 60%, continues to rate her pain as a 9/10. On December 6, 2013, Petitioner reported to Dr. Glaser that her pain had increased since her epidural injection. She notes severe upper neck pain causing headaches. At this point she reports her home activity rating is 8/10, passive recreational activities 6/10, physical activities 10/10, occupational or education 10/10, basic life activities and self-care 0/10, sleep 8/10, sexual behavior 8/10, thinking 3/10 and social 7/10 for a total disability score of 60/100. She notes that she sleeps four to five hours per night. Clinical exam demonstrates no tenderness of the facets on the right, moderate tenderness to the upper facets, and mild of the middle with none in the lower facets. She had limited range of motion of the cervical spine. She was referred for another left facet joint injection. On January 14, 2014, she noted that her pain had increased. Dr. Glaser reports that she was never a smoker. She now reports constant numbness in the distal medial left arm. Her total disability score is now 76/100 and she indicates she is sleeping two hours per night. On March 14, 2014, Dr. Glaser noted that her pain had increased since her last visit; that she continues to be forced to search for work continuously and is taking Norco two to three times a day to control her pain. Her total disability score is 72/100. She is utilizing medication for breakthrough pain during the majority of the day. Mild tenderness is noted of the left facet joints. On April 15, 2014, she notes that her pain has again increased. She notes that she was never a smoker, and she is written a new prescription for Norco. There is no change in her clinical presentation.

On June 17, 2014, claimant is seen by Dr. Glaser's physician's assistant noting her pain had increased, she had been using Voltaren gel with benefit but was out, perceived disability score 68/100, on August 15, 2014 she is again seen by the physician's assistant noting that her pain level stayed the same. She has not followed up with her primary care physician. She is utilizing breakthrough medication around the clock. Her current pain intensity score is 79/100. Her mental status exam completed on that date indicates that her thought content is intact, she has normal behavior without pain behavior, and no evidence of opioid intoxication, no slurred speech, pupils are normal, and she has normal gait.

On October 10, 2014, claimant was seen by the physician's assistant again noting that she had increased pain in her neck after sneezing on October 2, 2014. She wanted a new MRI. She reports her pain levels had increased by 60%. She has not noted improvement with increasing Norco. She notes for the past months he has had a crawling type sensation up and down her spine. Mental status exam demonstrated no pain behavior, and no signs of opioid withdrawal. Her pain disability score was 78/100.

On November 7, 2014, she was seen by Ms. Koys and reported feeling the same, with notation that putting things in boxes caused her pain to increase and a preference for Percocet. Her mental status exam was normal.

Petitioner was last seen by Alexis Lerch, NP-C of this office on December 5, 2014, noting no change. She reported having to sit or lie down most of the day to control pain. Her mental status exam was normal. Her disability score was 74 and she indicated medication improved her pain by twenty percent.

Deposition of Dr. Charles Slack (01/21/2016) PX10

Dr. Charles Slack, a board certified orthopedic surgeon, examined Petitioner on July 1, 2015 at the request of her attorney. He testified via deposition.

He obtained a history and reviewed the records of Drs. Chang, Dr. Beck and Dr. Glaser as well as two reports from Dr. Candido and one from Dr. Hsu, He noted that Petitioner complains of sharp, throbbing, aching, burning pain, muscle spasms, headaches, dizziness and left arm symptoms. She also stated that she had weakness in her left arm, difficulty opening jars and stated she dropped things with her left hand. She also noted some low back pain. (PX10, p. 8) She further noted that she had a feeling of bugs crawling up and down her low back, pain radiating into her mid back around her bra line, and she had no significant change since her surgery. (PX10, p. 9) She also stated that she was apprehensive about leaving the house for fear of being hurt, and that she was no longer drive due to difficulty turning her head and because her license plates had expired. (PX10, p. 9)

He stated he performed a clinical examination noting she could toe and heel stand without weakness, forward flex to 60 degrees with some low back pain and posterior neck pain, with similar symptoms in extension, Straight Leg Raise on each side caused low back pressure, ankle and knee reflexes were symmetrical, muscle

strength was intact, exam of her cervical spine demonstrated a well-healed scar, limited range of motion with posterior neck pain with attempts at moving her neck in all directions, tender to palpation with decreased left grip strength, left brachioradialis reflex was absent, and there was decreased sensation over the left fingertips and dorsal forearm. (PX10, p. 11)

Petitioner had decreased grip strength and the left brachioradialis reflex was absent. (PX10, p. 11) Dr. Slack testified that the absent brachioradialis reflex was consistent with her injury at C5-6. (PX10, p. 12)

Dr. Slack diagnosed Petitioner with a persistent postsurgical derangement with a myofascial pain response with radicular symptoms. (PX10, p. 17) Dr. Slack explained that a myofascial pain response is a residual pain process that continues despite surgical intervention without being able to determine specific areas of nerve root compression to account for the ongoing response. (TPX10, p. 17) He explained that Myofascial pain is a pain in the soft tissue, muscles and ligaments that can occur after traumatic incidents or surgery. It is a pain process that keeps firing off a pain response that is somewhat difficult to control. (PX10, p. 17)

He acknowledged that it is difficult to determine what causes the pain but that the residual pain was subsequent to her surgery. (PX10, p. 17-18) He testified that based on his review of the MRI, he did not believe that the adjacent discs were causing any significant issues that would be consistent with adjacent disc syndrome. (PX10, p. 20) Dr. Slack testified that she would require a combination of psychiatry, as well as pain clinic care including injections and possible spinal cord stimulator. (PX10, p. 21) He stated he did not believe she was capable of working due to the severity of her pain and her anxiety level. (PX10, p. 22)

Dr. Slack acknowledged that he does not perform facet blocks or epidurals but rather, refers people to pain management. (PX10, p. 26) Dr. Slack acknowledged he did not review any pre-accident records. (PX10, p. 27) Dr. Slack acknowledged that although he indicated that she had limited range of motion with posterior neck pain, he did not actually document the range of motion. (PX10, p. 29) He noted that she had decreased left grip strength but acknowledged that he did not document this with Jamar testing or anything objective. (PX10, pT. 30) He acknowledged that some individuals

just have decreased reflexes which could explain the left brachioradialis reflex being absent. (PX10. p.30-31) He acknowledged that decreased sensation over the left fingertips and dorsal forearm was a subjective response. (PX10, p. 31) Dr. Slack testified that he reviewed the post-surgical MRI of July 7, 2011, and that the issues previously noted were corrected surgically. (PX10, p. 35-36) He further acknowledged that he reviewed an EMG of February 9, 2010 that demonstrated no evidence of cervical radiculopathy. (PX10, T. 36) Dr. Slack acknowledged that there was no specific evidence of nerve root compression post operatively. (PX10, p. 38) Dr. Slack testified that fibromyalgia is much more diffuse throughout the spine. (PX10, p. 39) In response to inquiry as to whether myofascial pain requires actual trigger points, he indicates that her pain was diffuse, and she has got painful areas throughout her upper back. (PX10, p.40) He acknowledged that there were other potential causes for myofascial pain. (PX10, p. 40) Dr. Slack testified that her pain complaints were not trapezius pain, but actually interscapular pain. (PX10, p. 42) Dr. Slack acknowledged that based upon the review of the records, he found no evidence of post-operative nerve root compression. (PX10, p. 43) Dr. Slack acknowledged that he would defer to the opinions relative to psychiatric matters to professionals in that field. (PX10, p.45) Dr. Slack also acknowledged that he would defer to the pain clinicians as to the criteria for a spinal cord stimulator implant. Dr. Slack acknowledged that myofascial pain syndrome is not one of the recommended diseases to be treated by spinal cord stimulator. (PX10, p. 46) Dr. Slack acknowledged that her complaints relative to pain and ability to turn her head were what caused him to indicate that she was incapable of working but acknowledged these were all subjective. (PX10, p. 48-49) Dr. Slack acknowledged that she did not have an orthopedic problem for which he could provide assistance. (PX10, p. 51) Dr. Slack acknowledged that the clinical exam findings were all premised upon subjective complaints. (PX10, p. 55)

Deposition of Dr. Candido (05/24/2016) PX1

Dr. Kenneth Candido, board certified in anesthesiology and pain medicine, examined Petitioner three times at the request of Respondent. (PX1, p. 4) As part of each examination, Dr. Candido reviewed the treating records provided to him by Respondent and examined the Petitioner on three separate visits.

April 3, 2012:

Dr. Candido concluded Petitioner was not at maximum medical improvement. (PX1, p. 27) In regards to his examination, he obtained a history and noted that Petitioner complained of pain in the left side of the neck as well as the right, extending down the middle of the back to the bra line, numbness in her third, fourth and fifth fingers on the left hand, noted she occasionally dropped items, had *difficulty maintaining her balance* and also had a global type headache. She further described her sleep as being disturbed and had low back pain while walking. She rated her pain be 5-6/10 at rest and 9-10/10 with activity. She stated she spent time crying and was limited to watching television and going to the grocery store with her daughter and driving her daughter to school every day which was a short distance and tolerable. (T. 10) She noted all the medications which she had taken, none of which had been helpful. (PX1, p. 11) Her past medical history consisted of hypertension, morbid obesity and depression. (PX1, p. 12) Dr. Candido testified that social history is critical to evaluation of pain patients and to this individual, nicotine is a harbinger of patients who are likely to become addicted to other chemicals. (PX1, p. 14) Dr. Candido testified that during this evaluation she was giggling and smiling throughout the exam, despite providing a history of depression. PX1, p. 18) His clinical exam noted left sided tenderness, but no limitation in *range of motion of the neck.* (PX1, p.18) He stated she had tenderness from C3-6 on the left sided facet joints. There were also tender points in the left trapezius muscle. He acknowledged both were subjective complaints. (PX1, p. 19) Her upper extremity exam was normal with respect to all but one non-specific left shoulder limitation to elevation and she was neurologically intact. (PX1, p. 20) Dr. Candido opined that as of this exam she had not reached maximum medical improvement and recommended that she undergo a series of left sided medial branch blocks from C3 to C6. He stated if she failed to improve from same, the diagnosis was myofascial pain syndrome which was unrelated to the accident of August 2009 and she would be at MMI. If she did respond favorably then she might be a candidate for radiofrequency medial branch neurotomy. (PX1, p. 28) Dr. Candido recommended she be tapered off narcotics as they had been ineffective. (PX1, p. 29)

Dr. Candido opined that Petitioner was capable of working in a light-duty capacity as of April 3, 2012. (PX1, p. 30)

September 17, 2013:

Dr. Candido re-examined the Petitioner. He noted that she had gained fifteen pounds since the prior examination, and that her blood pressure was elevated. (PX1, p. 33) He stated that her general presentation was more business-like than the previous exam. (PX1, p. 34) He stated that her clinical exam continued to demonstrate tenderness to the left side of the neck with palpation, that she had no issues with range of motion other than subjective complaints with left lateral flexion between 30 and 45 degrees. She described the worse pain between the facet joints of C3 to C6 which was consistent with the previous exam. (PX1, p.34-35) Her upper extremity exam was essentially the same other than internal rotation which had not been measured previously, and she was considered neurologically intact. PX1, p.. 35)

He administered the recommended cervical medial branch injections as well as a cervical epidural injections and facet joint injection, none of which provided Petitioner any benefit. (PX1, p. 32)

Dr. Candido opined that Petitioner's current subjective complaints were not related to the work accident because Dr. Glaser himself ruled out the cervical spine as a competent cause for her symptoms because she had failed to benefit from the injections that he administered. (PX1, p. 40-41) Dr. Candido concluded that the pain was likely myofascial and not a sequela of the work-related accident as the complaints were not emanating from the cervical spine but rather from the musculature. (PX1, p. 41) Dr. Candido explained that Petitioner had two significant risks for myofascial pain, morbid obesity and deconditioning, which placed her at high risk for the development of myofascial or muscle-related pain. (PX1, p. 41) He stated that she met both of those criteria and would be a high risk for development of same. (PX1, p. 41) Dr. Candido opined that Petitioner was at maximum medical improvement from her work-related injuries and that she was capable of working pursuant to the functional capacity evaluation of April 3, 2012. (PX1, p. 42-43) He also noted that she had restarted smoking which was different from the prior exam.

November 24, 2015:

Dr. Candido examined the Petitioner, obtained an updated history and reviewed the updated medical records. Dr. Candido stated that headaches were the principle complaint in November of 2015. (PX1, p. 48). He stated that her dynameter had been unchanged since previous exam. (PX1, p. 48-49) He stated that she had pain over the mid line of the cervical spine at C5-6 and tenderness over the left trapezius muscle but continued to have normal range of motion. (PX1, p. 49) He noted that her upper extremity exam demonstrated tenderness over the AC joint on the left, glenohumeral joint, and left trapezius muscle. He stated that these were not findings that manifested in the prior two exams. (PX1, p. 50) He stated that motor strength and sensory exam as well as the entire neurological exam was normal. (PX1, p. 50)

Dr. Candido opined that Petitioner had myofascial pain unrelated to the accident. (PX1, p. 52) Dr. Candido testified that there is no objective test to diagnose myofascial pain syndrome. (PX1, p. 52) It is a clinical diagnosis made by response to trigger point injections. (PX1, p. 53) Dr. Candido testified that trigger point injections were the treatment modality available to Petitioner for her myofascial pain syndrome. He did not know why Petitioner had not received such injections. (p. 60)

Dr. Candido testified that Gabapentin, which was a non-specific analgesic, was not exclusively used for nerve-related pain, but is also used for things like fibromyalgia, which requires the presence of at least 11 out of 18 tender points. (PX1, p. 76) Dr. Candido stated that there is no documented cause and effect relationship between people who develop fibromyalgia and those who do not develop same. (PX1, p. 80)

Dr. Candido opined that there were no objective clinical findings to substantiate a diagnosis of myofascial pain. (PX1, p. 52) Dr. Candido indicated that in order to clinically diagnose myofascial pain, it is typically based upon a response to trigger point injections. He noted that he could not palpate any actual trigger points during the course of the exam. (PX1, p. 52-54) Dr. Candido indicated that Ms. Carlson's complaints to him were not trapezius related pain. Therefore, it was unrealistic to suggest that a cervical sprain occurring in August of 2009 could have been quiescent until now. (PX1, p. 64) Dr. Candido explained that double diagnostic blocks as was

completed by Dr. Glaser in this case, were done to minimize nonresponders with respect to possible cervical facet issues. (PX1, p. 69) Dr. Candido testified that given the abject failures, there were only two conclusions which could be drawn; one was that she had myofascial pain, or two that she is malingering. (PX1, p. 71) He further stated that he suggested that she had myofascial pain syndrome even without objective evidence substantiating same. (Id.)

On cross-examination, Dr. Candido acknowledged that he performed 200 "independent medical examinations" in the year 2015, of which 95% were for Respondents. (PX1, p. 56) Dr. Candido testified that he was aware that Petitioner was an employee of Advocate South Suburban Hospital and that he performed three examinations of Petitioner at the request of the Advocate Hospital Corporation which provides the majority of his income through his independent contractor corporations. (PX1, p. 58-59)

Dr. Candido testified that myofascial pain syndrome and facet arthritis are independent of each other and one can exist without the other. (PX1, p. 61) Dr. Candido testified that, according to some reports, spine surgery fails 35% of the time even though the surgery is performed technically well. Typically, a failed neck surgery will result in a radicular or radiating pain distribution related to the underlying condition which the technically perfect surgery had attempted to remedy. (PX1, p. 61-62)

Dr. Candido testified that nobody knows with any degree of certainty what causes myofascial pain. (PX1, p. 63) Dr. Candido was unaware of any condition of ill-being affecting the cervical spine and musculature of Petitioner prior to the accident. (p. 68) Dr. Candido remained convinced that Petitioner had myofascial pain syndrome at the time of all three of his examinations (PX1, p. 70) even though there were no objective findings to substantiate her subjective complaints. (p. 71)

Dr. Candido did not believe that the accident and events thereafter contributed to Petitioner's lack of conditioning and lack of physical exercise. He noted that they preempted and preexisted the August, 2009 accident. (PX1, p. 4) Rather, he believed that her myofascial pain syndrome was solely caused by her premorbid obesity, anxiety and depression. (PX1, p. 73-74) Dr. Candido was unaware of myofascial pain syndrome developing after a cervical spine fusion. (PX1, p. 75)

Deposition of Dr. Joseph Beck (07/14/2015) PX9

Dr. Joseph C. Beck testified that he is board certified in internal medicine, psychiatry, addiction medicine, addiction psychology and pain medicine. (p. 5) His fellowship at the University of Pennsylvania involved the care of patients with chronic pain and addictive disorders. (PX9, p. 7) He treated the Petitioner for her mental health condition. He stated that the experience of chronic pain leads to the development of secondary symptoms of sleep disturbance, anxiety and depression in certain individuals especially when the chronic pain is not managed. (PX9, p. 49) He disagreed with Dr. Obolsky's opinion that the accident did not cause any condition of psychiatric ill-being. He opined that Petitioner could not sustain a 40-hour work week job due to her lack of psychiatric stability. (PX9, p. 50) He testified that Petitioner would have difficulty interacting with others and following complex directions. She would have a severe degree of emotional reactivity. She has displaced panic attacks and agoraphobia. (PX9, PX9, p. 51)

On cross-examination, Dr. Becki testified that Petitioner first complained of panic attacks on May 14, 2012. (p. 63) Dr. Beck stated that the panic attacks were caused by the prolonged length of her pain disorder. He explained that a pain disorder causes panic attacks because anxiety is a symptom of a pain disorder. (PX9, p. 64) With respect to Petitioner's agoraphobia, Dr. Beck explained that agoraphobia exists in relative degrees. He does believe that Petitioner leaves the house but such may cause significant anxiety. She feels anxious with crowds and being forced to interact with certain individuals. (PX9, p. 73-74) He stated that his opinion and diagnosis was based on his observations of the petitioner during the 41 office visits. During 41 office visits with Petitioner.

The following is an abstract of the treatment dates:

August 2. 2011: Dr. Beck first Petitioner on a referral from Dr. Mark Chang. He diagnosed her with a pain disorder with symptoms of anhedonia, dysphonia, agoraphobia, hopelessness, helplessness and inappropriate sense of guilt and loss of her job role with pain affecting her functioning and mood, especially anxious and depressive features. (PX9, p. 10) Dr. Beck opined that Petitioner had a neurochemical process at work that needed to be reordered before she could have a reduction in

symptoms. (PX9, p. 11) He explained that prolonged chronic pain stimulus alters the central nervous system, both in the brain and the spinal cord, altering certain neurologic transmission. In the spinal cord, an alteration of a chemical gate often produces increased pain sensation and sensitivity and predisposes a patient to psychiatric symptomology. (PX9, p. 11) He opined that the Petitioner suffers from a pain disorder which is the psychiatric manifestation of the experience of chronic pain, per the DSM-IV-TR. (PX9, p. 12) He stated he did do a mental status exam on that date, she had no issues with speech, no cognitive issues, no suicidal or homicidal ideations, good insight on judgement, was well groomed, fully oriented with adequate knowledge but was tearful. He prescribed Cymbalta and Neurontin and recommended Howard Robinson for pain physiatrist and Peter Brown as a pain psychiatrist. (PX9, p. 15)

October 25, 2011:Petitioner's pain was uncontrolled. He stated crying episodes were increasing and Cymbalta was not helpful for depression or pain. She was placed on Zoloft and Ambien. (PX9, p. 17) On November 21, 2011, Dr. Beck testified that she had been compliant with her medication but her pain was not abated, and she had slight increase in her range of affect meaning she was less depressed. (PX9, p. 18) He further stated there were eleven elements to a mental status exam although he would not be able to list them all. (Id.)

May 14, 201: Petitioner states she was fatigued, having crying episodes, having sleep issues, hopelessness, helplessness and panic attacks. (PX9, p. 22)

July 11, 2012: She was still having crying episodes and panic attacks which remained the same on August 6, 2012 and on September 5, 2012. (PX9, p. 23)

October 3, 2012:A pain assessment was done noting that she received about 40% pain relief, that her activities of daily living were unchanged, and she was having mild nausea and constipation. She was scheduled for a diagnostic block. (PX9, p. 24-25)

November 2, 2012: Dr. Beck reports that she indicated some improvement from the injection she had with Dr. Glaser.

December 4, 2012-February 1, 2013 Reevaluation. New symptoms of poor concentration, memory impairment, depressed mood, hopelessness and helplessness. (PX9, p. 26)

March 1, 2013: Petitioner states she had weaned herself off muscle relaxants and opioids. She said that she had sleep disturbance, low energy, did not have a lot of pertinent positives on her mental status exam. (PX9, 27)

April 8, 2013: No change

On October 18, 2013: Petitioner states she is no longer taking her medications, she was dysphoric. (PX9, p. 28)

On November 18, 2013: Petitioner switched to Lunesta due to ongoing sleep issues.

On February 11, 2014: Petitioner states she had a depressed affect with anxiousness, restlessness, irritability and poor concentration and memory.

On March 11, 2014, Dr. Beck testified that she had panic attacks two to three times a week. (PX9, p. 30)

May 9, 2014 Petitioner anxious about attending a neuropsychological evaluation, that she felt it was an intrusion, her mood was depressed and anxious. (PX9, p. 32)

July 29, 2014: No change

August 26, 2014: Mr. Beck notes Petitioner had issues with sending her daughter back to school.

September 24, 2014: She was still having issues with sleeping, remained depressed, and did not wish to leave the house or dress for the day. (PX9, p. 33-34)

November 17, 2014: Petitioner claims she had trouble making choices, remains easily overwhelmed, was anxious and depressed. (PX9, p. 38-39)

January 7, 2015, Petitioner stated she was depressed, irritable and anxious but her affect was appropriate to thought. (PX9, p. 40)

February 4, 2015: Unchanged

March 6, 2015:Petitioner reports being anxious in relation to a change in her rehabilitation counselor.

March 31, 2015: Dr. Beck stated that she did not appear especially depressed, but reported anxiety.

May 12, 2015: Dr. Beck testified that she had to put her dog down, her father-in-law was ill, her daughter was out of school and spending more time with her and she was generally overwhelmed. (PX9, p. 42)

June 9, 2015: Unchanged

July 7, 2015: Petitioner crying a lot during her review of symptoms, worrying, restless and irritable. (PX9, p. 43-44)

After testifying regarding Petitioner's examination and condition, Dr. Beck stated that Petitioner suffers from pain disorder which is secondary to her chronic cervical pain which has caused dysphoria, anxiety, agoraphobia, and anhedonia, sleep disturbance, cognitive disturbance. (PX9, p. 44) Dr. Beck testified agoraphobia is in relative degrees, in that it may be difficult for her to leave her house, and cause her significant anxiety, but she is not a shut-in. Although that agoraphobia would not impact her ability to work an eight-hour day if she was isolated from external interaction, Petitioner would not be able to work a 40-hour week because of her emotional reactivity, difficulty interacting with others and difficulty following complex directions. (PX9, p. 50-51)

Dr. Beck felt that Petitioner was not exaggerating but she may have a bit of a histrionic presentation. (PX9, p. 45) Dr. Beck acknowledged that her histrionic presentation is a long-standing issue. (PX9, p. 74-75) Dr. Beck acknowledged that he was not aware of the fact that physicians indicated that she did not require the cervical fusion that she underwent. Additionally, he was not aware of any other physicians' opinions or impressions with respect to presentation during their visits. (PX9, 54) Dr. Beck acknowledged that in addition to her other complaints; she expressed frustration over her home life and lack of financial support from her boyfriend. (PX9, p. 57) He acknowledged that every visit she presented well groomed, that she had intact recent and remote memory at her initial visit, concentration was within normal limits, and other than his perception of her appearance being depressed, her mental status exam was normal. (PX9, p 58-59)

On cross examination, Dr. Beck indicates that Petitioner denied being a smoker. (PX9, p. 61) He also acknowledged that Petitioner was not suffering from panic attacks for approximately the first seven months he saw her. (PX9, p, 64) He further acknowledged that this was based upon her self-reporting. He also acknowledged that many of the symptoms (sleep issues, memory loss) were just based on Petitioner's self-reporting and that there were no outside studies to corroborate this allegation. (PX9, p 70). He also agreed that although she reported trouble sleeping, she never appeared tired or disheveled at her appointments. (PX9, p 70)

Dr. Beck was also cross examined regarding the medication he had prescribed for the Petitioner. He testified that he believes Gabapentin had an impact on anxiety reduction and pain. (PX9, p 72) He acknowledged that nothing during the mental status exam corroborates an improvement with Zoloft. (PX9, p. 72-73) Dr. Beck acknowledged that smoking impacts how medications metabolize such as Gabapentin. (PX9, p. 83-84) He acknowledged that he prescribes them, but has no way of knowing for certain whether she takes them. (PX9, p. 84)

Lastly, he acknowledged that remaining off work for compensation could be construed as secondary gain. (PX9, p. 76-77) He stated that if her presentation outside of his office was different, it could impact his opinion with respect to secondary gain. (PX9, p. 77) He acknowledged Petitioner's histrionic does not necessarily equate to anything with respect to her "pain disorder." (Id.)

Deposition of Alexander E. Obolsky (07/23/2015) RX2

Dr. Obolsky was deposed on July 23, 2015. He is a Board-Certified Psychiatrist who practices in clinical and forensic psychiatry. (RX2, p. 4-5) He testified that in rendering his opinion as to Petitioner's mental health injury, he performed a records review (including records from Dr. Beck and Dr. Glaser, Dr. Candido and Palos Surgical Center and Surgicare), conducted forensic, psychological and cognitive testing, and conducted a forensic psychiatric interview of the Petitioner. It should be noted that the battery of tests was administered by two psychometricians and the testing data was interpreted by Dr. Bailey, a psychologist.

The Petitioner was examined by Dr. Obolsky on August 2, 2011, and complained of agoraphobia, hopelessness, helplessness, inappropriate sense of guilt, loss of her job, pain including her everyday life and affecting her function and mood and especially anxious and depressive features. Dr. Obolsky opined that based on the above review, tests and examination, the Petitioner did not suffer from an anxiety disorder but that she was exaggerating her symptoms. (RX2, p. 12-13, 32-33) She did not suffer from mental, emotional or cognitive impairments to prevent her from working. (RX2, p. 38)

In reaching his analysis he disagreed with Dr. Beck's findings because Dr. Beck's did not document symptoms of anxiety and depression severe enough to indicate a mental-health condition. In Dr. Obolsky's opinion, Dr. Beck did not actually diagnose Petitioner with mental ill-being and additionally and failed to reassess his diagnosis or treatment when Petitioner showed no signs of improvement. He also found disagreement with Dr. Beck medication protocol in that Xanax and Lunesta were prescribed long term instead of the recommended short term use.

In explaining his opinion, Dr. Obolsky pointed out that there was a difference between individuals who suffer an untoward event in their life and get upset or sad as a result, as opposed to a major depressive disorder, in that a person who has major depression cannot imagine not being depressed. (RX2, p.. 29-30) Dr. Obolsky further stated that there is a spectrum of normal sadness, which are not diagnosable because they do not rise in severity, nature or frequency or real life impairment to be a mental disorder. People who have depression do not have a full spectrum of emotional responses and they are typically of low affect, therefore, one's ability to laugh during a personal interaction indicates a lack of severity of depression. (RX2, p. 93)

The Petitioner, in his opinion, did not have a mental-health injury. The noted that there was an inconsistency between Petitioner's symptoms. (RX2, p. 23-24) He further stated this incongruity indicated that there was an exaggeration of symptoms. (Id.) Dr. Obolsky testified that Petitioner was exaggerating her symptoms. He pointed to the interview process when Petitioner was hopeful when asked open-ended and in them.

Dr. Obolsky also explained and analysis his clinical and psychological test findings that support his opinion. He explained that Petitioner's MMPI-2 test indicated that she was inconsistent in her symptom reporting as did her BHIL-2 test note that she was over reporting negative experiences and symptoms, and the Green's word memory test, which was specifically focused on effort which Ms. Carlson did not make. Additionally, the Normal Wisconsin Card Sort test results for the Petitioner were inconsistent with someone who experiences pain on a constant basis or has a depressive disorder or anxiety disorder. RX2, p. 103-104) Her normal results indicate someone capable of normal executive functioning as well as higher cognitive functioning such as decision making (RX2, p. 103-104)

Dr. Obolsky testified that in additional to the clinical exams, Petitioner's mental status exam also supported his diagnosis. He noted that the Petitioner, although tearful, has regular speech and rhythm, was articulate and coherent, has tight associations and no psychotic thoughts. Someone suffering from depression or anxiety would likely exhibit these symptoms. Petitioner, on the other hand, was oriented to time, place and person, had intact reason and remote memory, her attention span and concentration was within normal limits and she could name objects and repeat. Dr. Obolsky also noted that Petitioner was well dressed, has good eye contact, exhibited good hygiene and had manicured nails which would not be something you would find in someone who is suffering from major depression. (RX2, p. 57-58)

Dr. Obolsky felt that Petitioner was exhibiting evidence of symptom exaggeration or secondary gain based upon her incongruity of complaints with her mental status exams, the results of the forensic psychological testing, limited report of symptoms when asked open ended questions, all of which led to this conclusion. (RX2, p. 59-60) He explained that if one is capable of paying attention to her appearance and puts interest and energy into same prior to going out, they are likely not suffering from major depressive disorder or serious anxiety disorder. (RX2, p. 63-64)

Dr. Obolsky also pointed to the Petitioner's own words to discount a mental health condition. He noted that Petitioner often got out of the house to eat with her husband and stated that this made her feel better. (RX2, p. 31) He noted that although she had fleeting suicidal ideations as is common among the general population, she did not ever have actual suicidal plans or want to hurt herself or try to hurt herself. He clarified that getting worried is not the same as an anxiety disorder.

On cross-examination Dr. Obolsky testified that he performs about 50 forensic psychiatric examinations per year. (RX2, p. 67) His fee for this case was $9,000.00, excluding his deposition. (p. 68) He advertises with three witness services that identify and locate expert witnesses for litigants. (p. 69)

Dr. Obolsky testified that when he asked Petitioner "How has it been emotionally", she listed 8 complaints: 1) it sucks; 2) I feel like I don't have a lift anymore; 3) I feel like a horrible parent; 4) I can't do things with my child that I should be able to; 5) I wanted more kids; 6) We were trying to start having more kids and this happened;

7) with the medicine and the pain, the ability to take care of a kid is gone; 8) it's like everything is gone. (RX2, p. 71) Dr. Obolsky opined that the above complaints represent a normal emotional reaction to the surgery. (RX2, p. 71)

Dr. Obolsky testified that the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) test has six validity scales and ten clinical scales. The L scale (the lie scale) was within normal limits. The F scale which looks for faking was also within the normal limits. (RX2, p. 78) The K scale which tests for exaggerated psychopathology, when evaluated with other scales, was within normal limits. (RX2, p. 79) Dr. Obolsky testified that Dr. Bailey who administered the MMPI-2 concluded that the 10 clinical scales were consistent with a somatoform disorder, anxiety disorder or depressive disorder. (RX2, p. 82-83). Dr. Bailey who administered and interpreted the MMPI-2 wrote in her report that sleep disturbance, perplexity, despondency and feelings of hopelessness were also common for Petitioner. (RX2, p. 83)

Dr. Obolsky agreed that somatization disorders can be triggered by a physical trauma. (RX2, p. 90) Dr. Obolsky testified that Dr. Bailey who administered the Battery for Health Improvement-2 testing concluded that it was unlikely that multiple objective conditions were causing the unusual combination of symptoms and that somatization is likely present. (RX2, p. 89-90)

Shaun O'Connor/Surveillance RX10

Shaun O'Connor, a private investigator, was retained by the insurance carrier. He testified in court and presented video surveillance evidence of Petitioner on ten separate occasions. The tapes (several hours' worth) were presented in evidence. The tapes show the Petitioner engaged in different activities:

February 19, 2012: Petitioner is in a vehicle with her daughter, who was driving. The daughter attempts to pull into a parking space and the Petitioner exits the car to help guild her into the space. Petitioner can move her head.

September 11, 2013: Petitioner in the passenger seat. Male driver going through drive-through at bank.

September 22, 2013 Petitioner is passenger in the car, goes into a home and leaves approximately ½ hour later in the car.

November 2, 201: Petitioner exited her home, goes across the street and meet a man and speaks with the neighbors. Conversation appears normal, Petitioner is talking and occasionally smiling. Later that afternoon, Petitioner leaved home and is driven to Kohls Department Store. Petitioner is seen in various physical activities including squatting, bending, and moving her head in a normal fashion. She leaves store with shopping bag and purse in her hands. Petitioner then goes to Men's Warehouse and then to Hooters. Inside Hooter, she sits on a backless stool in the company of her individual (identified as her boyfriend). She appears to be talking, laughing without any impediments. Lastly she goes to Best Buy where she is observed to be moving around without issues.

May 24, 2014: Petitioner is smoking on her driveway

May 25, 2014: Petitioner leaves home with her daughter to go to a gathering at 4:50 p.m. She leaves gathering at 8:55 p.m.

November 15, 2015: Petitioner leaves home and goes to video store. Returns home a little later.

December 4, 2015: Petitioner smoking outside of her home

December 6, 2015: Petitioner leaves home in car as passenger. Petitioner goes to Target and buys merchandise, unload items from cart and returns home after shopping trip

April 24, 2016: Petitioner inside Great Clips with boyfriend, then goes to Best Buy and then Target. Goes to Jimmy John's for lunch.

May 22, 2016: Petitioner visiting friends/relative. Standing outside on patio socializing at a barbecue.

Witness O'Connor supplemented his collected video evidence with his testimony that the stores the Petitioner visited were often crowded with people. He acknowledged that much of the video was taken on the weekend and that there were times during his surveillance that Petitioner did not seem to leave her home

Vocational Rehabilitation / Edward Steffan

Petitioner started vocational rehabilitation consultation around November, 2010. After her surgery, she restarted vocational rehabilitation in December, 2013. In January 8, 2014 Petitioner started a self-direction job search. Edward Steffan assisted the Petitioner with her rehabilitation. His record indicated that Petitioner was "both placeable

and employable in positions earning between $10.00 and $15.00 per hour." He found that that if Petitioner put a full time good faith effort to seek and secure employment she will obtain employment matching her Rehabilitation variables. His notes indicate that Petitioner complained about filing out online applications due to problems with her fingers and headaches. The March, 2014 report indicated that Petitioner, "did not wish to participate in job development activities at this date due to lack of sleep from excessive neck pain and her social phobia. She also complained that she has no internet or phone services due to the expense. She complained about worrying and freaking out.

On April, 2015 Petitioner advised Mr. Steffan that she is unable to follow any job leads. When he offered to escort her to Prairie State College she declined due to feeling of pain and social anxiety.

From May, 2014 Petitioner was unable to engage in vocational counseling due to various issues including feeling sleepy, dizzy, slurred speech, fainting, power outage, out of town for daughter's birthday. She declined help, rides or transportation from her counselor and by August, 2014, she had contacted 0 potential employers from the provided list.

On October 6, 2014, the counselor urged her to send in Job Seeker Forms for the

weeks of September 8, September 15, September 22 and September 29, 2014. On October 7, 2014 Petitioner indicated she had a series of family emergencies involving her daughter and she was not able to meet with us the week of September 29, 2014 as scheduled. She also advised she had sent in her Job Seeker Forms to the Tinley Park office through the mail, but they came back as *"Return to Sender."*

Petitioner told her counselor that the prospect of contacting potential employers in-person "paralyzes me with anxiety." The vocational counselor requested Ms. Carlson allow him to accompany her to potential employers this date and she stated "There is no way, I'm sick and even thinking about stopping in anywhere makes me anxious and sick." On December 2, 2014, Petitioner informed her counselor she is *"very ill"* and will not be able to participate in our scheduled December 3, 2014 consultation.

On June 4, 2015 Ms. Carlson completed 0 of the 15 requested vocational activities . On July 1, 2015 Ms. Carlson called 11 potential employers for more information instead of applying in person as requested by E.P.S. Rehabilitation, Inc.

Through July, August and September of 20, 2015 Petitioner had largely failed to apply to any potential employers; had failed to complete most the vocational activities and failed to apply to any employer in person. She claimed that she did not have access to a car and that her boyfriend only will let her use his car to do a short two-minute trip.

Vocational Forensic Review/ Dan Minnich

Respondent requested that Dan Minnich of Custom Case Management complete a forensic review of the vocational services provided up to that point. Mr. Minnich testified that he is a certified Vocational Rehabilitation Counselor employed by Custom Case Management. Prior to his testimony, he reviewed certain medical records, certain medical opinions and the reports of EJS Vocational Rehabilitation prepared by Edward Steffan. He also reviewed the job logs submitted by Petitioner to Mr. Steffan. He did not meet with the Petitioner.

Mr. Minnich completed a transferable skills analysis, wage data and labor market report, occupational projections and sought available job openings. Mr. Minnich testified at the hearing and stated that Petitioner should have been capable of securing employment at her previous wage rate within three months had she put forth a full effort. He stated she had appropriate transferable skills, in areas that reflected growing job opportunity. Mr. Minnich stated the Petitioner did not make in person contacts which was vital to securing employment. He also noted that Petitioner did not make sufficient contacts or follow up on a weekly basis. He agreed with Mr. Steffan, that the Petitioner could be placed in suitable employment and that there was a stable labor market for someone of her experience and abilities.

Mr. Minnich stated that Petitioner could have been placed in suitable employment within 120-160 days with a proper job search. He felt that Mr. Steffan did not adequately force Petitioner to follow up on the job leads after submitting her application.

On cross-examination, he acknowledged that Petitioner kept all her scheduled appointments with her vocational rehabilitation counselor and that turned in her job

search logs (although some were tardy). He agreed that his opinion of Petitioner's job prospects was based on the restrictions placed by Dr. Candido which limited Petitioner to light work duty capacity. He noted that he did not consider the sedentary restrictions given to Petitioner by Dr. Chang at her discharge her from orthopedic care.

ANALYSIS AND FINDINGS

Per Arbitrator Lammie's decision of December 30, 2010 the Petitioner's condition of ill-being in regards to her cervical spine was causally connected to her work accident.

On April 11, 2011 Petitioner underwent anterior cervical discectomy porcedures and a fusion of C4 to C6 with Dr. Chang. She attended physical therapy at St. James Health and Rehab and had an MRI on July 27, 2011. On November 3, 2011, she underwent a functional capacity exam at Accelerated Rehabilitation and was provided permanent restrictions. The Respondent did not submit an updated orthopedic opinion.

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

Myofascial Pain Syndrome

Petitioner claims that she suffered from myofascial pain related to her work accident. Myofascial pain is a pain that can occur in soft tissue, muscles and ligaments after a traumatic incident or surgery. It can also be caused by morbid obesity and deconditioning. Myofascial pain response can cause pain despite surgical intervention. Both Dr. Slack and Dr. Candido explained and described myofascial pain syndrome in relationship to Petitioner. Both physicians, after examining and evaluation the Petitioner, concur that Petitioner has myofascial pain syndrome. Dr. Slack opined that the pain was causally connected to the accident and that the epitology of the response is the cervical spine surgery because theses symptoms was not present prior to the surgery and prior to the accident. (PX10 at 18) Dr. Candido opined that the syndrome is not causally connected to the work accident or the surgery as it emanates from the musculature and not the cervical spine. (RX1 at 41) He opined that the causation was entirely related to Petitioner's condition of morbid obesity and deconditioning. He noted that Petitioner suffered from unrelated past medical conditions of hypertension, morbid obesity and depression. (T. 12) He further opined that Petitioner can work in a light-duty capacity as of April 3, 2012. (p. 30)

The Arbitrator finds the opinion of Dr. Candido to be more persuasive based on the following analysis:

Both physicians are experienced, well qualified and certified in pain medicine. Although Dr. Slack treated Petitioner for a longer period, the Arbitrator finds Dr. Candido's examination of the Petitioner, her medical records and the objective testing to be thorough. Dr. Candido noted that Petitioner suffered from unrelated past medical conditions of hypertension, morbid obesity and depression. His analysis and opinion also include a thorough social history which is critical to this elusive causation diagnosis. This history included addiction to cigarettes (which Petitioner denied), a growing dependency on narcotics (which Petitioner claimed gave no relief) and complaints of depression (which were unsupported by her behavior during the physical exams). Dr. Slack does little to evaluate, explain or negate the significance of this social history in his diagnosis

Dr. Candido's opinion is persuasive as it is supported by Dr. Glaser who himself ruled out the cervical spine as a competent cause for her symptoms because she had failed to benefit from the injections that he administered. Dr. Slack does not address Dr. Glaser's opinion.

Dr. Candido's opinion that the pain emanates from the musculature and not the cervical spine is based on the physical examination and tests performed on the Petitioner. Dr. Candido acknowledged that there were no objective clinical findings to substantiate a diagnosis of myofascial pain. Dr. Candido indicated that to clinically diagnose myofascial pain, it is typically based upon a response to trigger point injections. He noted that he could not palpate any actual trigger points during the exam. Dr. Candido indicated that Petitioner's complaints to him were not trapezius related pain; therefore, it was unrealistic to suggest that a cervical sprain occurring in August of 2009 could have been quiescent until now. Dr. Candido explained that double diagnostic blocks as was completed by Dr. Glaser in this case, were done to minimize nonresponders with respect to possible cervical facet issues. Dr. Candido testified that given the abject failures, there were only two conclusions which could be drawn; one was that she had myofascial pain, or two that she is malingering. He further stated that

he suggested that she had myofascial pain syndrome even without objective evidence substantiating same. The Arbitrator finds his reasoning to be sound.

Dr. Candido attributed the pains origin to two significant risks for myofascial pain, morbid obesity and deconditioning, which placed Petitioner at high risk for the development of myofascial or muscle-related pain. He stated that she met both of those criteria and would be a high risk for development of same. Dr. Slack does little to discount or explain away these two causes. He does state that Petitioner, in spite of her issues, was able to perform her duties and did not have myofascial pain in the past; therefore the new pain must be related to the surgery. However, the Arbitrator is not convinced by his reasoning.

Ultimately, the burden to prove the causation is on the Petitioner. Dr. Slack's testimony and opinion needs to better explain his diagnosis considering several credibility issues that weaken Petitioner's cause. For example, in assessing Petitioner's inability to work, he put significant weight on the fact that she reports that she cannot turn her neck. The video evidence and medical observations of Dr. Candido discount this. If the video were to be taken as an objective observations of Petitioner's demeanor and ability, Dr. Slack's opinion is significantly weakened. These is especially significant because there is no red-line test or objective exam that can confirm the cause of myofascial pain syndrome. Petitioner's motor strength and sensory exam as well as the entire neurological exam was normal.

Therefore, the Arbitrator is more persuaded by Dr. Candido's opinion. The argument raised on cross examination that he is tainted by his own financial interests or his position as an IME can be true of any professional. However, it does not rise to the level where the other physical evidence of Petitioner's abilities can be ignored.The Arbitrator finds that Petitioner has failed to prove that the myofascial pain syndrome is causally connected to the work accident.

Psychiatric/Psychological Conditions

Petitioner claims that she suffered a psychiatric injury, specifically depression, anxiety, sleep disorder, agoraphobia because of her prolonged pain and condition of ill-being following her accident. Dr. Beck, a psychiatrist and pain medicine specialist, treated Petitioner and opined that her prolonged chronic pain exacerbated her

preexisting mental conditions. Dr. Obolsky, a forensic psychiatrist, found that Petitioner did not suffer from mental, emotional or cognitive impairments to prevent her from working. Rather, she was exaggerating her symptoms. He found that the objective tests along with the subjective observations did not support a diagnosable illness.

The Arbitrator concurs with the findings and opinion of Dr. Obolsky as they are better reasoned and supported by objective testing. Additionally, outside factors such as the video surveillance tapes and testimony, vocational rehabilitation reports and findings all discount Dr. Beck's diagnosis and give compelling evidence that Petitioner is likely exaggerating her symptoms for secondary gain.

Undoubtedly, Dr. Beck treated the Petitioner extensively. There are 41 well-documented visits. Her initial visit was in August, 2011, two years after her work accident and two months' prior finishing her physical therapy following her cervical surgery. Dr. Beck diagnosed her with DSM-IV-TR (PX9 p. 12) He opined that prolonged chronic pain stimulus alters the central nervous system, both in the brain and the spinal cord, altering certain neurologic transmission. In Petitioner's case this had caused increased pain sensitive and sensitivity and predisposed her to psychiatric problems. He treated he with pain medication and referred her to Dr. Howard Robinson but Petitioner did not follow up. The medication did not help. He did not believe that Petitioner was malingering or exaggerating and opined that Petitioner could not sustain a 40-hour work week due to her psychiatric instability (PX9, p. 50) He discounted Petitioner social behavior (her outside trips) as being contrary to his diagnosis because he surmised that her agoraphobia is relative, she can make some social engagements.

However, Dr. Beck's opinion and findings are lacking in several key areas. Most his diagnosis and opinion is based on Petitioner's self-reporting of her ailments and symptoms (sleep issues, memory loss). There are no medical findings or outside studies to corroborate her conditions. He fails to account for the discrepancy between the self-reporting (trouble sleeping) with his own objective observation that Petitioner never appeared tired or disheveled at her appointments. He also fails to account for the fact that Petitioner was not suffering from panic attacks for approximately the first seven months he saw her. Dr. Beck also fails to documents symptoms of anxiety and depression severe enough to indicate a mental-health condition. Lastly, Dr. Beck

continued a medication and treatment protocol (Xanax and Lunesta) that were not recommended for long term use and failed to change his protocol despite of any lack of improvement for the Petitioner.

Lastly, he acknowledged that remaining off work for compensation could be construed as secondary gain. He stated that if her presentation outside of his office was different, it could impact his opinion with respect to secondary gain. He acknowledged Petitioner's histrionic does not necessarily equate to anything with respect to her "pain disorder."

In sharp contrast, IME Dr. Obolsky testified that Petitioner was not suffering from any condition of mental ill-being that was causally connected to her work accident. Dr. Obolsky is Board Certified Psychiatrist who practices in clinical and forensic psychiatry. The Arbitrator finds his opinion more persuasive based on a variety of factors. First, his exam was thorough in that he reviewed all the medical records, performed forensic psychological and cognitive testing and reviewed all relevant medical records and social history. Secondly his opinion is sound and based on medical findings and tests psychological and cognitive testing, and a forensic psychiatric interview of the Petitioner. (administered by two psychometricians and the testing data was interpreted by Dr. Bailey, a psychologist).

Specifically, Dr. Obolsky explanation about the difference between individuals who suffer an untoward event in their life and get upset or sad thus, as opposed to a major depressive disorder, is sound and supported by the facts in this case. His explanation that there is a spectrum of normal sadness, which are not diagnosable because they do not rise in severity, nature or frequency or life impairment to be a mental disorder make sense as applied to Petitioner's specific situation. Angela Carlson did suffer a work injury and claims to be depressed and dejected by the medical and personal events in her life. However, the video surveillance shows her in several social situations where she is out to dinner, at a barbecue of helping her daughter drive.

Unlike Dr. Obolsky's, Dr. Beck does little to account for this discrepancy between Petitioner's complaints and her behavior in the doctor's office or on the tapes. Dr. Obolsky's findings that the Petitioner, although tearful, has regular speech and rhythm, was articulate and coherent, has tight associations and no psychotic thoughts highlight

the credibility issues for the petitioner. Dr. Obolsky's conclusion that someone suffering from depression or anxiety would likely exhibit these symptoms is sound. He documents how the Petitioner is oriented to time, place and person, had intact reason and remote memory, her attention span and concentration was within normal limits and she could name objects and repeat. He also notes that the Petitioner was well dressed, has good eye contact, exhibited good hygiene and had manicured nails which would not be something you would find in someone who is suffering from major depression. (T. 57-58)

Although it may sound petty to fault Petitioner for her good hygiene and manicured nails, a doctor or an Arbitrator is forced to look at these little signs of discrepancy which may enlighten the difficult arena of mental health disorders that may arise from prolonged illness and pain. Dr. Obolsky's explanation that if one is capable of paying attention to their appearance and puts interest and energy into same prior to going out, they are likely not suffering from major depressive disorder or serious anxiety disorder is logical and supported by medical evidence.

Such observations are specially relevant because unlike many other physical ailments that are objectively measurable, mental health claims are difficult to detect by conventional MRI's or blood tests. Rather, physicians must rely on clinical and psychological test findings that support their opinion. Unlike Dr. Beck, Dr. Obolsky based his opinion on Petitioner's MMPI-2 test that indicated that she was inconsistent in her symptom reporting and on her BHIL-2 test note that she was over reporting negative experiences and symptoms. Additionally, the Normal Wisconsin Card Sort test results for the Petitioner were inconsistent with someone who experiences pain on a constant basis or has a depressive disorder or anxiety disorder.

Overall, per Dr. Obolsky, Petitioner's normal results indicate someone capable of normal executive functioning as well as higher cognitive functioning such as decision making.

Therefore, the Arbitrator finds Dr. Obolsky's opinion that Petitioner is not suffering from a mental injury but is exhibiting evidence of symptom exaggeration or secondary gain based upon her incongruity of complaints with her mental status exams, to be more persuasive.

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

Based upon the above findings on the issue of causal connection, the Arbitrator finds that Respondent has paid all appropriate, reasonable and necessary medical services stemming from Petitioner's work accident. Petitioner request for payment for medical services from Dr. Joseph C. Beck, MD, $2,103.79 (PX11); Prescription Partners, $2,583.50 (PX13); LabPro, $210.00 (PX14) and Prescription receipts of $334.15 (PX15) is denied. Respondent is granted a credit for $2007.73 for payments made to Dr. Beck.

In regards to the bills from Pain and Rehab Specialist, Respondent has made payment through the MMI date. Request for additional payment is denied.

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

The Arbitrator finds that Petitioner reached MMI on September 17, 2013. Based on the above findings regarding causal connection for psychiatric or psychological care, the Arbitrator denies prospective medical care for the same. The Arbitrator finds that the myofascial pain is not related the work accident and denied perspective medical care for the same.

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

Respondent stipulated that Petitioner was temporarily totally disabled from October 23, 2010 through August 27, 2013 (148 4/7 weeks) Petitioner claimed 316 3/7 weeks for the period of October 23, 2010 through the date of hearing of November 14, 2016. Petitioner is requesting TTD benefits for the period of period of August 28, 2013 through November 14, 2016 (167 6/7 weeks)

The Respondent claimed that Petitioner was at MMI as of September 17, 2013 and that no further TTD benefits were due. On August 27, 2013, the Petitioner failed to attend a Section 12 exam. Respondent terminated benefits until she rescheduled and attended an exam on September 17, 2013. Thereafter Respondent paid maintenance benefits beginning on 9/17/13 until 10/8/2015 for an additional 107 1/7 weeks for a total of $80,726.44.

"The period of temporary total disability encompasses the time from which the injury incapacitates the claimant until the claimant has recovered as much as the character of the injury will permit, i.e., until the condition has stabilized." *Gallentine v. Industrial Comm'n*, 201 Ill. App. 3d 880, 886 (2nd Dist. 1990). The dispositive test is whether the claimant's condition has stabilized, i.e., reached MMI. *Sunny Hill of Will County v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130028WC at *28 (June 26, 2014, Opinion Filed); *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003). To show entitlement to temporary total disability benefits, a claimant must prove not only that he did not work, *but also that he was unable to work*. *Gallentine*, 201 Ill. App. 3d at 887 (*emphasis* added); *see also City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090 (5th Dist. 1996).

"Maintenance is awarded incidental to vocational rehabilitation." *Interstate Scaffolding v. Ill. Workers' Comp. Comm'n*, 385 Ill.App.3d 1040, 1049 (3rd Dist. 2008). Section 8(a) of the Act provides for an award of maintenance benefits while an employee is engaged in a prescribed rehabilitation program. *Nascote Indus. v. Indus. Comm'n (Berry)*, 353 Ill. App. 3d 1067, 1075 (5th Dist. 2004); *Connell v. Industrial Comm'n*, 170 Ill. App. 3d 49, 55 (1988)). There is also no prohibition against claimant-created and directed vocational rehabilitation programs, although they are disfavored. *Roper Contracting v. Industrial Comm'n*, 349 Ill. App. 3d 500, 505-506 (5th Dist. 2004).

Respondent's defense on TTD benefits is premised upon liability claiming that Petitioner reached MMI for her back/cervical injury and that the myofascial and psychological injuries are not related to the work accident. Based on the facts and conclusions explained in detail above, the Arbitrator finds that Petitioner at MMI as of September 17, 2013 and that no further TTD benefits were due. The Arbitrator finds that Petitioner was entitled to maintenance benefits after that date.

Per parties' stipulation, the Arbitrator finds that Petitioner was temporarily totally disabled from October 23, 2010 through August 27, 2013 (148 4/7 weeks) and awards TTD for same period. The Arbitrator denies Petitioner's claim for TTD for the period of August 28, 2013 through November 14, 2016 (167 6/7 weeks).

The Arbitrator finds that the Petitioner is entitled to maintenance benefits beginning on 9/17/13 until 10/8/2015 for an additional 107 1/7 weeks for a total of

$80,726.44. The Arbitrator finds that the Respondent properly terminated such benefits on October 8, 2015 based on Petitioner's lack of cooperation with vocational counseling and specifically, failure to attend a job interview without good cause.

Initially it is well settled principle that when a claimant seeks TTD benefits, the dispositive question is whether the claimant's condition has stabilized, i.e. whether the claimant has reached maximum medical improvement. Interstate Scaffolding, Inc. v. IWCC 236 Il. 2d 132 (2000). As to her back injuries, Petitioner reached MMI on September 17, 2013. As to her myofascial and psychological injuries, the Arbitrator finds the same to be unrelated to the work accident. As to the issue of maintenance benefit that the Respondent terminated on October 8, 2015, the Arbitrator concurs and states as follows:

The Petitioner' initial consultation for vocational rehabilitation started around November, 2010. It was suspended till December, 2013 for surgery. Edward Steffan assisted Petitioner with her rehabilitation and Dan Minnich performed a forensic Review of the vocational services provided to the Petitioner. Both gave testimony and opinions regarding Petitioner's efforts. The Arbitrator concurs with their findings that Petitioner failed to actively participate in vocational rehabilitation and that she should have been capable of securing employment at her previous wage rate within three months had she put forth a full effort. Some glaring deficiencies in her efforts were as follows:

* Failure to personally contact potential employees
* Several sick calls or excuses for missing appointments
* Failed to complete most the requested vocational activities
* Failed to attend a set job interview on March 10, 2015 when transportation was offered because the same was "inconvenient" (RX5)

Therefore, the arbitrator finds credence in the opinion of Mr. Steffan that Petitioner was "placeable and employable in positions earning between $10.00 and $15.00 per hour." The Arbitrator finds ample proof in the overall record that Petitioner failed to put a full time, good faith effort to seek and secure employment. Take for example her complains that she had trouble filing online applications due to problems with her fingers and her headaches. Or consider the evidence that from May through August, 2014 Petitioner was unable to engage in vocational counseling due to various

issues including feeling sleepy, dizzy, slurred speech, fainting, power outage, out of town for daughter's birthday and that she declined help, rides or transportation from her counselor, and contacted 0 potential employers from the provided list. Such conduct highlights an extreme disregard for what the spirit of the vocational rehabilitation process. If a Petitioner minimally participates in vocational rehabilitation to obtain benefits but not with sufficient efforts to get the benefits for vocational guidance, the process becomes a futile effort. Petitioner's actions, willingly or unwittingly have caused such a scenario.

The Arbitrator recognizes that this process is a vital right that aims to aid injured Illinois workers in finding appropriate employment after a work accident compromises their opportunities and abilities. However, this right is not unrestricted or endless. A claimant is required to make a reasonable good faith effort to cooperate with vocational rehabilitation. Stone v. Industrial Commission, 286 Ill. App. 3d 174 (1997) Petitioner's efforts cannot be the bare bones or designed to thwart or undermine the process. A Petitioner cannot simply fill out employment logs yet fail to follow up on leads in person. Missing set job interviews or failure to follow the directives of the vocational activities will likely result in an empty and meaningless job search. The vocational rehabilitation process in this case started in November, 2010, was suspended and restarted in December, 2013. Respondent terminated maintenance benefits in October, 2015. It was not a quick fix or just a self-directed search. Petitioner had the benefit of a vocational counselor. Per the testimony and findings of Dan Minnich, the Forensic Reviewer, Petitioner should have been capable of securing employment at her previous wage rate within three months had she put forth a full effort. The Arbitrator finds his opinion that the Petitioner could be placed in suitable employment and that there was a stable labor market for someone of her experience and abilities to be persuasive.

The Arbitrator finds that based on the testimony of the vocational experts that Petitioner did not make a reasonable or good faith effort to cooperate with vocational rehabilitation. Petitioner's testimony alone is not sufficient to overcome their findings. There are several items of evidence that cause the Arbitrator to question the reliability of Petitioner's testimony. Notably, Petitioner made claims to her vocational counselors

and physicians at various points that she could not turn her head yet the video depicts her turning her head on several occasions. Petitioner claims that she could not drive due to pain and/or anxiety or did not have access to a car (in regards to job search) but the video depicted her driving without any anxiety. She is seen laughing and smiling in the surveillance. Just prior to the resumption of vocational services on December 6, 2013, she was seen at multiple locations for a total of four hours moving in a normal fashion and out enjoying herself.

Therefore, the Arbitrator finds that the Petitioner did not co-operate with vocational counseling. The Petitioner's request for additional TTD is denied. The Respondent had paid all maintenance benefits owed the Petitioner.

M. Shall penalties or fees be imposed upon Respondent?

Penalties imposed under section 19(l) are a late fee. The award of section 19(l) penalties is mandatory if the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay. The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness. The employer bears the burden of justifying the delay, and its justification is sufficient only if a reasonable person in the employer's position would have believed the delay was justified. "When the employer acts in reliance upon medical opinion or when there are conflicting medical opinions, penalties are not ordinarily imposed." *O'Neal Bros. Const. Co. v. Indus. Comm'n*, 93 Ill. 2d 30, 41, 442 N.E.2d 895, 900 (1982).

The standard for awarding penalties and attorney fees under sections 19(k) and 16 is higher than the standard for awarding penalties under section 19(l) because sections 19(k) and (16) require more than an "unreasonable delay" in payment of benefits. For the award of penalties and attorney fees under sections 19(k) and 16, it is not enough for the claimant to show that the employer simply failed, neglected, or refused to make payment or unreasonably delayed payment without good and just cause. Instead, penalties and attorney fees under sections 19(k) and 16 are intended to address situations where there is not only delay, but the delay is deliberate or the result of bad faith or improper purpose. In addition,

while section 19(l) penalties are mandatory, the imposition of penalties and attorney fees under sections 19(k) and 16 is discretionary.

Given the facts presented in this case, and after considering the medical opinions, the surveillance evidence as well as the opinions of Mr. Minnich and Mr. Steffan, the Arbitrator finds that Respondent had a reasonable dispute as to whether Petitioner's current condition of ill being relating to her myofascial pain and psychological injury were related to the accident. The Arbitrator also finds that the Respondent had sufficient facts to support that Petitioner had reached MMI relating to the cervical/back injuries as of September 17, 2013. Additionally, Petitioner was repeatedly required to submit to Section 12 examinations throughout Petitioner's treatment. Respondent's reliance on the same is well documented. The Arbitrator finds that Respondent's conduct was not unreasonable, vexatious and/or in bad faith. Although Petitioner's treating physicians give differing opinions as to causal connection, the same is not sufficient to impose penalties.

Thus, Petitioner's claim for penalties and fees under Sections 19(k), 19(l) or 16 of the Act is denied.

KSSteffen May 30, 2017

Signature of Arbitrator Ketki Shroff Steffen Date

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Matthew Thornton,

Petitioner,

vs. NO: 15WC 17511

Peoria Disposal, Co.,

Respondent.

18IWCC0631

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of medical, 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 January 8, 2018 is hereby affirmed and adopted.

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

18IWCC0631

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 25 2018
o101618
KWL/jrc
042

Kevin W. Lamborn

Michael J. Brennan

Thomas J. Tyrrell

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

THORTON, MATTHEW
Employee/Petitioner

Case# **15WC017511**

PEORIA DISPOSAL CO
Employer/Respondent

18IWCC0631

On 1/8/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.57% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0225 GOLDFINE & BOWLES PC
KEVIN ELDER/MICHAEL MARINCIC
4242 N KNOXVILLE AVE
PEORIA, IL 61614

2674 BRADY CONNOLLY & MASUDA PC
JULIA McCARTHY
211 LANDMARK DR SUITE C-2
NORMAL, IL 61761

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

MATTHEW THORTON,
Employee/Petitioner

v.

PEORIA DISPOSAL, CO.
Employer/Respondent

Case # **15** WC **17511**

Consolidated cases: _____

18IWCC0631

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Peoria**, on **11/20/17**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **5/19/15**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being as it relates to his left shoulder *is* causally related to the accident, only through 9/28/15.

Petitioner's current condition of ill-being as it relates to his right hip *is* causally related to the accident, only through 10/2/15.

Petitioner's current condition of ill-being as it relates to his concussion *is* causally related to the accident, only through 7/28/15.

Petitioner's current condition of ill-being as it relates to his incontinence *is not* causally related to the accident.

In the year preceding the injury, Petitioner earned **$66,044.68**; the average weekly wage was **$1,270.09**.

On the date of accident, Petitioner was **45** years of age, ***single*** with **0** dependent children.

Respondent ***has or will*** pay all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$14,031.43** for TTD, **$894.22** for TPD, **$00.00** for maintenance, and **$00.00** for other benefits, for a total credit of **$14,925.65**.

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 $846.73/week for 14 weeks, commencing 5/20/15 through 8/25/15, as provided in Section 8(b) of the Act. Respondent shall get credit for the $14,031.43 it has already paid in temporary total disability benefits.

Respondent shall pay reasonable and necessary medical services related to petitioner's left shoulder only through 9/28/15, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay reasonable and necessary medical services related to petitioner's right hip only through 10/2/15, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay reasonable and necessary medical services related to petitioner's concussion only through 7/28/15, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay no medical services related to petitioner's incontinence, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay reasonable and necessary medical services for petitioner's admission to OSF Medical Center from 5/19/15 through 5/26/15, 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.

Petitioner's claim for prospective medical services is denied.

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

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

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

Signature of Arbitrator

12/18/17
Date

ICArbDec19(b)

JAN 8 - 2018

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 45 year old front load rolloff trucker, alleges he sustained an accidental injury that arose out of and in the course of his employment by respondent on 5/19/15, when he was involved in a motor vehicle accident. Petitioner alleges multiple injuries. At that time petitioner held a Class X and CDL license, and his routes varied.

Petitioner's duties include picking up loads and transporting them back to the dumping area. The physical demands of the job include lifting, hooking up, and tying down loads. These duties vary depending on the job he is doing.

Petitioner testified that prior to the motor vehicle accident on 5/19/15 he never noticed problems with his memory, cognitive thinking, headaches, right hip, groin or incontinence, or left shoulder. Petitioner testified that about 5 years prior to the injury on 5/19/15 he was in another motor vehicle accident and sustained a concussion. He also testified that he sustained a left collarbone injury in another motor vehicle accident.

On 5/19/15 petitioner performed a pre-check of his front loader garbage truck and then proceeded on his route. Petitioner testified that while driving on Sterling he approached an intersection where he alleges that he had a green light, and was then involved in a motor vehicle accident. Petitioner testified at trial that the last clear memory before the accident was that he had a green light and was going on his route. He testified that his next memory was being in the hospital. Petitioner had no recall as to the speed the other vehicle was driving.

The Illinois Traffic Report showed the truck petitioner was driving sustained damage to the left driver's side. The collision was between petitioner's front loader garbage truck and a Kia Optima. Petitioner complained of pain in his neck, shoulders, wrist and legs. Both drivers indicated they had a green light. The truck struck a lower level traffic light. Petitioner was transported by ambulance to OSF St. Francis Hospital. Petitioner was unable to get out of the vehicle on his own power. The officer noted that petitioner's truck skid marks started in the inside lane just prior to entering the intersection, then gradually into the outer lane as they entered the intersection. After impact, the garbage truck continued at an angle, driving over an intersection island and struck a lower level traffic light before it stopped in the grass on the northeast side of the intersection.

Petitioner presented to OSF St. Francis Medical Center emergency room with multiple complaints including neck, bilateral shoulder, low back, and right hip pain. He also complained of tingling in both

arms. He denied any other injuries. He reported that he was driving 35-40 mph when a car pulled in front of him and struck his garbage truck on the side. Petitioner reported that he had undergone surgery on 7/11/14 with Dr. Garst for a right shoulder arthroscopy with labral repair. He could not recall the events of the accident, and was not sure if he lost consciousness or hit his head. An examination revealed strength of 4/5 in all extremities. Petitioner complained of decreased strength and range of motion in the right hip and neck, as well as decreased range of motion and tenderness in his shoulders and back. Petitioner was diagnosed with acute back pain, acute cervical strain, acute right hip pain, and bilateral shoulder pain. X-rays showed no obvious fractures. A CT of head and cervical spine showed no acute abnormalities. Petitioner reported headaches and seeing circles. He denied any bladder or bowel problems. He was admitted to the hospital.

During his hospital stay petitioner underwent CT imaging of the brain and cervical spine. He was felt to have a concussion, photophobia, and headaches. He was examined by neurology for his headaches, and orthopedic surgery for his right hip. Petitioner was also seen for his hypertension. MRI's were taken of the cervical, thoracic, and lumbar spine, and right hip. The MRI of the lumbar spine showed degenerative spondylosis; the MRI of the right hip showed a partial thickness tear of the hamstring origin versus tendinopathy; the MRI of the thoracic spine revealed degenerative spondylosis with a prominent central/right paracentral anterior extradural impression related to a protruded disk at T5-T6, resulting in minimal cord deformation; and the MRI of the cervical spine revealed cervical degenerative spondylosis. With respect to the findings on the cervical MRI, Dr. Wang recommended correlation with a CT of the cervical spine if there is clinical concern of a cervical spine fracture, which might be occult by MRI, particularly given the technical factors related to the patient's body habitus. No evidence of any acute soft tissue/ligamentous injury was noted. With respect to the thoracic MRI, Dr. Wang also recommended correlation with CT imaging for further evaluation if there was continued clinical concern of a thoracic fracture, which can be occult by MRI. No definite evidence of ligamentous injury was noted. Neurosurgery consulted and no neurosurgical intervention was recommended. Neurology recommended symptomatic management for headaches, nausea and dizziness, and if they did not resolve in 7-10 days, petitioner was instructed to follow-up with the Concussion Clinic. An orthopedic consult was performed for petitioner's right hip on 5/21/15 after petitioner continued to have discomfort to the point where he was unwilling to bear weight on his right lower extremity. He denied any bladder/bowel incontinence. On 5/22/15 petitioner was able to bear weight on his right leg. Conservative treatment was recommended for the right hip, and petitioner was given scripts for outpatient physical and occupational therapy. The orthopedic surgeon felt the right hip pain was most likely due to

lumbar spine pathology. Petitioner underwent physical therapy from 5/20/15 through 5/26/15. He was discharged from physical therapy secondary to being medically stable to discharge from hospital. Petitioner was referred to his primary care physician Dr. Ziad Musaitif. Petitioner was restricted from work for a week, and instructed to ease into his normal daily activities. Petitioner was instructed to follow-up with ophthalmologist as an outpatient after seeing bright lights and pain with eye movement after the accident. Petitioner was discharged with Elavil, ibuprofen, proranolol, Norco, and Ambien.

Petitioner was discharged from OSF St. Francis on 5/26/15 by Dr. Ashvarya Mangla. His final diagnoses were sprain of the neck, concussion with loss of consciousness of 30 minutes or less, sprain and strain of other specified sites of knee and leg, unspecified essential hypertension, pain in shoulder region joint, and unspecified back ache. He was instructed to follow-up with physical therapy for ongoing strengthening. and was taken off work for 2 weeks. He was given a rolling walker for mobility. Petitioner only met 1/5 goals in while in physical therapy in the hospital. He stated that his friend would provide 24/7 supervision.

Petitioner testified that while he was in the hospital he was in a lot of pain and everything hurt. He stated that it hurt to move around. He testified that he could not get up and was very disoriented. He also stated that he needed help getting up, and did not feel very stable.

On 5/27/15 petitioner followed-up post inpatient with Dr. Musaitif, his primary care physician, per his discharge orders. Petitioner saw Dr. Musaitif to determine what follow-up medications he should be taking. Petitioner reported pain all over from whiplash. He also reported bruising, intermittent burning, and a pulled hamstring. He stated that he did not break any bones. Dr. Musaitif took petitioner off work through 6/28/15.

On 6/1/15 petitioner presented to the Concussion Clinic at INI. He was evaluated by Cristin Rassi, APN, CNS. He complained of intermittent shortness of breath, and pain from his left shoulder to his right abdomen in the location where his seatbelt was located. Petitioner was examined and diagnosed with a concussion with loss of consciousness of 30 minutes or less, motor vehicle accident, musculoskeletal neck pain, low back pain, and dizziness. Petitioner was instructed to stop taking Valium. Petitioner was referred to physical and speech therapy.

On 6/16/15 petitioner presented to Dr. Garst at Great Plains Orthopedics for his left shoulder, neck, thoracic, low back and right hip pain. Petitioner had treated as recently as 2014 with Dr. Garst for his right shoulder and had undergone surgery for that shoulder with Dr. Garst. Dr. Garst's partner Dr.

Capecci saw petitioner in the hospital. Petitioner followed-up with Dr. Garst because Dr. Capecci was no longer with the practice. Petitioner provided a vague description of the accident and Dr. Garst noted a flat affect. He reported that his right shoulder was doing very well. An examination revealed full pain free range of the right shoulder, and flexion to 130 degrees and abduction to 120 degrees of the left shoulder. Internal rotation of the left arm allowed the thumb to go to L4. Petitioner demonstrated pain anterolaterally in the left shoulder with range of motion. With regards to the neck, petitioner was unable to touch his chin to his chest, but could forward flex to 50 degrees, hyperextend to 40 degrees, and laterally bend to 30 degrees in either direction. Petitioner also reported pain in his thoracic and lumbar spine. With regards to his right hip, petitioner was walking normally. Dr. Garst reviewed the diagnostic imaging and diagnosed left shoulder, neck, thoracic, lumbar, and right hip pain, as well as a concussion. Dr. Garst authorized petitioner off work. He recommended therapy. He did not think there was much to be done for the right hip. Dr. Garst had a low suspicion of internal derangement of the left shoulder, but felt it could be possible. He also recommended a referral to Dr. Lisa Snyder in the near future for direction on his rehab.

On 6/23/15 petitioner underwent a physical therapy and speech therapy evaluation at IPMR.

On 7/13/15 petitioner followed-up with Dr. Garst. He reported that his left shoulder was quite sore. Petitioner's range of motion had decreased to only 100 degrees of flexion and 90 degrees of abduction. Internal rotation was to L5. Petitioner had pain with range of motion . No atrophy or deformity was noted. Dr. Garst recommended an MRI scan and an MRI arthrogram of the left shoulder. He also continued the petitioner off work.

On 7/15/15 petitioner returned to INI. Rassi noted that petitioner had not yet been evaluated by Dr. Jankowska , and would remain off work until then. Rassi referred petitioner to INI physical therapy, speech therapy, and neuropsychology.

On 7/20/15 petitioner presented to Dr. Lisa Snyder at IPMR, on the referral of Dr. Garst. Petitioner reported multiple pain complaints, including his neck, low back, left shoulder, and right hip. Dr. Snyder took an accident history and reviewed imaging studies. Following an examination, Dr. Snyder's impression was multiple trauma with complaints of upper back, low back, left shoulder, and right hip pain, and mild concussion. She recommended continued physical therapy. She stated that he could continue the use of the cane; that he should undergo a clinical speech evaluation; and that he be on Meloxicam. She continued petitioner off work.

On 7/23/15 Prium performed a retrospective UR Review of petitioner's hospital stay from 5/19/15 through 5/27/15 at the request of the respondent and drafted a Retrospective Review Denial Letter denying the treatment claiming it was not medically necessary. An amended report was issued on 8/11/15 reiterating the denial of treatment. It was determined that initial treatment would have been acceptable with subsequent testing completed outpatient.

On 7/27/15 petitioner underwent an MRI and MR arthrogram of the left shoulder. The findings included a SLAP type II labral tear, and no other internal derangement.

On 7/28/15 petitioner underwent a Section 12 examination performed by Dr. Russell Glantz, a neurologist, at the request of the respondent. Petitioner provided a history of the accident and his complaints. Dr. Glantz examined petitioner and performed a record review. Petitioner reported that he had not worked since the accident. His complaints included dizziness, trouble sleeping and reading, balance problems, shakiness all over, nausea, memory problems, light and sound bothering him, headaches, left shoulder pain, neck and back stiffness and pain, tingling in the legs, urinary incontinence, trouble swallowing, and a slight tear of the right hamstring, and burning/pain over the right hip. Dr. Glantz was of the opinion that these symptoms 2 months after the injury were out of proportion to the motor vehicle accident of 5/19/15, even if a concussion was suffered. Petitioner reported the medications he was on. Petitioner could not recall any specifics of the accident. Dr. Glantz assessed that petitioner had sustained a concussion, but did not have any objective neurological abnormalities. He was of the opinion that petitioner demonstrated significant symptom magnification. Dr. Glantz was of the opinion that even if petitioner sustained a concussion as a result of the injury, he would not still be nauseous. He was also of the opinion that the use of dark shades throughout the examination was inconsistent with a concussion injury over 2 months ago. He noted that petitioner's sensory exam did not have any anatomical or physiological connection to any condition of the brain or spine. He also noted that his brain scan was normal and the spine MRIs did not show any significant spinal cord or nerve root compression. He opined that petitioner's subjective symptomatology was magnified and not related to the accident on 5/19/15. Dr. Glantz was of the opinion that petitioner was not in need of any treatment and could return to full duty work.

Dr. Musaitif authorized petitioner off work through 8/25/15, with a return to light duty work on 8/26/15. While on light duty petitioner worked at the Maple Shade nursing home 40 hours a week. Petitioner would socialize and play games with the seniors. Petitioner would also visit with the senior

residents. He enjoyed this work and stated that it reminded him of his mom and dad. Petitioner testified that he still returns to Maple Shades on occasion to play chess with a friend he made there.

On 8/4/15 petitioner returned to Dr. Garst. Dr. Garst referred petitioner to Dr. Schneider and Dr. Driessnack for the right hip. He recommended conservative treatment for the left shoulder. Dr. Garst noted that petitioner had similar problems in his right shoulder in the past. Petitioner told Dr. Garst he wanted definitive care. Dr. Garst agreed with the petitioner and stated that he did not think it would heal on its own. Dr. Garst recommended a left shoulder arthroscopy with superior labral repair for his SLAP tear. He released petitioner to light duty work. He noted that petitioner was continuing to treat with Dr. Snyder, and he was going to try and set him up with Dr. Driessnack for further recommendations regarding his right hip.

On 8/19/15 petitioner presented to Dr. Driessnack on the referral of Dr. Garst, for his right hip complaints. Petitioner reported that at the time of the accident his right foot jammed on the brake to help control the garbage truck. He complained of vague diffuse pain in the right hip area centered over the lateral aspect of the hips and deep in the groin that was somewhat constant. He also described some burning. He reported that twisting causes pain and he could not walk more than 1/2 block. Petitioner reported that he could not fully extend his right hip and was using a cane. Dr. Driessnack noted on examination that the petitioner moved slowly and it was hard for him to walk. Petitioner was able to walk without the cane, but his gait was better when he used the cane. Dr. Driessnack could not elicit reflexes. Petitioner denied any sensory loss. X-rays ordered were normal. Dr. Driessnack ordered an MRI of the right hip to assess for a soft tissue occult lesion. The impression was normal. Dr. Driessnack was of the opinion that petitioner primarily had a contusion/sprain/strain injury to the right hip. He told petitioner that his hip pain should abate over time, maybe 6-12 months. He anticipated MMI by May of 2016. Dr. Driessnack was of the opinion petitioner could work a sedentary type job.

On 8/25/15 petitioner was reevaluated by Dr. Snyder. She reviewed his therapy notes and noted that petitioner was making progress in physical therapy and his pain was somewhat decreased. He reported mild improvement with Meloxicam. Following an examination, Dr. Snyder's impression was multiple trauma with lumbar strain and cervical strain; history of mild concussion; left shoulder pain and right hip pain. She recommended that concentration be given primarily to his back. She noted his vision complaints and his sensitivity to light seemed to be resolving. She recommended another month of therapy for the back, with a transition to work conditioning or work hardening.

On 9/1/15 petitioner returned to Dr. Garst. His left shoulder was still sore. Dr. Garst's examination was essentially normal. Dr. Garst reiterated his recommendation for a superior labral repair. He restricted petitioner to work with two pounds of lifting with the left arm, and nothing above the shoulder.

On 9/2/15 petitioner followed up with Dr. Driessnack. Dr. Driessnack noted that the MRI of the right hip was essentially normal with no joint effusion or abnormal bursal fluid. He also noted that the ligaments and tendons were normal. Dr. Driessnack examined petitioner. He again diagnosed blunt tissue injury and trauma from the May 2015 accident. He told petitioner his right hip pain should abate over time. He was of the opinion that petitioner should be at MMI in May of 2016. He released petitioner to sedentary work as of 10/1/15 with restrictions of no prolonged or repetitive bending, stooping, walking, standing, and climbing, kneeling or squatting. He did not believe petitioner was in need of any further orthopedic treatment in the future. He recommended one more month of physical therapy two times a week.

On 9/21/15 petitioner returned Dr. Snyder. Dr. Snyder felt petitioner's cervical strain had resolved. She was of the opinion that petitioner's physical therapy for his multiple traumas, lumbar strain, mild concussion, left shoulder pain and right hip pain would come to a close in 4-5 weeks from a physical therapy perspective, and petitioner could be discharged with a home program. She further noted that if petitioner needed any further Meloxicam, he could contact his primary care physician. She was of the opinion that petitioner would reach MMI in approximately a month.

Petitioner testified that he was released to light duty work on 9/21/15, but returned to full duty work.

On 9/28/15 the petitioner presented to Dr. Kevin Walsh, at the request of the respondent for a Section12 examination. Dr. Walsh also reviewed a large number of medical records, and a copy of petitioner's imaging studies from OSF HealthCare. Petitioner reported being involved in a motor vehicle accident on 5/19/15. Petitioner noted that he was restrained at the time of the accident. Petitioner reported that he was hit "head on" and sustained a loss of consciousness. Petitioner stated that he remembered being admitted to the hospital with a diagnosis of a concussion, as well as neck and back pain. Petitioner reported that he remembered having pain in his right hip, right groin, and buttock area. He reported that he had been seen and treated for his concussion and neck complaints, and was still in physical therapy. Petitioner stated that he had therapy for his back, neck, and right hip. He also reported that he underwent treatment for his left shoulder. Petitioner stated that he was not working and was taking Meloxicam. He stated that he could not sleep on his left side. He noted pain anteriorly and on the

lateral aspect of the left shoulder that had not changed since the accident. He noted that his right hip was 50% improved. He reported numbness in his left upper extremity and right toes. Petitioner was utilizing a cane that he stated he got from physical therapy. Petitioner drew a pain diagram that showed numbness on the anterior aspect of the left shoulder with burning and aching inferior to the area of the numbness with pins-and-needles extending down the volar aspect of the arm to the wrist. He did not mark any pain in his low back or neck.

Following an examination and record review, Dr. Walsh was of the opinion that petitioner had subjective complaints of right hip pain without any abnormal objective findings. Dr. Walsh noted that Dr. Driessnack opined that petitioner had sustained a blunt soft tissue injury or trauma as a result of the injury, but Dr. Walsh saw no evidence of any blunt soft tissue injury or trauma on the MRI scans performed in May or September of 2015. Dr. Walsh opined that petitioner sustained, if anything, a very mild trauma to his right hip. He noted that petitioner was seated and belted at the time of the accident. He was of the opinion that although petitioner had subjective complaints of right hip pain following the accident, it was not at all likely that petitioner would have any ongoing pain or discomfort as a result of the injury. He opined that work restrictions were not necessary for the right hip given the normal physical examination and MRI. Dr. Walsh noted that the initial MRI showed a tendinopathy or partial thickness tear of the hamstring origin on the right, but petitioner had a complaint of pain in his groin and pain with abduction and adduction of the right hip. Dr. Walsh opined that there is no clear evidence in the orthopedic note of pain well localized to the hamstring area, and the initial MRI findings at OSF St. Francis probably represented tendinopathy, rather than an acute hamstring tear. Nevertheless, Dr. Walsh was of the opinion that if there is a hamstring tear, it would certainly heal nonoperatively and would require no residual treatment, and petitioner would not likely have any residual symptoms.

With respect to petitioner's left shoulder, Dr. Walsh noted that petitioner had pain and discomfort in both shoulders when evaluated in the emergency room. He also had decreased range of motion in both shoulders. X-rays of the shoulder were unremarkable, and the initial orthopedic evaluation focused on the right hip. Dr. Walsh noted that petitioner's left shoulder got worse while he was treating with Dr. Garst. He noted that the MR arthrogram of the left shoulder showed a type II SLAP lesion, and he was of the opinion that SLAP tears occur typically with repetitive overhead activities or a fall on an outstretched arm. Therefore, he was of the opinion that it is unlikely that petitioner suffered a SLAP tear as a result of the motor vehicle accident in May of 2015, and did not receive a diagnosis of a SLAP tear until after his MR arthrogram in late July of 2015. Dr. Walsh also found it significant that petitioner had a history of a

previous right shoulder labral tear. He believed the type II SLAP lesion in petitioner's left shoulder was an incidental finding, unrelated to the motor vehicle accident in May of 2015. Dr. Walsh opined that any surgery for the SLAP lesion may be reasonable, but not related to the motor vehicle accident.

With respect to petitioner's right hip Dr. Walsh opined that petitioner had reached maximum medical improvement. He noted that petitioner had a normal MRI of the right hip and a normal physical examination, and required no additional intervention. He was of the opinion that petitioner's subjective complaints were without objective abnormalities. He opined that any additional medical intervention for the right hip would not be reasonable or necessary. With respect to the left shoulder, Dr. Walsh opined that petitioner had also reached maximum medical improvement. He opined that petitioner's current left shoulder symptoms were not related to the motor vehicle accident. He was of the opinion that it is not likely that petitioner suffered a superior labral tear when his truck impacted the Kia Optima and sustained front end damage. He further noted that there was no evidence in the medical records that petitioner sustained a blow, direct or indirect, to his left shoulder with the incident. Dr. Walsh was of the opinion that petitioner can work full duty without restrictions. He was also of the opinion that petitioner was not in need of any additional intervention to his right hip, back, neck or left shoulder as a result of the injury sustained. Dr. Walsh was of the opinion that petitioner's imaging studies fail to demonstrate any clear evidence of an acute traumatic injury. He opined that the hamstring finding, was more likely than not, a tendinopathy, and the type II SLAP lesion described on the left shoulder MR arthrogram, more likely than not, is not causally related to the motor vehicle accident. He was of the opinion that the petitioner's presentation when he saw Dr. Garst was not an examination that clearly indicated a SLAP lesion, because if he had a SLAP lesion at that time, more than likely, he would have had a positive O'Brien test, and not have pain throughout the entire range of motion. He again reiterated that the MR arthrogram finding of a SLAP lesion was incidental, and not related to the accident.

On 10/6/15 petitioner returned to Dr. Garst. Petitioner's complaints remained unchanged. Dr. Garst reiterated his surgical recommendation and continued petitioner in physical therapy. On 10/19/15 petitioner called Dr. Driessnack's office requesting an MR arthrogram of the right hip. On 10/21/15 Dr. Driessnack responded to petitioner and told him that there was no basis to recommend or order an MR arthrogram.

On 10/20/15 petitioner's attorney, Kevin Elders, sent a letter to Dr. Garst, requesting a narrative report to address specific questions.

On 10/26/15 Dr. Musaitif issued an off work note that returned petitioner to work on 10/26/15 with a 2 pound lifting restriction and no repetitive hip rotation movements per Dr. Garst. Petitioner testified that on 10/26/15 he received a full duty release.

On 11/3/15 petitioner returned to Dr. Garst and had very limited range of motion of his left shoulder, unchanged from 10/6/15. Petitioner had pain on extremes of motion, and was weak in the left shoulder as compared to the right. Dr. Garst again recommended surgical intervention and decreased his restrictions to 5 pounds of lifting with the left arm.

On 11/4/15 petitioner presented to Dr. Kelly Bewsey for evaluation of urinary incontinence. Petitioner had been previously seen for urethritis. Petitioner stated that since the accident on 5/19/15 he has had quite a bit of problems with urinary leakage. He sometimes has to wear diapers. Dr. Bewsey was of the opinion that petitioner had some sort of overactive bladder. Dr. Bewsey was of the opinion that it was related to accident. Dr. Bewsey prescribed VESIcare.

On 11/19/15 Dr. Garst drafted a narrative report in response to petitioner's letter dated 10/20/15. He provided a summary of his office visits and noted that he was treating petitioner primarily for his left shoulder and had recommended a superior labral repair of his left shoulder. He was of the opinion that the goal of the surgery was mainly to improve his function and to decrease his pain at the left shoulder. Dr. Garst was of the opinion that the motor vehicle accident in May of 2015 was apparently rather serious and involved what sounds like a high energy trauma. He was of the opinion that there is a causal relationship between the petitioner's accident and the labral tear in his left shoulder. He was further of the opinion that the recommended surgery is related to the motor vehicle accident in May of 2015. He reiterated his restrictions of 11/3/15.

On 12/8/15 petitioner underwent his IDOT examination at IWIRC. The only health history he noted was an illness or injury in the past 5 years. It was noted that petitioner was in a motor vehicle accident in 2006 and sustained a left shoulder labrum tear, but now had full strength and decreased range of motion. Also noted was minimal discomfort in his left hip with full range of motion and strength; and concussion symptoms many years ago that had resolved. Petitioner passed his commercial driver medical exam.

On 12/14/15 petitioner returned to Dr. Bewsey for his incontinence. Petitioner reported that he saw no difference with the VESIcare. Dr. Bewsey did a residual urine on petitioner, and it was normal. Dr. Bewswy prescribed a trial of Myrbetriq, and ordered some urodynamic studies.

On 2/24/16 petitioner followed up with Dr. Musaitif. He complained of weakness of his fine motor function of his hands and fingers, and urinary incontinence that was getting worse. He wanted a referral to a neurologist for problems with fine motor skills and headaches. Dr. Musaitif's identified petitioner's problem list as insomnia, erectile dysfunction and sleep apnea. Dr. Musaitif noted that petitioner's BMI was 43.47, and his blood pressure was uncontrolled. He referred petitioner to Methodist Neurology Group.

On 3/9/16 petitioner returned to Dr. Bewsey. He again stated that the Myrbetriq did not help. Because of this, Dr. Bewsey was of the opinion that he was not sure that petitioner had a neurogenic problem, muscular problem, or a combination.

On 4/13/16 petitioner presented to Dr. Howard Liu for a neurological consultation. He gave a history of a motor vehicle accident in May of 2015. He stated that he hit his occipital area hard and suffered a severe headache injury. He stated that he developed incontinence, as well as back and neck pain. He reported almost daily headaches at the right parietal/occipital. He stated that he was sensitive to light and noise He also complained of sleep difficulty, memory problems, and clumsiness of his hands. Following an examination, Dr. Liu assessed posttraumatic headache, sleep disorder, memory loss, and incontinence. He recommended petitioner increase his amitriptyline to 20 mg, try yoga or tai-chi for relaxation, exercise regularly, eat healthy, lose weight, improve sleep quality, and consider repeat of brain MRI and/or L-S spine MRI.

On 4/25/16 petitioner underwent a cystoscopy for his urinary incontinence. This procedure was performed by Dr. Kelly Bewsey. Petitioner reported a work related accident a number of years ago. He reported that since that time he has had multiple problems, including some urinary issues, urinary incontinence. Petitioner followed-up with Dr Bewsey on 6/13/16. Dr. Bewsey noted that no stricture was found. He went over the risks and benefits of the Interstim sacral nerve stimulator versus Botox injections. Dr. Bewsey told petitioner that if he was going to get frequent MRIs the Interstim device would not be a good option. His diagnosis was overactive bladder, of an unknown etiology.

On 7/13/16 petitioner returned to Dr. Driessnack for the first time since September of 2015. He reported that his right hip still hurt, but he had returned to work with restrictions. Petitioner reported pain in his right hip with twisting movements, and climbing in and out of the truck. He described the pain as a sharp, grabbing pain in the right groin and over the lateral aspect of the right hip, with numbness and tingling in the right leg, primarily in the thigh down to the knee, and occasionally to the distal of the knee. On examination, petitioner had no Trendelenburg component to his gait. He walked slowly, but fairly

symmetrically. Dr. Driessnack noted that the petitioner was guarding, and he felt the petitioner had pain with gentle passive range of motion. Petitioner had a positive FADIR and FABER sign. His pain was located deep in the right groin, but the patient could not localize it with 1 finger. Dr. Driessnack was of the opinion that it is not unreasonable to consider the possibility of an occult labral injury in the presence of persistent, positive hip pain signs on exam. Additional x-rays were ordered, but were normal. Also, another MR arthrogram was ordered. Dr. Driessnack noted that the reason for petitioner's persistent pain was not clear.

On 7/27/16 petitioner underwent another MR arthrogram of the right hip. The radiologist noted an interval development of a Grade 1 strain of the gluteus maximus, and findings suspicious for an anterior superior labral tear, with no cam-type femoroacetabular impingement. The labrum had a blunted appearance anteriorly and superiorly. Possible mild right trochanteric bursitis was noted.

On 8/17/16 petitioner presented to Dr. Jianxun Zhou at INI for back pain. He reported that his urologist referred him for possible cauda equina syndrome. Petitioner reported that his urinary incontinence started right after the accident, on the second day in the hospital. He reported numbness of his private part and some loss of control of bowel and bladder. Based on petitioner's history, Dr. Zhou's assessment was chronic urinary incontinence and bowel incontinence since accident on 5/19/15, and other multiple symptoms. Dr. Zhou was of the opinion that petitioner did not have cauda equina syndrome. Petitioner was referred back to the urologist.

On 11/23/16 petitioner underwent his annual IDOT commercial driver examination at IWIRC. Petitioner reported a head/brain illness or injury (concussion), and noted that he spent a night in the hospital. Petitioner also identified that he was in a car crash, and had a concussion from a motor vehicle accident in 2014/2015. He also noted a right shoulder labral tear in 2015. Petitioner also noted that uses a CPAP machine for sleep apnea. Petitioner's entire physical examination was normal. His BMI was identified as 41, and his weight was 318 pounds. Petitioner was found to meet the standards for commercial driving, but periodic monitoring was required for his OSA on CPAP. Petitioner made no mention of any right hip problems. Petitioner also denied any problems with urination.

On 12/9/16 Dr. Driessnack noted that petitioner appeared to be mildly depressed, and in chronic pain. He also noted that petitioner was limping and favoring his right leg. Petitioner demonstrated trouble getting on and off the exam table. Petitioner had a positive Stinchfield sign with moderate loss of strength in the right leg. Petitioner's pain was localized to the groin. Petitioner had minimal tenderness to palpation over the lateral and anterior right hip. Petitioner reported pain in the right hip with sitting or

turning in certain positions. Petitioner could not put weight on his hip, or climb in his truck, and was considering surgery. Petitioner also felt it was work related. Dr. Driessnack recommended a diagnostic and therapeutic injection into the right hip.

On 12/15/16 petitioner underwent a right hip injection performed by Dr. Driessnack. Petitioner was to call Dr. Driessnack to report his results.

On 12/28/16 petitioner underwent a neurologic evaluation by Dr. Maria Karbowska-Jankowska. Petitioner reported that he was hit head-on on the driver's side, while driving a garbage truck on 5/19/15. He reported that he hit his head against the object behind him. He reported an immediate headache before being taken to hospital. He reported difficulty with his memory and concentration. Following an examination and record review, petitioner was diagnosed with intractable chronic post-traumatic headaches, cognitive decline, and adjustment disorder. He was referred to OSF Neuro Psychology.

On 2/14/17 petitioner returned to Dr. Driessnack. He reported that he had exhausted physical therapy. He reported that the injection helped about 50%. He continued to complain of a lot of pain, sometimes sharp, on the anterolateral aspect of the right hip at work with sitting. Dr. Driessnack noted that petitioner had a BMI of 43.68. Petitioner was able to stand and walk independently, and did not appear uncomfortable. Petitioner guarded his hip when going from a seated to supine position, and would lift it up with his other leg. The Stinchfield test was painful, and he had a positive FADIR and negative FABER. There was no tenderness to palpation over the lateral aspect of the right hip. Dr. Driessnack recommended a referral to the hip arthroscopist. He felt that there was nothing more he could do for petitioner. Dr. Driessnack referred petitioner to Dr. Michael Terry in Chicago for evaluation for a hip arthroscopy, and released petitioner from his care. Dr. Driessnack noted that he does not do arthroscopies.

On 2/27/17 petitioner followed-up with Dr. Garst for his left shoulder. Petitioner last saw Dr. Garst on 11/3/15. Petitioner demonstrated limited range of motion of his left shoulder with only 100 degrees of flexion, and 90 degrees of abduction. Internal rotation was to L5. Petitioner had pain at the extremes of motion. Dr. Garst felt that petitioner had a left superior labral tear and was still recommending a left shoulder arthroscopy. Dr. Garst told petitioner he could drive. He continued the same work restrictions for the left arm. Repeat x-rays of the left shoulder were normal. He instructed petitioner to return in 2 months.

On 3/29/17 the evidence deposition of Dr. Garst an orthopedic surgeon who specializes in hands and upper extremities, was taken on behalf of the petitioner. Dr. Garst had performed a prior surgery on petitioner's right shoulder and treated him until his release on 9/29/14. After that, Dr. Garst did not see petitioner again for his right shoulder. Dr. Garst could not say with any certainty, based on the MR arthrogram, whether or not petitioner's labral tear in his left shoulder was traumatic or degenerative. Absent causality, Dr. Garst was of the opinion that the recommended left shoulder surgery was reasonable and necessary. Dr. Garst opined that petitioner's left shoulder condition is related to the accident because he had no left shoulder problems before the accident.

On cross-examination Dr. Garst was of the opinion that the labral tear petitioner sustained in his right shoulder was due to an acute episode. Dr. Garst admitted that he did not know much about the motor vehicle accident petitioner sustained, other than it was serious because he spent a week in the hospital. Dr. Garst was of the opinion that when he first saw petitioner 1 month after the motor vehicle accident he had a very low suspicion for internal derangement in petitioner's left shoulder. Dr. Garst admitted that on 10/22/15 that petitioner called the office and stated that he wanted to schedule the left shoulder surgery through his primary insurance carrier, Blue Cross, Blue Shield. He further testified that petitioner had not yet undergone the surgery. Dr. Garst was of the opinion that if a garbage truck hits a small car it is going to smash the small car. Dr. Garst admitted that petitioner gave a very vague history of the motor vehicle accident.

On 4/5/17 the evidence deposition of Dr. Richard Driessnack, an orthopedic surgeon, specializing in hip and knee replacements, was taken on behalf of respondent. He opined that the MRI of petitioner's right hip on 9/1/15 was normal, but believed a labral tear could have been missed by the initial MRI. He was of the opinion that a labral tear may not be evident on a non-arthrogram MRI, and may have been there since the beginning. Dr. Driessnack could not say if he actually reviewed the actual films of the repeat arthrogram on 7/27/16, but was of the opinion that the presence of the blunted appearance anterosuperiorly in the labrum suspicious for a labral lear was significant. Dr. Driessnack was of the opinion that the possible tear on the repeat arthrogram of 7/27/16 was a degenerative tear. Dr. Driessnack was of the opinion that a hip arthroscopy on petitioner would be very difficult because of his weight being 300 pounds. Dr. Driessnack deferred any opinion as to whether or not petitioner is in need of a hip arthroscopy to a hip arthroscopist. He opined that petitioner had reached maximum medical improvement with respect to his right hip. He was of the opinion that if petitioner was not a candidate for a hip arthroscopy the petitioner would have some chronic residual pain in his right hip that may end in

three years or may not end in five years. Dr. Driessnack opined that if petitioner had no symptoms of right hip pain prior to the accident in May of 2015 then his right hip pain and labral tear would be causally connected to the accident.

On cross examination Dr. Driessnack testified that his opinions were based on the mechanism of injury that petitioner provided of jamming his right foot on the brake. He was of the opinion that if petitioner's right foot was on his brake and there was a load that was transmitted up the extremity from his foot to his hip or spine, there can be associated injuries to those joints along the way. Dr. Driessnack noted that there was a difference between the MRI of the right hip on 9/1/15 and the MR arthrogram of the right hip on 7/27/16. He testified that the radiologist noted that the new finding was an abnormal signal in the gluteus maximus muscle. Dr. Driessnack noted that because petitioner weighed 300 pounds and was 6'1", that could be a factor in hip problems.

On 4/12/17 petitioner presented to Dr. Michael Terry at Northwestern Center for Comprehensive Orthopedic & Spine Center for his right hip pain, on the referral of Dr. Driessnack. Petitioner denied any right hip pain before the motor vehicle accident. He stated that he was taking Meloxicam with limited relief. Dr. Terry performed a review of systems, physical examination, and imaging. Dr. Terry was of the opinion that petitioner had a labral tear and trochanteric bursitis. Dr. Terry noted that petitioner elected to proceed with a right hip arthroscopy, labral tear, femoral acetabular impingement decompression, trochanteric bursectomy with trochanteric windowing.

On 4/24/17 petitioner presented to IWIRC for initial evaluation of his right hip. Petitioner reported an injury on 4/24/17 while pushing a dumpster and feeling a sharp pain radiating from his hip to his toes. He reported that his right hip hurts when he puts pressure on it. He also complained of pain in the front of the right leg that extends to his foot. He rated his pain at a 10/10 when it happened, and a 7/10 currently. He stated that he was taking Meloxicam for a prior right hip injury. An examination revealed severely limited range of motion, and significantly decreased strength. There was also significant pain/tenderness at the greater trochanter. He had an antalgic gait. Reflexes were normal. He was assessed with a strain of the right hip, and right hip lateral tear-degenerative-not work related. He was released to light duty work and no commercial driving. On 4/27/17 petitioner returned to IWIRC and reported that his symptoms had improved and he only had a little pain. He rated his pain at 0/10. Range of motion and strength were slightly limited; tenderness was noted at the greater trochanter; and gait was antalgic. His restrictions were decreased to medium work and no commercial driving.

On 4/27/17 Dr. Walsh drafted a letter to respondent in response to the correspondence and medical records he was sent by respondent, and reviewed. Dr. Walsh was of the opinion that his review of these additional records did not change his opinions. He was of the opinion that it was not likely that petitioner suffered an acute labral tear as a result of the motor vehicle accident, when he was seated and belted in the truck. He opined that petitioner's subjective complaints were disproportionate to a patient with a subtle labral tear of the hip. At best, Dr. Walsh noted that the petitioner had a blunted appearance to the anterior superior aspect of the labrum, suspicious for a labral tear. He was of the opinion that it is not at all likely that this blunted labral pathology would lead to the petitioner's significant loss of strength in his right leg with the significant limitations of motion as documented in the medical record. He noted that it was somewhat remarkable that the petitioner guards his hip and lifts it with his other leg when moving from a seated to supine position. He believed this is a somewhat unusual response to a blunted labral finding. He opined that it is not likely that petitioner suffered a superior labral tear with the motor vehicle accident. He was of the opinion that the mechanism of injury is not typical for an acetebular or labral tear or a SLAP lesion. He opined that these are incidental findings in the imaging that do not adequately explain petitioner's symptomatology. He was of the opinion that the loss of motion petitioner had in his left shoulder when he last saw Dr. Garst was a profound loss of motion, and not typical for a patient with a SLAP II lesion, since those patients typically have full range of motion. He also noted that Dr. Garst found that petitioner was definitely weak in the left shoulder, and type II SLAP lesions do not usually lead to definite weakness. Dr. Walsh opined that petitioner is not a candidate for surgery of his right hip or left shoulder as a result of the motor vehicle accident. He opined that petitioner remained at MMI as a result of the motor vehicle accident as it relates to his right hip. He opined that petitioner needs no work restrictions or surgical intervention as it relates to his motor vehicle accident. He recommended weight reduction. He further opined that the labral pathology in the left shoulder is not related to the motor vehicle accident and that petitioner has reached MMI with regards to the motor vehicle accident.

On 5/1/17 and 5/12/17 petitioner followed up at IWIRC for his right hip. On 5/1/17 petitioner reported that he was much better. He reported that he felt he was back to baseline. Petitioner was released to full duty work. On 5/12/17 petitioner reported that he was doing well and the injection he had helped. Petitioner's gait was normal and he had no tenderness or pain at the greater trochanter. Petitioner was continued on regular duty work.

On 6/7/17 petitioner returned to Dr. Driessnack for his hip pain. Petitioner underwent an x-ray of the right hip with history of a sudden pop this morning. The impression was no acute changes in the right

hip. He was instructed to contact Dr. Terry. Petitioner was released to work on 6/14/17 with restrictions on lifting more than 20 pounds floor to waist, lifting more than 20 pounds waist to shoulder; no kneeling, squatting, jumping or running; avoidance of prolonged sitting/standing; sedentary work until hip addressed by Dr. Terry.

On 6/20/17 the evidence deposition of Dr. Walsh, a general orthopedic surgeon, was taken on behalf of the respondent. Dr. Walsh performs surgeries for hips and shoulders. He opined that petitioner had a BMI of 43.68 and is morbidly obese. Because of this he was not surprised petitioner had joint pain. He was of the opinion that petitioner needed to lose weight. Dr. Walsh was of the opinion that it would take a pretty violent maneuver to tear a labrum, and he doesn't see a lot of labral tears of the hip coming out of motor vehicle accidents. He also noted that Dr. Driessnack's initial exam of the hip was benign. He did not believe a person putting their right foot on the brake pedal could transmit enough force to jam the femur bone and cause it to temporarily dislocate out of the hip joint. Dr. Walsh was of the opinion that the MR arthrogram showed a blunted labrum, and not one that was detached or torn away from the bone. He was of the opinion that there are many reasons a labrum would be blunted unrelated to an accident. Dr. Walsh was of the opinion that another reason petitioner would not be a good candidate for hip surgery would be because of his obesity. Dr. Walsh admitted that he did not know the speed of the vehicle at the time of the motor vehicle accident. Dr. Walsh noted that when he asked petitioner what happened with the accident he said he did not know. As a result, if petitioner was talking about jamming the brake, that would be inconsistent with his claim that he lost consciousness and did not recall anything regarding the accident until he got to the hospital.

On 7/7/17 petitioner was evaluated by Dr. Driessnack and given a return to work slip with the same restrictions. On 7/24/17 petitioner called Dr. Driessnack's office and reported that his hip pain had improved, and he could work without restrictions. Petitioner requested a full duty release to return to work. Dr. Driessnack's office gave petitioner a return to work slip allowing him to return to full duty work without restrictions on 7/24/17.

On 9/13/17 the evidence deposition of Dr. Kelly Bewsey, a urologist, was taken on behalf of petitioner. Dr. Bewsey was of the opinion that petitioner was a self referral, and did not present with a referral from any other doctor on 11/4/15. Dr. Bewsey was of the opinion that a urinary tract infection goes along with urethritis and can cause an overactive bladder. He noted that petitioner had urethritis in the past. Dr. Bewsey was of the opinion that an overactive bladder can be caused by an irritation to what you eat or drink, or a neurogenic or muscular cause. Dr. Bewsey noted that the muscles of petitioner's

bladder looked normal on exam. For this reason he thought petitioner had a nerve issue. Dr. Bewsey could not say for certain that the accident was the cause of petitioner's overactive bladder, but noted that the timing was suspicious if it only occurred after the accident, was so significant, and seemed to be one of the biggest deficits that he maintained after the accident.

On cross examination Dr. Bewsey testified that he does not have a specific diagnosis for petitioner, and that his possible diagnosis is of an unknown etiology. Dr. Bewsey testified that his understanding was that the onset of petitioner's symptoms was after the accident on 5/19/15 and have continued since then. Dr. Bewsey testified that if petitioner's symptoms did not occur after the accident as petitioner claimed, that could change his opinions. Dr. Bewsey admitted that he reviewed no medical records for petitioner from 5/19/15 until the date he initially saw petitioner. Dr. Bewsey assessed petitioner with an enlarged prostate and was of the opinion that obesity can have something to do with it. Dr. Bewsey noted that petitioner had urethritis in 2011.

Petitioner testified that between October of 2015 and 11/8/17 he drove tractor trailer and front load routes. Petitioner testified that he did not perform any residential routes. He further testified that he talked with Kevin Coulter, his supervisor, regarding his concerns about residential routes. Petitioner testified that Coulter has not required him to do any residential routes.

On 11/8/17 petitioner underwent his most recent IDOT Commercial Driver Medical Examination. Petitioner indicated that he had a head/brain injury or illness (concussion), kidney problems, kidney stones, or pain/problems with urination; bone, muscle, joint, or nerve problems; blood clots or bleeding problems; sleep apnea; and had spent a night in the hospital. Petitioner complained of hip and shoulder pain, numbness and shooting pain. An examination revealed abnormal general, cardiovascular, extremities/joints, and gait body systems. Also noted was that petitioner was overweight (320 pounds), irregular rhythm and pulse, decreased left shoulder range of motion, decreased right hip range of motion due to pain, antalgic gait, and narcotic use. For these reasons petitioner did not meet the standards for a Commercial Driver. With respect to his sleep apnea, petitioner was found to meet the standards, but periodic monitoring was required. Petitioner was directed to discontinue hydrocodone. His heart rhythm also needed to be checked. He was instructed to follow up on 11/23/17.

Respondent offered into evidence information regarding petitioner's prior Worker's Compensation Settlements. These included a settlement approved 7/9/90 for 3% of a man for an injury to his whole body (89 WC 25909, 89 WC 25910); a settlement approved 1/21/09 for 3% of a man for an injury to his

upper extremity (06 WC 24642, 06 WC 40207); a settlement approved 4/11/16 for 7.5% of a man for an injury to his right upper extremity (13 WC 36454).

Petitioner treated at Restore Medical, LLC. from 11/10/15 through 12/15/16. He identified the referring doctor as Dr. Musaitif. Petitioner asked Dr. Musaitif for a referral to Dr. Cummings since he had previously seen Dr. Cummings for a previous IME and appreciated his thoroughness. As a result, Dr. Musaitif referred petitioner to Dr. Cummings. There was a note on petitioner's demographic page that states "11/18/15 - stopped paying on 9/28/15 due to IME-put through medical insurance". Petitioner was seen by Dr. Alexander Cummings. He described his primary complaints as left shoulder, right leg, and lower back. Petitioner stated that he did not remember from the moment before impact until he was in the emergency room. Petitioner also mentioned that he was having bowel and bladder incontinence, trouble with balance, weight gain, headaches and some depression. Petitioner was examined, and Dr. Cummings reviewed multiple records. He diagnosed petitioner with low back pain, pain in joint involving shoulder region, pain in right hip, disorder of tendon of right lower leg; labral tear, muscle spasm of back, pain in multiple muscles, and paresthesias of lower limb. Dr. Cummings ordered physical therapy and wanted petitioner to take anti-inflammatory pain medication. It was also noted that petitioner may benefit from some trigger point injections. The first visit focused on his low back. Dr. Cummings incorporated Dr. Garst's work restrictions. Petitioner was prescribed Meloxicam and Omeprazole.

Petitioner underwent therapy at Koch Physical Therapy on the referral of Dr. Cummings for right hip, left shoulder and back. He was initially evaluated on 11/19/15. Dr. Cummings prescribed 8 weeks of therapy, 2-3 times a week. Petitioner presented for therapy on 12/3/15, 1/28/16, 2/4/16, 2/18/16 and 3/3/16. Petitioner did not show, or cancelled his appointments on 11/24/15, 12/21/15, 12/28/15, 1/4/16, 1/8/16, 2/11/16. Petitioner underwent a trigger point injections to his lumbar spine on 12/3/15. On 1/7/16 petitioner reported that his hip, shoulder and back hurt about the same. On 1/28/16 petitioner reported that his pain levels had not changed since his last visit. Petitioner reported no improvement on 2/4/16. On 2/18/16 he reported his hip pain was more constant, and his shoulder pain the same. On 3/3/16 petitioner was discharged from care because he would require a new referral in order to return to therapy.

Petitioner had additional physical therapy sessions at Koch Therapy beginning 5/19/16 for his shoulder and hip. He stated that his pain was worse. On 5/19/16 petitioner stated that he received a couple weeks of relief after his left shoulder injection, but now the pain was back. On 7/5/16 petitioner continued to complain of a significant amount of pain and disability. On 8/11/16 petitioner was still complaining of left shoulder, right hip and low back pain. On 9/22/16 petitioner reported that not much

had changed since he was last seen. On 11/22/16 petitioner stated that his left shoulder pain had gotten worse, and his right hip pain was continuing. On 12/15/16 petitioner continued with all his previous symptoms. Petitioner did not show, or cancelled his appointments on 5/5/16, 5/10/16, 6/7/16, 8/4/16, 9/8/16, 9/13/16, 9/20/16, 10/20/16, and 1/26/17.

Kevin Coulter, petitioner's supervisor, has worked for respondent for 43 years. Since 2010 he has been the transportation manager. He works out of the Swords Facility in Peoria. On 5/19/15 he was called regarding petitioner's accident on Sterling, and went to the accident scene. He testified that the truck was on church grass and petitioner was still in the truck. He testified that petitioner was removed from the truck by the Fire Department. Coulter checked out the accident scene and took some pictures of petitioner's truck. He testified that they accurately depict the petitioner's truck immediately after the accident. He testified that the only damage to the truck was a front bumper and pushed into the headlight. He also noted that the step to enter the left side of truck was damaged. Coulter testified that the truck was driven off the grass and onto the church parking lot. He testified that he did not have to pull the bumper out of the tires to drive it. Coulter drove the truck back to the shop where the bumper, headlight and step were fixed and the truck was back on the road the next day.

Coulter testified that petitioner is able to choose what he wants to do on a daily basis. He testified that he calls petitioner daily and asks him if he wants to drive a front loader or semi, based on seniority and qualifications. He testified that all other employees are approached the same way.

Coulter testified that prior to 5/19/15 petitioner carried out his duties without complaints. He testified that petitioner's job duties after the accident were about the same. Coulter was of the opinion that petitioner was a good employee and carried out his route as expected. However, he did note that petitioner has always been one of the slower employers.

Coulter testified that when petitioner returned to work on 9/21/15 on light duty he painted containers for a while. From 10/23/15, when he was released to full duty, until the present time, Coulter testified that he observed petitioner on a regular basis and noted no difference in his job performance. He testified that petitioner never voiced any complaints about his inability to perform his job duties. He noted that the petitioner worked at the same pace before and after the accident. He noted when petitioner returned to full duty work he has worked his normal job duties, at the same pace, without any complaints.

Coulter testified that petitioner has been written up a few times since the accident because his paperwork was messed up. Additionally, he noted that this was not something new since the accident. He testified that over the years petitioner has had problems with paperwork and other things.

Currently, petitioner experiences burning in his whole left shoulder when he works. Despite this pain petitioner testified that he is able to perform all his job duties, except residential. Petitioner reported difficulty maneuvering his left shoulder around. He testified that he drops things. He stated that he wants the shoulder surgery recommended by Dr. Garst. Petitioner testified that Dr. Terry is recommending surgery for his right hip because his right hip hurts a lot. He stated that he has no pending treatment for his concussion, but still has headaches and difficulty remembering things. He testified that it has improved over the last 2 years.

Petitioner testified that he has not received any benefits since he failed the IDOT physical on 11/8/17.

Petitioner denied any new injuries to his left shoulder since 5/19/15. He testified that he did reinjure his right hip in April of 2017, was on light duty for a month, and then had no further injuries. Petitioner denied any re-injury to his head or groin.

In 2006 petitioner was in a motor vehicle accident and sustained a whiplash injury. He was seen by Dr. Julian Lin for concussion and numbness. Neurologically he was found stable. An MRI of the cervical spine was normal. Petitioner also noted on his 12/8/15 IDOT exam that he sustained a left shoulder labrum tear as a result of a motor vehicle accident in 2006.

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

Petitioner is alleging injuries to his left shoulder and right hip, as well as problems with incontinence and a concussion. He claims all these problems are causally related to the injury he sustained on 5/19/15. At the time of the injury petitioner weighed approximately 320 pounds and had a BMI over 40.

Before getting into the specifics regarding the causal connection of each claimed injury to the accident on 5/19/15, the arbitrator makes specific note of petitioner's testimony that his last clear memory before the impact was that he had a green light and was going on his route. He specifically stated that his next memory was being in the hospital. The arbitrator finds this testimony significant when assessing the credibility of petitioner with respect to the accident histories he provided his various healthcare providers. The arbitrator also finds this significant given that petitioner's history of the accident at times would

change to support the treatment he was claiming he needed, or the treatment a specific healthcare provider was recommending. The specifics of this will be addressed when the causality of each claimed injury is discussed below.

LEFT SHOULDER

The petitioner is claiming that his current condition of ill-being, as it relates to his left shoulder, is causally related to the injury on 5/19/15. The arbitrator finds it significant that petitioner indicated on his IDOT examination report on 12/8/15 that in 2006 he had already sustained a labrum tear of his left shoulder as a result of a motor vehicle accident.

Following the injury on 5/19/15, petitioner was taken by ambulance to OSF St. Francis Medical Center. Petitioner had bilateral shoulder complaints and complained of tingling in both arms, and decreased range of motion and tenderness in both shoulders. However, an examination revealed strength of 4/5 in all extremities. Additionally, all x-rays showed no obvious fractures. While hospitalized petitioner's treatment focused primarily on his cervical, thoracic, and lumbar spine, as well as his right hip, and his concussion symptoms. MRIs were taken of these body parts, but not of the shoulders. His diagnose with respect to his shoulders on discharge from the hospital was simply "pain in shoulder region joint", with no imaging performed while inpatient other than a possible x-ray.

When petitioner presented to his primary care physician Dr. Musaitif on 5/27/15 he did not specifically mention any problems with his left shoulder. On 6/1/15 when he presented to the Concussion Clinic at INI, his complaints included pain from his left shoulder to his abdomen. However, his diagnoses did not include anything regarding the left shoulder.

On 6/16/15 petitioner first saw Dr. Garst for his left shoulder. Dr. Garst had previously performed surgery on petitioner's right shoulder in 2014. Petitioner only provided a vague description of the accident. Dr. Garst examined petitioner and assessed left shoulder pain. He only had a low suspicion of internal derangement of the left shoulder, but felt it could be possible.

A month later he followed up with Dr. Garst and reported that his left shoulder was quite sore. His range of motion was decreased. An MRI and MR arthrogram of the left shoulder was performed on 7/27/15 and showed a SLAP type II labral tear, which petitioner had indicated on his IDOT exam form on 12/8/15 he had had since 2006.

Dr. Glantz examined petitioner on 7/28/15. His complaints included left shoulder pain. Petitioner told Dr. Glantz he could not remember any specifics of the accident. Dr. Glantz was of the opinion that petitioner's subjective symptomatology was out of proportion to his objective findings.

On 8/4/15 Dr. Garst recommended conservative treatment for petitioner's left shoulder. He also noted that petitioner had similar problems with his right shoulder in the past, for which he had treated as recently as 2014 with surgical intervention. Despite his recommendation for conservative treatment for petitioner's left shoulder, petitioner pushed back and wanted definitive care. Dr. Garst agreed and recommended a left shoulder arthroscopy with superior labral repair for the type II SLAP tear.

On 9/1/15 petitioner returned to Dr. Garst. He stated that his left shoulder was still sore. However, Dr. Garst's examination was normal. Nonetheless, Dr. Garst reiterated his surgical recommendation.

On 9/28/15 petitioner was examined by Dr. Walsh. He reported pain in his left shoulder that had not changed since the accident. He also reported numbness, burning, aching, and pins and needles in his left upper extremity. He told Dr. Walsh he was restrained at the time of the accident. Dr. Walsh was of the opinion that petitioner's left shoulder got worse while treating with Dr. Garst. He was further of the opinion that SLAP tears typically occur with repetitive overhead activities, or a fall on an outstretched arm. Dr. Walsh opined that it is unlikely that petitioner suffered a SLAP tear as a result of a motor vehicle accident. He also noted that petitioner did not receive a diagnosis of a SLAP tear until after the MR arthrogram in July of 2015. Dr. Walsh also found it significant that petitioner had a history of a previous right shoulder labral tear just one year prior. Dr. Walsh opined that the type II SLAP lesion in petitioner's left shoulder was an incidental finding, unrelated to the injury on 5/19/15.

On 11/3/15 Dr. Garst saw petitioner and again recommended surgery to improve the function of petitioner's left shoulder and decrease his pain. Dr. Garst assumed the motor vehicle accident on 5/19/15 was apparently rather serious and involved what sounded like a high energy trauma. Based on this history he was of the opinion that there is a causal connection between petitioner's accident and the labral tear in his left shoulder.

Petitioner did not treat again for his left shoulder until 2/27/16, when he returned to Dr. Garst. His condition remained unchanged and Dr. Garst was still recommending surgery. X-rays of the left shoulder were normal.

Dr. Garst was deposed on 3/29/17. Dr. Garst could not opine, based on the MR arthrogram, whether or not petitioner's labral tear in his left shoulder was traumatic or degenerative. Nonetheless, Dr.

Garst opined that petitioner's left shoulder condition was related to the injury on 5/19/15 because he had no left shoulder problems before that. Dr. Garst was not aware of petitioner's notes on his IDOT examination on 12/8/15 that he had a labrum tear in his left shoulder as far back as 2006. On cross examination Dr. Garst admitted that he did not know much about the motor vehicle accident petitioner sustained on 5/19/15, other than it must have been serious because petitioner was in the hospital for a week. Dr. Garst also admitted that when he saw petitioner a month after the accident he had a very low suspicion for internal derangement in his left shoulder. Dr. Garst also admitted that petitioner gave him a very vague history of the motor vehicle accident.

On 4/27/15 Dr. Walsh drafted a letter after reviewing a multitude of medical records. He opined that the mechanism of petitioner's injury was not typical for a type II SLAP lesion. He further opined that the type II SLAP lesion was only an incidental finding in the imaging, and does not adequately explain petitioner's symptomatology. He noted that the loss of motion petitioner had in his left shoulder when he last saw Dr. Garst was a profound loss of motion and not typical for a patient with a type II SLAP lesion, since those patients typically have full range of motion. He also noted that Dr. Garst found that petitioner was weak in the left shoulder, and type II SLAP lesions do not usually lead to definite weakness. Dr. Walsh was of the opinion that the labral pathology in petitioner's left shoulder is not related to the motor vehicle accident on 5/19/15.

Based on the above, as well as the credible record, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that his current condition of ill-being as it relates to his left shoulder is causally related to the injury he sustained on 5/19/15, after 9/28/15. The arbitrator notes that the burden of proof is on the petitioner to prove a causal relationship by a preponderance of the credible evidence, and in this case he did not meet that burden.

Having reviewed the two differing opinions of Dr. Garst and Dr. Walsh as it relates to the causal connection between petitioner's left shoulder condition and the accident on 5/19/15, the arbitrator finds the opinions of Dr. Walsh more persuasive than those of Dr. Garst, and finds the type II SLAP lesion of the left shoulder seen on the MR arthrogram was an incidental finding, unrelated to the injury on 5/19/15. The arbitrator bases this opinion on the inconsistencies in petitioner's left shoulder complaints when compared to most patients with type II SLAP lesions; the fact that at the end of his weeklong hospital stay petitioner was only diagnosed with "pain in the shoulder region joint"; that other than a normal x-ray, no other testing was performed on petitioner's left shoulder the entire time he was in the hospital following the accident; the fact that Dr. Garst's causal connection opinion is based on a belief that petitioner was

involved in a high energy trauma on 5/19/15, despite the fact that he only had a vague history of the accident, and did not know that petitioner was only driving about 35 mph at the time of the accident; that petitioner's symptomatology was often found to be out of proportion to his objective findings; that petitioner had the same problem with his right shoulder just one year prior; that Dr. Garst initially only had a low suspicion of internal derangement of the left shoulder; that Dr. Garst could not opine whether or not petitioner's type II SLAP lesion was traumatic or degenerative; and that petitioner himself noted on his IDOT examination papers that he has had a labrum tear in his left shoulder since 2006.

RIGHT HIP

Following the accident on 5/19/15 petitioner was taken to the emergency room of OSF St. Francis and then admitted to the hospital for a week. In the emergency room petitioner complained of right hip pain, as well as decreased strength and range of motion in the right hip. X-rays showed no fractures. An MRI of the right hip showed a partial thickness tear of the hamstring origin versus tendinopathy. No hip pathology was noted. An orthopedic consult was performed on petitioner's right hip after he was unwilling to bear weight on it and had continued discomfort. Conservative treatment was recommended. The orthopedic surgeon felt the right hip pain was most likely due to lumbar spine pathology. Petitioner underwent physical therapy for his right hip while in the hospital. He was given a rolling walker for mobility upon discharge.

Petitioner reported his right hip pain to Dr. Garst and Dr. Snyder. He continued in therapy. On 7/28/15 petitioner reported to Dr. Glantz that he had a slight tear of the right hamstring and burning pain over the right hip.

On 8/4/15 Dr. Garst referred petitioner to Dr. Driessnack for his right hip pain. Petitioner saw Dr. Driessnack on 8/19/15. Petitioner gave a history that at the time of the accident his right foot jammed on the brake to help control the garbage truck. The arbitrator finds this history a bit suspicious given the fact that this was the first time petitioner had offered this particular history after he had repeatedly reported that he had no history of the accident from before impact until he was in the hospital. X-rays of the right hip were normal. An MRI of the right hip was performed and was normal. Based on these findings, Dr. Driessnack assessed a contusion/sprain/strain injury to the right hip, and was of the opinion that petitioner's pain should abate over time, maybe 6-12 months. On 9/2/15 Dr. Driessnack was of the opinion that petitioner was not in need of any further orthopedic treatment in the future for his right hip. He recommended one more month of physical therapy.

On 9/28/15 Dr. Walsh examined petitioner and noted subjective complaints of right hip pain without any abnormal objective findings. Dr. Walsh noted that although Dr. Driessnack opined that petitioner had blunt soft tissue injury or trauma to his right hip based on his accident history, he saw no evidence of blunt soft tissue injury or trauma on the MRI scans of May or September of 2015. If anything, Dr. Walsh was of the opinion petitioner sustained a very mild trauma to his right hip. Dr. Walsh noted that the findings on the MRI were inconsistent with petitioner's complaints of pain in his groin and pain with abduction or adduction of the right hip. He noted that there was no clear evidence in the orthopedic notes of pain well localized to the hamstring area, and the MRI findings in May probably represented tendinopathy, rather than an acute hamstring tear. Dr. Walsh further opined that even if there was a hamstring tear, it would certainly heal nonoperatively, and would require no residual treatment. Dr. Walsh placed petitioner at maximum medical improvement for his right hip based on the normal MRIs, normal examination, and no recommendation for further intervention. He noted that petitioner's subjective complaints were without objective abnormalities.

From 11/10/15 through 12/15/16 petitioner treated at Restore Medical with Dr. Cummings. This treatment involved physical therapy for multiple body parts, of which petitioner missed quite a few sessions.

Petitioner did not seek any further treatment for his right hip until 7/13/16. At that time, he returned to Dr. Driessnack with right hip pain, after returning to his regular duty job in October of 2015. Since the 9/3/15 petitioner sought a lot of treatment, but none of it with Dr. Driessnack for his right hip. Petitioner described the pain as being in the right groin, over the lateral hip, with numbness and tingling in the right leg, primarily to the knee. Based on positive hip pain signs on exam, Dr. Driessnack took additional x-rays that were normal. He noted that the reason for petitioner's persistent pain was not clear.

An MR arthrogram of the right hip on 7/27/16 showed an interval development of a Grade 1 strain of the gluteus maximus, and findings suspicious for an anterior superior labral tear, with no cam-type femoroacetabular impingement. The labrum had a blunted appearance anteriorly and superiorly, and possible mild right trochanteric bursitis was noted.

On 12/9/16 petitioner returned to Dr. Driessnack limping and favoring his right leg. Petitioner's pain was localized to the groin. Petitioner reported that he could not put weight on his right hip, or climb in his truck. He stated that he was considering surgery, and felt it was work related. Dr. Driessnack recommended an injection. Petitioner underwent the injection on 12/15/16.

Petitioner did not return to Dr. Driessnack until 2/14/17. He reported that the injection helped about 50%. He still continued to complain of pain. Dr. Driessnack noted that petitioner weighed over 300 pounds and had a BMI of 43.68. He also noted that petitioner was able to stand and walk independently and did not appear uncomfortable. He noted no tenderness to palpation over the lateral aspect of the right hip. Dr. Driessnack was of the opinion that there was nothing more he could do for petitioner. He referred petitioner to Dr. Terry, a hip arthroscopist.

Dr. Driessnack was deposed on 4/5/17. He opined that although the MRIs of petitioner's right hip in May and September of 2015 were normal, he believed a labral tear could have been missed because it may not be evident on a non-arthrogram MRI, and may have been there from the beginning. Dr. Driessnack could not say if he actually reviewed the MR arthrogram of the right hip, but nonetheless was of the opinion that the presence of the blunted appearance anterosuperiorly in the labrum suspicious for a labral tear was significant. He was also of the opinion that the possible tear was degenerative. Dr. Driessnack believed that a hip arthroscopy on petitioner would be difficult because of his weight being over 300 pounds, but deferred the need of this to Dr. Terry. He opined petitioner was at maximum medical improvement with respect to his right hip. He was of the opinion that if petitioner had no symptoms of right hip pain prior to the accident in May of 2015, then his right hip pain and labral tear would be causally related to the accident. However, on cross examination, he indicated that all his opinions were based on the mechanism of injury petitioner provided of jamming his right foot on the brake, which the arbitrator finds is inconsistent with all other accident histories petitioner provided his healthcare providers and testified to at trial. Dr. Driessnack was of the opinion that because petitioner weighed 300 pounds and was 6'1", this could also be a factor in his hip problems.

Petitioner saw Dr. Terry on 4/12/17. Dr. Terry examined petitioner, and reviewed the imaging, and was of the opinion that petitioner had a labral tear and trochanteric bursitis. He noted that petitioner wanted to proceed with the right hip arthroscopy, labral tear, femoral acetabular impingement decompression, and trochanteric bursectomy with trochanteric windowing. Dr. Terry offered no causal connection opinion.

On 4/24/17 petitioner presented to IWIRC following an injury to his right hip that day. He returned on 4/27/17 and stated that his symptoms has improved and he only had a little pain. He actually rated his pain at 0/10.

On 4/27/17 Dr. Walsh was of the opinion that it is not likely that petitioner suffered an acute labral tear as a result of the injury on 5/19/15, when he was seated and belted in the truck. He noted that

petitioner's subjective complaints were disproportionate to a person with a subtle labral tear of the hip. Dr. Walsh was of the opinion that at best, petitioner had a blunted appearance to the anterior superior aspect of the labrum, suspicious for a labral tear, but that it is not at all likely that this pathology would lead to the petitioner's significant loss of strength in his right leg with the significant limitations as documented in the medical records. He noted that the way petitioner guards his hip and lifts it with his other leg when moving from a seated to supine position is a somewhat unusual response to a blunted labral finding. He opined that it is not likely that petitioner suffered a superior labral tear as a result of the accident. He further opined that the mechanism of injury is not typical for an acetebular or labral tear. He opined that these were incidental findings in the imaging and do not adequately explain petitioner's symptomatology. He opined that petitioner was at maximum medical improvement with respect to his right hip. He recommended weight reduction.

By 5/12/17 petitioner reported to IWIRC that he was back to baseline following the right hip injury on 4/24/17. Petitioner's gait was normal and he had no tenderness or pain at the greater trochanter.

On 6/7/17 petitioner saw Dr. Driessnack following a sudden popping in his right hip that morning. An x-ray of the right hip showed no acute changes of the right hip. On 7/24/17 petitioner called Dr. Driessnack's office and reported that his right hip pain had improved and he could work without restrictions.

Based on the above, as well as the credible evidence, the arbitrator finds the opinions of Dr. Walsh, more persuasive than those of Dr. Driessnack, especially given the fact that Dr. Driessnack's causal connection opinions were all based on a less than credible accident history of jamming his right foot on the brake, which was totally inconsistent with the petitioner's accident history to all other healthcare providers, and his testimony at trial, that he had no memory from the time the light turned green to the time he was in the hospital. For this reason, the arbitrator finds Dr. Driessnack's opinions as to causal connection between petitioner's right hip condition and the accident on 5/19/15 are based on an accident history that is inconsistent with every other accident history, and an accident history that seems to be very self serving.

In addition to finding the opinions of Dr. Walsh more credible, given that they are based on an accurate accident history, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that his current condition of ill-being as it relates to his right hip is causally related to the injury on 5/19/15, after 10/2/15, given the fact that the MRIs of the right hip in May and September of 2015 were normal, and showed no right hip labral tear; that Dr. Driessnack on 8/4/15 assessed only a

contusion/sprain/strain injury to the right hip; that Dr. Driessnack on 9/2/15 was of the opinion that petitioner was not in need of any further orthopedic treatment for his right hip, and should have only 1 more month of physical therapy for it; that Dr. Walsh saw no evidence of a blunt soft injury or trauma to petitioner's right hip on 9/28/15 when he reviewed the MRI films; that both Dr. Walsh and Dr. Driessnack noted that petitioner's subjective complaints did not always correlate with the objective findings; that from 9/3/15 through 7/12/16 petitioner never returned to Dr. Driessnack with respect to his right hip problems, even though he was following up with other doctors for his other problems; that petitioner worked full duty without restrictions from October of 2015 until he presented to Dr. Driessnack on 7/13/16; that the findings suspicious for an anterior superior labral tear did not first appear until nearly a year after petitioner was released from care by Dr. Driessnack and returned to full duty work, and 14 months after the accident; that Dr. Driessnack opined that this possible tear was degenerative in nature; that Dr. Driessnack was of the opinion that petitioner's weight of 300 pounds, and BMI of over 43, could be a factor in his hip problems; that Dr. Walsh was of the opinion that an acute labral tear of the hip is unlikely given that petitioner was sitting and belted at the time of the accident; that Dr. Walsh was of the opinion that a labral tear, if present, would not lead to the petitioner's significant loss of strength in his right leg with the significant limitations documented in the medical records; that Dr. Walsh was of the opinion that the way petitioner guards his hips and lifts it with his other leg when moving from a seated to supine position is a somewhat unusual response to a blunted labral finding; and that Dr. Walsh was of the opinion that the blunted labral finding is incidental and does not adequately explain petitioner's symptomatology.

CONCUSSION

Petitioner alleges that his current condition of ill-being as it relates to his concussion symptoms is causally related to the injury on 5/19/15.

Petitioner testified that he was in another motor vehicle accident 5 years prior to the injury on 5/19/15 and sustained a concussion. When petitioner was in the hospital following the motor vehicle accident on 5/19/15 he underwent CT imaging of the brain that was normal. He was found to have a concussion, photophobia, and headaches. Neurology recommended symptomatic management for headaches, nausea, and dizziness. He was told to follow-up at the Concussion Clinic at INI if they did not improve in 7-10 days. Petitioner was also instructed to follow up with ophthalmologist as an outpatient after seeing bright lights and pain with eye movement after the accident.

Petitioner presented to the Concussion Clinic at INI and was seen by nurse Rassi. He was examined and his diagnoses included a concussion with loss of consciousness of 30 minutes or less, and dizziness. Petitioner underwent some speech therapy, physical therapy and neuropsychology.

Petitioner presented to Dr. Snyder at IPMR. Dr. Snyder's impression included a mild concussion. She recommended that petitioner undergo a clinical speech evaluation.

On 7/28/15 petitioner presented to Dr. Glantz and complained of dizziness, trouble sleeping and reading, balance problems, shakiness all over, nausea, memory problems, trouble swallowing, headaches and problems with lights and sound. Dr. Glantz was of the opinion that these symptoms 2 months after the injury, were out of proportion to the motor vehicle accident of 5/19/15, even if a concussion was suffered. Dr. Glantz assessed that petitioner had a sustained a concussion, but did not have any objective neurological abnormalities. He was of the opinion that petitioner demonstrated significant symptom magnification. He noted that even if petitioner sustained a concussion as a result of the injury, he would not still be nauseous, and the use of dark shades throughout the examination was inconsistent with a concussion injury over 2 months ago. Dr. Glantz noted that petitioner's sensory exam did not have any anatomical or physiological connection to any condition of the brain. He noted that petitioner's brain scan was normal. Dr. Glantz was of the opinion that petitioner was not in need of any further treatment for his brain and could return to full duty work.

On 8/25/15 when petitioner presented to Snyder, the only reference to his concussion was "a history of mild concussion". She noted that petitioner's vision complaints and sensitivity to light seemed to be resolving. On 9/21/15 she was of the opinion that petitioner's therapy for multiple traumas would come to a close in 4-5 weeks. Dr. Snyder placed petitioner at MMI in approximately a month.

On 2/24/16 petitioner presented to Dr. Musaitif complaining of headaches. He was referred to Methodist Neurology Group. Petitioner presented to Dr. Liu for a neurological consultation on 4/13/16. Petitioner reported that he hit his occipital area hard and suffered a severe headache injury. The arbitrator notes that this history is not consistent with the credible medical records and appears to be self serving. He reported almost daily headaches and sensitivity to light and noise. Following an examination, Dr. Liu's assessments included posttraumatic headache, sleep disorder, memory loss. Petitioner did not treat again for his headaches until he saw Dr. Jankowska in 12/28/16. At that time, he reported that he hit his head against the object behind him, and reported an immediate headache before being taken to the hospital. He also reported difficulty with his memory and concentration. Dr. Jankowska was diagnosed

with intractable chronic post-traumatic headaches, cognitive decline, and adjustment disorder. Petitioner had no further treatment for his mild concussion.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner's current condition of ill-being as it relates to his mild concussion is causally related to the motor vehicle accident through 7/28/15 when he was examined by Dr. Glantz and Dr. Glantz found that he was not in need of any further treatment for his brain. The arbitrator further finds the petitioner's concussion symptoms are no longer related to the injury on 5/19/15 after 7/28/15, based on Dr. Snyder's assessment on 8/25/15 that petitioner only had a "history of a mild concussion". Petitioner next sought treatment for his headaches on 2/24/16 when he presented to Dr. Musaitif complaining of headaches. He was referred to Methodist Neurology Group. Petitioner presented to Dr. Liu for a neurological consultation on 4/13/16, and provided an inconsistent and self serving history of the accident. Petitioner did not seek any further treatment until 12/28/16 when he also gave Dr. Jankowska an inconsistent and self-serving history of the accident, which Dr. Jankowska based her causal connection opinions on. Relying on the accident history petitioner provided his healthcare providers, and his testimony at trial, that he had no memory of the accident from before it occurred to after he arrived at the hospital, the arbitrator finds the accident history petitioner gave to Dr. Jankowska self serving and unreliable, and therefore the arbitrator is unable to rely upon her opinions.

INCONTINENCE

Lastly, petitioner alleges that his incontinence problems are causally related to the injury on 5/19/15. The petitioner claims these problems began the day after the accident and have continued. The arbitrator finds this claim unsupported by the credible evidence.

The arbitrator notes that when petitioner was in the hospital from 5/19/15 to 5/26/15 the medical records reflect that petitioner denied any bladder or bowel problems. He also made no mention to any healthcare provider any incontinence problems until 7/28/15 when he mentioned urinary incontinence as one of his problems. Dr. Glantz made no assessment regarding petitioner's urinary incontinence, and was of the opinion that petitioner was not in need of any further treatment.

On 11/4/15 Dr. Bewsey noted that he had previously seen petitioner for urethritis. Petitioner told him that since the accident on 5/19/15 and since then has had a quite a bit of problems with urinary leakage, and has had to wear diapers. Based on this inconsistent history, Dr. Bewsey was of the opinion

that petitioner's overactive bladder was related to the accident. Petitioner continued to treat with Dr. Bewsey for his incontinence.

The next mention of any urinary incontinence in the medical records was on 2/24/16 when he mentioned to Dr. Musaitif that his urinary incontinence was getting worse. On 4/13/16 petitioner reported to Dr. Liu that he developed urinary incontinence as a result of the injury on 5/19/15. On 4/25/16 petitioner underwent a cystoscopy for his urinary incontinence. No stricture was found. Dr. Bewsey assessed an overactive bladder of an unknown etiology.

Dr. Bewsey was deposed on 9/13/17. Dr. Bewsey was of the opinion that a urinary tract infection goes along with urethritis and can cause an overactive bladder. He was also of the opinion that an overactive bladder can be caused by an irritation to what you eat or drink, or a neurogenic or muscular cause. Dr. Bewswy noted that petitioner had urethritis in the past. Dr. Bewsey was of the opinion that petitioners bladder looked normal, so he thought petitioner had a nerve issue. He could not say for certain that the accident on 5/19/15 was the cause of petitioner's overactive bladder, but noted that the timing was suspicious if it only occurred after the accident. Dr. Bewsey could not provide a definite diagnosis or etiology of any possible diagnosis. Dr. Bewsey was of the opinion that if petitioner's symptoms did not occur after the accident as petitioner claimed, that could change his opinion. Dr. Bewsey did not review any of petitioner's medical records before he saw him.

Based on the above, as well as the credible evidence the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that his urinary incontinence is causally related to the injury on 5/19/15. The arbitrator bases this opinion on the fact that petitioner's history to Dr. Bewsey regarding the onset of his urinary incontinence is contradicted by the credible medical records. The arbitrator finds petitioner's history to Dr. Bewsey that his urinary incontinence started right after the accident and had worsened until he saw him, was nothing more than a self serving history totally contradicted by the credible record. In support of this, the arbitrator refers to the documented evidence in the hospital records that petitioner denied any bladder problems while in the hospital; that there is no reference to any incontinence problems until 7/28/15 when he simply mentioned them to Dr. Glantz as one of his problems; that the next mention of any incontinence problems was when he presented to Dr. Bewsey on 11/14/15 and provided an inconsistent accident history; that on 11/14/15 Dr. Bewsey noted that he had treated petitioner in the past for urethritis; and that Dr. Bewsey was of the opinion that if petitioner's symptoms did not occur as petitioner claimed, that his opinions could change.

In summary, the arbitrator finds the petitioner's current condition of ill-being as it relates to his left shoulder is causally related to the accident on 5/19/15, only through 9/28/15; that the petitioner's current condition of ill-being as it relates to his right hip is causally related to the accident on 5/19/15, only through 10/2/15; the petitioner's current condition of ill-being as it relates to his concussion is causally related to the accident on 5/19/15, only through 7/28/15; and that the petitioner's current condition of ill-being as it relates to his incontinence is not causally related to the accident on 5/19/15.

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 respondent claims the petitioner's medical expenses from 5/19/15 through 5/26/15 while in OSF Medical Center were not reasonable and necessary based on a Utilization Review performed by Prium on 7/23/15 and 8/11/15. Having reviewed all the medical records of petitioner's admission in OSF Medical Center, the arbitrator finds the treatment the petitioner received while inpatient at OSF Medical Center from 5/19/15 through 5/26/15 was reasonable and necessary. With respect to all remaining medical services, the arbitrator finds the following.

With respect to petitioner's left shoulder, the respondent shall pay all reasonable and necessary medical services for petitioner's left shoulder through 9/28/15 pursuant to Sections 8(a) and 8.2 of the Act. The arbitrator finds all medical services for petitioner's left shoulder after 9/28/15 were not reasonable and necessary to cure or relieve petitioner from the effects of the injury on 5/19/15.

With respect to petitioner's right hip, the respondent shall pay all reasonable and necessary medical services for petitioner's right hip through 10/2/15 pursuant to Sections 8(a) and 8.2 of the Act. The arbitrator finds all medical services for petitioner's right hip after 10/2/15 were not reasonable and necessary to cure or relieve petitioner from the effects of the injury on 5/19/15.

With respect to petitioner's concussion, the respondent shall pay all reasonable and necessary medical services for petitioner's concussion through 7/28/15 pursuant to Sections 8(a) and 8.2 of the Act. The arbitrator finds all medical services for petitioner's concussion after 7/28/15 were not reasonable and necessary to cure or relieve petitioner from the effects of the injury on 5/19/15.

With respect to petitioner's incontinence, the respondent shall pay for no medical services related to petitioner's incontinence pursuant to Sections 8(a) and 8.2 of the Act. The arbitrator finds all medical services for petitioner's incontinence were not reasonable and necessary to cure or relieve petitioner from the effects of the injury on 5/19/15.

K. IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE?

The petitioner is claiming he is entitled to prospective surgery for his left shoulder and right hip. Having found the petitioner's current condition of ill-being as it relates to his left shoulder is causally related to the accident on 5/19/15, only through 9/28/15; and that the petitioner's current condition of ill-being as it relates to his right hip is causally related to the accident on 5/19/15, only through 10/2/15, the arbitrator finds petitioner is not entitled to the prospective surgeries recommended for his left shoulder and his right hip.

L. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

Petitioner is claiming he is entitled to temporary total disability benefits from 5/19/15 through 9/19/15, and 11/8/17 through 11/20/17. Petitioner was off work from 5/20/15 through 8/26/15 . On 8/26/15 petitioner returned to light duty work at Maple Shade Nursing Home. Thereafter, he worked either light duty or full duty through 9/19/15. Having found none of petitioner's claimed injuries were causally related to the injury on 5/19/15, after 10/2/15, the arbitrator finds the petitioner is not entitled to temporary total disability for the period 11/8/17 through 11/20/17.

Based on the above, as well as the credible evidence the arbitrator finds the petitioner is entitled to temporary total disability benefits from 5/20/15 through 8/25/15, a period of 14 weeks, at a rate of $846.73 per week. Respondent shall receive credit for the $14,031.43 in temporary total disability benefits, and $894.22 in temporary partial disability benefits it has already paid. 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

O. DID PETITIONER EXCEED NUMBER OF DOCTOR CHOICES ALLOWED?

Respondent claims petitioner's treatment with respect to Dr. Cummings with Restore Medical were outside the chain of referrals and exceeded petitioner's doctor choices. Given that this treatment was for treatment dates after which the arbitrator found petitioner's injuries were causally related to the accident on 5/19/15, the arbitrator finds this issue moot.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANGELA GRAY,

Petitioner,

vs. NO: 15 WC 22477

ACE DISTRIBUTION CENTER,

18IWCC0632

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 average weekly wage, marital status, causal relationship, temporary total disability benefits, medical expenses both incurred and prospective, vocational rehabilitation, and penalties and fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission 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).

Supplemental Statement of Facts

Petitioner testified on December 22, 2014 she fell into a bin on her right side, attempting to catch herself with her right hand. T. 18. Upon impact, the palm of Petitioner's right hand made contact with the bin along with her right hip and back. T. 19. Petitioner testified she did not initially report injury to her wrist as her back pain was her primary focus. T. 21.

The medical records evidence Petitioner sought treatment on December 22, 2014 at the Illinois Valley Community Hospital-Occupational Health Department (OHD) complaining of pain in her lower back and right hip which she associated to a fall into a bin. PX6. Petitioner was diagnosed with a lumbar/right hip contusion and released to return to work with restrictions of no lifting greater than ten-pounds, minimum bending or stooping, no over the shoulder work, and sit/stand as needed. PX6. On December 29, 2014, Petitioner was re-evaluated at the OHD and continued to voice complaints of low back pain. Petitioner was again released to return to work with the same restrictions. On January 8, 2015, Petitioner was re-evaluated for a final time at the OHD at which time her lower back and right hip complaints were improving but not fully resolved. Petitioner was released to return to work without restrictions. PX6.

Petitioner testified she initially returned to work light duty but working caused her back pain to increase. T. 21. Petitioner testified she continued to experience back pain during her initial treatment, but the pain subsided causing her to notice her wrist pain. T. 28-29.

The medical records evidence, Petitioner presented to her primary care physician, Dr. Timothy Pratt, on January 16, 2015 complaining of back and hip pain as well as right wrist pain. Petitioner provided a consistent history of the mechanism of injury. Dr. Pratt recommended a right wrist x-ray and prescribed steroids. PX2. On January 30, 2015, Dr. Pratt re-evaluated Petitioner who advised her back pain was much improved, but her wrist pain was significant. Dr. Pratt reviewed the x-ray which was negative for a fracture but evidenced soft tissue swelling. Dr. Pratt provided a wrist splint and referred Petitioner to Dr. Perona for an orthopedic consultation. PX2.

The medical records evidence Petitioner was evaluated by Dr. Perona on April 14, 2015. Petitioner testified it took three months to be seen by Dr. Perona. T. 76-77. Petitioner provided a consistent history or the mechanism of injury and voiced right wrist complaints. Dr. Perona diagnosed de Quervain's syndrome, recommended an MRI, and released Petitioner to full duty work. PX7. An MRI performed on April 20, 2015 evidenced de Quervain's tenosynovitis as well as bone marrow edema. PX4.

On April 30, 2015, Dr. Perona re-evaluated Petitioner and reviewed the MRI scan. Dr. Perona diagnosed de Quervain's syndrome confirmed by MRI, provided an injection, and recommend surgery. PX4. Thereafter, on June 26, 2015, Dr. Perona performed surgery consisting of a right wrist dorsal extensor compartment release. PX5. On July 2, 2015 Dr. Perona re-evaluated Petitioner who continued to voice complaints of wrist pain. Dr. Perona recommended occupational therapy and authorized Petitioner off work. On July 7, 2015, Petitioner commenced physical therapy three times per week at Princeton Physical Therapy with complaints of wrist pain and swelling. On July 30, 2015, Dr. Perona re-evaluated Petitioner who advised her pain was worse than prior to surgery. Dr. Perona diagnosed a cyst, provided an injection, and recommended a cessation of physical therapy. Dr. Perona continued Petitioner's off-work status and recommended a second opinion if her symptoms did not improve. On August 13, 2015, Dr. Perona recommended an evaluation with either Dr. Carroll or Dr. Bednar and diagnosed possible Wattenberg syndrome. PX7.

The medical records evidence Dr. Carroll evaluated Petitioner on September 9, 2015. Petitioner provided a consistent history of the mechanism of injury as well as relayed her treatment to date. Dr. Carroll diagnosed right de Quervain's tenosynovitis as well as possible radial neuropathy and recommended an EMG and possible MRI pending the results of the EMG. Dr. Carroll released Petitioner to one-handed work and advised her follow-up with Dr. Perona. PX8.

On September 25, 2015, Dr. Perona prescribed the recommend EMG and consistent with Dr. Carroll, released Petitioner to return to one-handed work. PX7. Petitioner testified Respondent did not provided light duty work. T. 37. On October 6, 2015, and EMG/NCV was performed evidencing bilateral median mononeuropathy of a mild-moderate degree. PX3. On October 8, 2015, Dr. Perona diagnosed right wrist neuropathy with superficial radial nerve irritation and recommend medication and a referral to Dr. Carroll. On October 22, 2015 and December 15, 2015, Dr. Perona again evaluated Petitioner and again recommended a referral to Dr. Carroll. PX7.

In the interim, on October 21, 2015, Petitioner was evaluated by Dr. John Cherf on Respondent's behalf pursuant to Section 12 of the Act. Petitioner provided a consistent history of the mechanism of injury. Dr. Cherf stated "Ms. Gray may have sustained a work-related right wrist sprain/strain on December 22, 2014, [*sic*] and may have developed de Quervain's tenosynovitis of her right wrist…It is possible that some of her symptoms are the result of irritation of the sensory branch of the radial nerve from her surgery on June 26, 2015." Dr. Cherf recommended the continued use of Neurontin, a possible cortisone injection, and no additional surgery. Dr. Cherf release Petitioner to return to work without restrictions and anticipated maximum medical improvement by December 26, 2015. RX1.

On January 13, 2016, Dr. Carroll re-evaluated Petitioner who continued to voice complaints of right hand pain. Dr. Carroll diagnosed radial styloid tenosynovitis and hand numbness and recommended an FCE. Dr. Carroll concurred with Dr. Cherf that an injection might be of benefit, but no surgery was warranted. PX8. On January 26, 2016, Dr. Perona evaluated Petitioner and concurred with Dr. Carroll's recommendation for an FCE. PX7.

On February 17, 2016, Petitioner was evaluated by Dr. John Cherf on Respondent's behalf pursuant to Section 12 of the Act for a second time. Dr. Cherf reiterated his opinion "that some of her subjective symptoms are the result of irritation or the sensory branch of the radial nerve from her surgery on June 26, 2015, and/or residual de Quervain's tenosynovitis." Dr. Cherf reiterated his opinion of a temporal relationship between her symptoms and wrist injury but modified his opinion as to causation finding: "[i]t is unlikely that the de Quervain's tenosynovitis that was identified on this MRI [April 20, 2015] was a direct result of the injury in question or work since Mr. [*sic*] Gray was not working the four months prior to the MRI of the right wrist." Dr. Cherf diagnosed a wrist sprain in relation to the December 22, 2014 injury. Dr. Cherf opined Petitioner was at maximum medical improvement as of December 26, 2015 and felt an FCE could be considered but did not relate its need to the wrist sprain. RX2.

On March 3, 2016, Petitioner underwent an FCE at Athletico. The FCE was valid and found Petitioner able to occasionally lift 25 pounds floor to waist and frequently lift 10 pounds and occasionally lift 15 pounds waist to shoulder and frequently lift 10 pounds. PX9. On April 7, 2016, Dr. Perona released Petitioner to return to work within the restrictions of the FCE. On June 28, 2016, Dr. Perona placed Petitioner at maximum medical improvement and modified her work restrictions to no lifting greater than 20 pounds and no repetitive activities on a permanent basis. Dr. Perona noted "Petitioner starts work at Casey's on Wednesday." PX7.

Dr. Cherf authored two supplemental reports February 17, 2016, and May 16, 2017. In the February 17, 2016 report, Dr. Cherf provided an impairment rating of 1% of the upper extremity and whole person impairment rating of 1%. RX3. In the May 16, 2017 report, Dr. Cherf opined "It does not appear that Ms. Gray's inability to perform the floor to waist and waist to shoulder lifting activities can be attributed to her right wrist and/or her work-related right wrist sprain/strain on December 22, 2014." RX4.

Petitioner testified Respondent did not offer her a job within her permanent restrictions, and she was conducting a job search. T. 52-53. Petitioner testified she obtained employment at Casey's General Store on June 27, 2016 and was waiting to receive her first pay check. T. 55, 97.

CONCLUSIONS OF LAW

I. Causal Relationship for Right Wrist

The Commission finds the Petitioner proved a causal relationship between her accident of December 22, 2014 and her right wrist condition and subsequent need for treatment. "[T]he Commission is not bound by the arbitrator's findings and may properly determine the credibility of witnesses, weigh their testimony and assess the weight to be given to the evidence. [citation omitted]." *R.A. Cullinan and Sons v. The Industrial Commission*, 216 Ill. App. 3d 1048, 1054, 575 N.E.2d 1240 (1991). The "interpretation of the testimony of medical witnesses is particularly within the province of the Industrial Commission. [citation omitted]." *A.O. Smith Corporation v. The Industrial Commission*, 51 Ill. 2d 533, 537, 283 N.E.2d 875 (1972).

The Petitioner testified credibly at trial she injured her right wrist when she fell into a bin. Certainly, there was a delay of 26 days from the time of the accident until her first voiced complaints to Dr. Pratt on January 16, 2015, but unlike the Arbitrator, we find Petitioner provided a credible explanation for this delay. Petitioner testified she did not immediately report her wrist injury as her back complaints were more significant. More importantly, Dr. Cherf, Respondent's expert, opined Petitioner's fall was a competent cause of an injury to the wrist. Additionally, once Petitioner's wrist pain manifested, she provided a consistent history of the mechanism of injury to all of her providers.

Having weighed the competing medical opinions of Dr. Perona and Dr. Cherf, the Commission affords greater weight to the opinions of Dr. Perona finding such opinions more

persuasive. Moreover, Dr. Perona's opinions are supported by the opinions and findings of Dr. Carroll.

As of Petitioner's initial visit to Dr. Perona (April 14, 2015), Dr. Perona opined Petitioner suffered from de Quervain's syndrome. X-rays taken on January 30, 2015 evidenced soft tissue swelling consistent with an acute finding. PX2. The MRI performed on April 20, 2015 evidenced de Quervain's tenosynovitis as well as bone marrow edema. PX4. Dr. Perona performed surgery on June 26, 2015 consisting of a right wrist dorsal extensor compartment release for treatment of de Quervain's syndrome. PX5. On September 9, 2015, Dr. Carroll provided a diagnosis of de Quervain's tenosynovitis as well as possible radial neuropathy. PX8. Even Dr. Cherf when he initially evaluated Petitioner on October 21, 2015 found Petitioner suffered from a wrist sprain and may have developed de Quervain's tenosynovitis and related her ongoing symptoms to the possible sequela from her surgery. RX1. Dr. Cherf altered his opinion after the second evaluation of Petitioner on February 17, 2016, but the Commission does not find this new opinion persuasive.

The Commission finds Petitioner suffered a wrist injury on December 22, 2014 which lead to the development of de Quervain's syndrome and her need for surgery and subsequent medical treatment including the FCE. Both Dr. Perona and Dr. Carroll opined the need for an FCE. An FCE was performed on March 3, 2016 which was valid and resulted in lifting limitations. PX9. Again, Dr. Cherf felt an FCE might be appropriate but did not relate the need for the same to Petitioner's wrist injury. RX2. Dr. Perona placed Petitioner at maximum medical improvement (MMI) as of June 28, 2016 and released her to return to work with a 20-pound lifting restriction and no repetitive activities on a permanent basis. PX7.

II. Temporary Total Disability Benefits

"The factors to be considered in determining whether a claimant has reached maximum medical improvement include: (1) a release to return to work; (2) the medical testimony concerning the claimant's injury; (3) the extent of the injury; and (4) 'most importantly,' whether the injury has stabilized. [citations omitted]." *Mechanical Devices v. Industrial Commission (Johnson)*, 344 Ill. App. 3d 752, 760, 800 N.E.2d 819 (2003). "Once an injured employee's physical condition has stabilized, the employee is no longer eligible for TTD benefits because the disabling condition has become permanent. [citation omitted]." *Id.* at 759. Based on the above finding of causal relationship, the medical evidence regarding MMI, and Petitioner's return to work as of June 27, 2016 (T. 97), the Commission modifies the award of temporary total disability benefits (TTD) and awards the same from June 26, 2015 through June 26, 2016, a period of 52 and 3/7 weeks. Respondent paid TTD benefits in the amount of $7,702.00 and advances in the amount of $5,684.08 and is entitled to a total credit of $13,386.08.

III. Medical Expenses

Section 8(a) of the Illinois Workers' Compensation Act entitles a claimant to recover medical expenses which are reasonable, necessary, and causally related to an accident. *820 ILCS 305/8(a)* (West 2010); *Zarley v. The Industrial Commission*, 84 Ill. 2d 380, 418 N.E.2d 718 (1981).

The same standard applies to prospective medical care. *Homebrite Ace Hardware v. The Industrial Commission*, 351 Ill. App. 3d 333, 814 N.E.2d 126 (2004). Petitioner sustained a right wrist injury due to her accident of December 22, 2014 resulting in a diagnosis of de Quervain's syndrome with maximum medical improvement being reached by June 28, 2016. As such all treatment relating to Petitioner's right wrist through this date is reasonable and necessary and causally related to Petitioner's accident. The Respondent shall pay the medical expenses pursuant to Section 8 and 8.2 of the Act. The Commission denies prospective medical care as none has been recommended.

IV. Vocational Rehabilitation/Maintenance Benefits

"Generally, a claimant has been deemed entitled to rehabilitation where he sustained an injury which caused a reduction in earning power and there is evidence rehabilitation will increase his earning capacity. [citation omitted]." *National Tea Co. v. Industrial Commission*, 97 Ill. 2d 424, 431, 454 N.E.2d 672 (1983). "Furthermore, it is widely accepted that 'the primary goal of rehabilitation is to return the injured employee to work.' [citation omitted]." *Hartlein v. Illinois Power Co.*, 141 Ill. 2d 142, 165, 601 N.E.2d 720 (1992). The Commission finds Petitioner failed to prove entitlement to vocational rehabilitation.

The Petitioner testified she obtained employment at a new employer even before being released from medical care. T. 55, 97. Petitioner testified regarding the hours and wages at her new employer which appear less than those while employed with Respondent but stated her hours were increasing, and she continued to pursue other employment opportunities. T. 57. The Petitioner offered no evidence of a reduction of earning power especially in light of Petitioner's testimony regarding her prior employment as an administrative assistant, home health care aid, bus monitor, bartender, waitress, office manager, and head cashier/bookkeeper (T. 80-85) evidencing a vast amount of transferable skills. Vocational rehabilitation is not warranted so neither are maintenance benefits as such benefits are only awardable while Petitioner participates in a vocational rehabilitation program. See *W.B. Olson v. Illinois Workers' Compensation Commission*, 2012 IL App (1st) 113129WC, ¶ 39 ("Section 8(a) of the Act permits an award of maintenance benefits while a claimant is engaged in a prescribed vocational-rehabilitation program.").

V. Penalties and Fees

On Petitioner's Petition for Review, she noted the issues of Penalties and Fees but did not advance an argument in her brief. The Commission affirms the Arbitrator's denial of the same.

VI. Ancillary Issues

On Petitioner's Petition for Review, she noted the issue of marital status. The Arbitrator's Decision reflects Petitioner was single on the date of accident. The Commission finds this is a clerical error as the Request for Hearing executed at trial notes Petitioner was married with two dependent children, and both parties stipulated to the same. The Commission corrects the Order to reflect Petitioner's marital status is married.

Also, on Petitioner's Petition for Review, she noted the issue of average weekly wage but did not advance an argument in her brief. The stipulation sheet notes Petitioner claimed average weekly wage to be $528.41 which Respondent disputed. The Commission finds Petitioner's average weekly wage to equal $528.41.

The Commission affirms all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's September 8, 2016 decision is modified for the reasons stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $352.27 per week for a period of 52 3/7 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 the reasonable, necessary and related medical expenses for treatment of Petitioner's right hip, right wrist, and low back through June 28, 2016 pursuant to §8(a) of the Act, subject to the Medical Fee Schedule pursuant to §8.2 of the Act. Respondent shall receive credit for all medical expense paid.

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. The Commission notes Respondent paid $7,702.00 in TTD benefits and $5,684.08 in other benefits for a total credit of $13,386.08.

IT IS FURTHER ORDERED BY THE COMMISSION that vocational rehabilitation and maintenance benefits are denied.

IT IS FURTHER ORDERED BY THE COMMISSION that penalties pursuant to Sections 19(l) and (k) and attorneys' fees pursuant to Section 16 of the Act are denied.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $5,200.00. 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 25 2018
LEC/maw
o07/31/18
43

L. Elizabeth Coppoletti

Charles J. DeVriendt

Joshua D. Luskin

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

GRAY, ANGELA
Employee/Petitioner

Case# **15WC022477**

ACE HARDWARE
Employer/Respondent

18IWCC0632

On 9/8/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.47% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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PERU, IL 61354

1832 KLAUKE LAW GROUP LLC
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1900 E GOLF RD SUITE 950
SCHAUMBURG, IL 60173

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)

Angela Gray
Employee/Petitioner

v.

Ace Hardware
Employer/Respondent

Case # 15 WC 22477

Consolidated cases: _____

18IWCC0632

An *Application for Adjustment 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 **New Lenox**, on **July 14, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **12/22/14**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$27477.32**; the average weekly wage was **$528.41**.

On the date of accident, Petitioner was **44** years of age, ***single*** with **2** dependent children.

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

Respondent shall be given a credit of **$7702.00** for TTD, $ for TPD, $ for maintenance, and **$5684.08** for other benefits, for a total credit of **$13,386.08**.

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

ORDER

Petitioner suffered work related accidental injuries to her low back and right hip on December 22, 2014. It is also specifically ordered that no work related accidental injuries were sustained to the right wrist on December 22, 2014.

Petitioner had no lost time from the date of accident until release to full duty work on January 8, 2015.Thereafter, Petitioner worked full duty until June 25, 2015 at which time she was off of work for complaints of right wrist pain. No temporary total disability is awarded as all lost time occurred for the non-work related right wrist complaints.

Respondent has paid $25,297.00 in medical benefits and shall be granted full credit for all medical payments. Respondent has paid all medical expenses related to the right hip and low back. No medical expenses are awarded for the right wrist and hand as they are not related to the accident of December 22, 2014. Respondent shall receive full credit for all medical expenses paid, any unpaid and awarded medical expenses shall be subject to the medical fee schedule in section 8.2 of the Illinois workers compensation act. Petitioner shall not seek payment of any medical expenses already paid even if such amounts were awarded.

Petitioner is not entitled to vocational assistance as she returned to full duty work subsequent to her right hip and low back work related injuries and has not met the burden required under *National Tea Co. v. Industrial Comm'n*, 97 Ill. 2d 424, 432-33, 454 N.E.2d 672 (1983).

Penalties are denied, Respondent has not been unreasonable or vexatious in their dispute of the issues in this case.

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 to the right hip and low back, if any.

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

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

Robert E Abrams
Signature of Arbitrator

September 7, 2016
Date

ICArbDec19(b)

SEP - 8 2016

18IWCC0632

STATE OF ILINOIS)

) SS.

COUNTY OF WILL)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(B)

Angela Gray

V **Case # 15 WC 22477**

Ace Hardware

FINDINGS OF FACT

Petitioner testified as follows. Petitioner was a 44-year-old material handler/break fill for Ace Hardware on the date of the claimed accident, December 21, 2014. Petitioner described her job pushing a cart and picking products that are sent to local hardware stores. The break fill position is one of four designations for Material Handler at Ace Hardware. The other three are Full Case Fill, Break Stock and Off Load. In the Break Fill position, the majority of the time items were in the 1 oz to 20 lbs range. Occasionally, items were heavier. The carts were on wheels and moved easily.

On that date, Petitioner had climbed up a ladder which was attached to the movable cart onto which she placed items that she picked from bins. She placed her foot on an adjacent movable cart in order to reach into the bin, and when she did so, that cart began to roll and she lost her balance and fell into one of the bins, alleging that she struck her right side and landed on her right wrist. She reported the accident to Bruce Gibson after it happened. She went home after the accident to rest her back and was seen by a doctor at Occupational Health that afternoon.
Initial treatment records from Illinois Valley Community Hospital Occupational Health, dated December 22, 2014 only document complaints of pain in the right hip, low back and upper back. There were no documented complaints to the right hand or wrist.

Petitioner was again seen at Occupational Health on 12/29/2014 and again there were no complaints to the right wrist. The only complaints were to the low back and right hip. The diagnosis remained contusion of the right hip and lumbosacral spine. Petitioner returned on 1/8/15 noting improvement in her symptoms with intermittent pain in the right hip and occasional radiation into her right leg. The diagnosis remained contusion of the right hip and

lumbosacral spine. At that time, she was released from care and advised to return to work full duty. The records of IVCH are devoid of any complaint or mention of a right wrist injury. (Px6)

On 1/16/15, Petitioner began treating with Dr. Pratt. At that time, she gave a consistent history of a work-accident and complained of pain in her back, hip and for the first time complained of right wrist pain. On 1/30/15, she again treated with Dr. Pratt and stated that her back had improved, but she was still experiencing pain in her right wrist. She was diagnosed with right wrist joint pain and given a thumb spica splint, referred to Dr. Perona and advised to continue working full duty. (Px2)

After a three-month gap, she next treated at St. Margaret's Community Health Clinic with Dr. Perona on 4/14/15 for her right wrist. At that appointment, she mentioned a history of bilateral carpal tunnel release. She underwent an MRI of her right wrist on April 20, 2015 which was positive for de Quervain's tenosynovitis. She had an injection in the wrist on April 30, 2015 and a first dorsal extensor compartment release was recommended. She underwent that procedure on 6/26/15. She had physical therapy and another injection after surgery and continued to complain that her pain in her right wrist was worse than before surgery. On 8/13/15 Petitioner was referred to Dr. Carroll for a second opinion due to complaints of 10/10 pain. (Px5)

On September 9, 2015 Petitioner saw Dr. Carroll for a second opinion. Dr. Carroll diagnosed possible radial nerve irritation due to complaints of numbness to the dorsal thumb and radial dorsal index finger. It was noted that the right wrist had full range of motion, no carpal instability, LT and SL joints were normal, midcarpal exam was normal, TFCC was not tender, radio-ulnar joint was not tender and was stable, Finklestein sign was negative and no masses or bone spurs were noted. X-rays were normal. He ordered an EMG and released Petitioner to light work.

The EMG was performed on October 6, 2015 and only revealed the prior moderate bilateral carpal tunnel syndrome.

On October 21, 2015, Petitioner attended an IME by Dr. Cherf. Dr. Cherf agreed with the findings of Dr. Carroll essentially a normal wrist with the exception of evidence of a pre-existing carpal tunnel. All motor groups in the right upper extremity were 5/5. Sensation was intact although Petitioner described some decreased sensation to radial aspect of her index finger. Dr. Cherf opined that it is possible that some residual from the surgery of June 26, 2015 resulted in irritation of the sensory branch of the radial nerve but noted that she is capable of returning to work full time full duty with no restrictions.

On January 13, 2016, Petitioner returned to Dr. Carroll. The examination was unchanged from the September 2015 exam. An FCE was suggested, further surgery was not recommended.

On February 17, 2016, Petitioner was re-evaluated by Dr. Cherf. Dr. Cherf noted the examination was unchanged from the prior IME. Dr. Cherf opined that Petitioner was at MMI. A

Impairment rating was prepared of the same date by Dr. Cherf and Petitioner was found to have an AMA rating of 1% of the upper extremity.

An FCE was performed at Athletico on March 22, 2016 finding that Petitioner was capable of Medium physical demand level job duties including a 2-hand floor to waist lift of 25# and a 2-hand occasional carry of 35#. Their stated job description was 2-hand occasional floor to waist life and carry of 35#.

On May 16, 2016, Dr. Cherf authored an addendum after review of the FCE, job task analysis from Ace Hardware as well as other medical reports and letters. Dr. Cherf opined that the FCE limitation was not attributed to the injury in question.

CONCLUSIONS OF LAW

With regard to issue (F) whether Petitioner's current condition of ill being is causally connected to this injury or exposure, issue (J) liability for medical expenses, issue (K) what amounts are due for TTD, issue (N) vocational rehabilitation, and issue (O) prospective medical expenses and penalties and attorney fees, the Arbitrator finds as follows:

The evidence on arbitration reveals that Petitioner fell while working on December 22, 2014 resulting in a sprain/strain of her right hip and low back. There was no lost time from work and no complaints of any issues with the right wrist until 26 days from the date of accident. During this time period Petitioner treated three times with medical providers regarding the sequalae from her accident, without mentioning any symptomology or complaints to her right wrist

The injury to the right hip and low back apparently resolved well before April of 2015 when Petitioner went to Dr. Perona with complaints exclusively to her right wrist. None of the medical records after that date mentioned any complaints about the right hip or low back.

Therefore, based on the evidence in the record, it is found that Petitioner's right wrist complaints are not related to the accident on December 22, 2014. Medical treatment for the right wrist issues are also not related to the December 22, 2014 accident and are denied.

Petitioner had returned to work full duty on January 8, 2015 with respect to the low back and right hip and did not treat again for these conditions thereafter. The arbitrator concludes that Petitioner reached maximal medical improvement with respect to the right hip and low back on January 8, 2015. Therefore, TTD claimed is not appropriate and not related to the December 22, 2014 accident. TTD is denied and Respondent shall receive credit for all TTD and advances paid.

Respondent has paid all medical expenses for treatment to the right hip and low back. Respondent has also made payments in good faith for treatment beyond January 8, 2015 when

Petitioner was released full duty. Medical payments after January 8, 2015 were related to the right wrist and hereby found not related to the accident of December 22, 2014. Respondent shall be given credit for all payments of medical expenses and in no event shall any medical expenses be paid that exceed the medical fee schedule, Section 8.2 of the IWCA. Respondent paid $25,297.00 in medical expenses.

Vocational rehabilitation is denied as Petitioner returned to work full duty before any complaints to the right hand or wrist on January 8, 2015, also noting the findings of no causal connection to the right wrist as set forth above.

Penalties are denied. There was reasonable rationale for disputing the injuries to the right wrist based on the lack of initial complaints and the return to work full duty. Respondent, in fact, provide payments to Petitioner in good faith while disputing the matter.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROBERT STARBUCK,

Petitioner,

vs. NO: 05 WC 51021

CITY OF CHICAGO,

Respondent.

18IWCC0633

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, causal connection, maintenance, permanent disability, prospective medical and attorneys' fee petition, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms and adopts the Arbitrator's Decision with respect to all issues except the attorneys' fees. The Commission finds that there was no offer of settlement extended to Petitioner immediately prior to the second attorney filing a co-counsel appearance or before Petitioner's first attorney withdrew from the case. Therefore, to enable the Commission to determine the amount of his entitlement to attorney's fees, the Petitioner's first attorney must file a Quantum Meruit Petition for Fees before the Commission.

Based on the Commission's finding above, under the Conclusions of Law section of the Arbitrator's Decision, in the subsection entitled "Fee Petition" on page 18, the Commission strikes all three paragraphs with the exceptions of the first sentence in both the first and second paragraphs and the last sentence in the second paragraph.

Further, under the Order of the Arbitrator section of the Arbitrator's Decision, in the

subsection entitled "Fee Petition" on page 19, the Commission also strikes the three paragraphs contained therein.

The Commission also vacates that portion of the Arbitrator's award entitled "Fee Petition" in the Order section of the Arbitration Decision.

Finally, the Commission addresses a clerical error. The Commission corrects the number of weeks of Petitioner's temporary total disability (TTD) entitlement for the period from June 1, 2005 through April 9, 2008 from "148-1/7" weeks to "149-1/7" weeks in the Order of the Arbitrator's Decision and on page 13, under the section (K), in the first sentence of the first paragraph.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 23, 2017 is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's first attorney file a Quantum Meruit Petition for Fees before the Commission.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $746.63 per week for a period of 149-1/7 weeks, for the period from June 1, 2005 through April 9, 2008, 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 $746.63 per week for a period of 235-1/7 weeks, for the period from April 10, 2008 through October 11, 2012, that being the period of maintenance under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $567.87 per week for a period of 200 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the Petitioner 40% loss of use of the person-as-a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $69.74 for medical expenses, identified as the outstanding bill owed to Dr. Mitchell Goldflies, under §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's Petition for Penalties is denied.

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

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

No county, city, town, township, incorporated village, school district, body politic or municipal corporation is required to file a bond to secure the payment of the award and the costs of the proceedings in the court to authorize the court to issue such summons. *820 ILCS 305/19(f)(2).* Based upon the named Respondent herein, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 25 2018
KWL/bsd
O: 8/28/18
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

STARBUCK, ROBERT
Employee/Petitioner

Case# **05WC051021**

CITY OF CHICAGO
Employer/Respondent

18IWCC0633

On 2/23/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.67% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5181 CANDIANO LAW OFFICE
CHARLES J CANDIANO
53 W JACKSON BLVD SUITE 1337
CHICAGO, IL 60604

0766 HENNESSY & ROACH PC
AUKSE GRIGALIUNAS
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

Robert Starbuck
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # 05 WC 51021

Consolidated cases: _____

18IWCC0633

An *Application for Adjustment 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 **December 1, 2015 and January 20, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On May 31, 2005, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$58,236.88**; the average weekly wage was **$1,119.94**.

On the date of accident, Petitioner was **51** years of age, *married* with **0** dependent children.

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

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

Respondent shall be given a credit of **$149,329.76** for TTD, **$0** for TPD, **$150,377.27** for maintenance, and **$57,930.48** for other benefits, for a total credit of **$357,367.51**.

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

ORDER

The petitioner's condition as relates to his left arm and psychological condition are causally related to the accident.

The respondent shall pay $69.74 in outstanding medical bills (Dr. Goldflies).

The respondent shall pay TTD in the amount of $746.63 per week for a period of 148 1/7 weeks from June 1, 2005 through April 9, 2008.

The respondent shall pay maintenance benefits in the amount of $746.63 per week for a period of 235 1/7 weeks from April 10, 2008 through October 11, 2012.

The respondent shall pay permanent partial disability benefits in the amount of $567.87 for a period of 200 weeks because the injuries sustained resulted in a loss of 40% loss of use of a man as a whole pursuant to Section 8(d)(2) for a loss of trade/occupation.

The petitioner's petition for penalties is denied.

Fee Petition:

The fee should be portioned with 1/3 going to Mr. Spingola and the remaining 2/3 to Mr. Candiano.

Petitioner shall reimburse Mr. Candiano for the costs of obtaining the medical records and shall reimburse Mr. Spingola an equal amount for the medical records he obtained.

Mr. Candiano is entitled to re-imbursement for any other costs associated with preparing the case for hearing on the Petition for adjudication of benefits as well.

See attached findings of fact and conclusions of law for detailed discussion of the order.

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

February 22, 2017
Date

FEB 23 2017

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Starbuck, Petitioner,	)	
vs.	)	No. 05 WC 51021
City of Chicago Respondent.	)	18IWCC0633

PROPOSED DECISION OF THE ARBITRATOR

The parties agree that on May 31, 2005, 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 further agree that on that date the Petitioner sustained accidental injuries that arose out of and in the course of the employment and that the Petitioner gave the Respondent notice of the accident within the time limits stated in the Act. They agree that in the year preceding the injuries, the Petitioner earned $58,236.88, and that his average weekly wage was $1,119.94.

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 for Dr. Kiokmeister and Dr. Goldflies as well as the out of pocket expenses for medications; (3) Is Petitioner entitled to TTD; (4) Is the Respondent entitled to credit in the amount of $149,329.76 in TTD, $150.377.27 in maintenance and $57,930.48 in other benefits (wage differential); (5)What is the nature and extent of the injury; and (6) Is the Petitioner entitled to attorney's fees and penalties.

At the time of the hearing there was a petition on file for fees by a previous attorney for the Petitioner. The issue of how to split the fees was not resolved between the two attorneys before the close of proofs. The Proofs had to be re-opened to allow the attorneys the opportunity to prepare for a hearing on that issue. Proofs were re-opened in March of 2016 and remained open until May 12, 2016 at which time evidence was heard on the issue and a record made of the hearing,

FINDINGS OF FACT

Left Arm Treatment

This matter was previously tried on a 19(b) basis before Arbitrator Galicia on May 12, 2006. His decision was rendered on May 24, 2006. Arbitrator Galicia's decision found that the petitioner sustained an accident arising out of and in the course of his employment on May 31, 2005. The award indicated that the petitioner's condition, as related to his left arm was causally related to the accident. At that time, prospective medical benefits to the left arm were awarded. No decision was rendered at that time regarding any other body part. (PX 12)

Following the hearing, Dr. Goldflies saw the petitioner on August 25, 2005. (PX 6) It was noted that the petitioner is right-handed. Dr. Goldflies diagnosed him with tendonitis. The petitioner went back to Dr. Goldflies on September 8, 2005. He was continuing to have problems with his left forearm. He further reported that in the past he had right elbow pain related to lifting at work. He was diagnosed with left forearm and wrist tendonitis and also evidence of tendonitis at the right elbow and forearm.

On December 8, 2005 it was reported that the petitioner had been in hand therapy and his main problem was persistent forearm pain with weak grip strength and wrist strength. It was stated that most of his symptoms were subjective in nature. (PX 6)

The petitioner returned to Dr. Goldflies on March 28, 2006. He stated that while the petitioner did have a plate in his forearm, he did not feel it was the primary source of his symptoms. He did state it could be a contributing factor to the inability to recover from his work-related injury. (PX 6)

On April 25, 2006, Dr. Goldflies stated that the petitioner's left forearm remained symptomatic and on exam he had tenderness in the proximal left forearm musculature up to the upper condyles with grip strength weakness. (PX 6)

The petitioner continued conservative care and eventually underwent a Functional Capacity Evaluation at Mercy on April 9, 2008. (RX 13) It indicated that the performance was valid, but that the petitioner could not return to a heavy level of work. He demonstrated the ability to lift 65 pounds occasionally from waist to floor and 40 pounds above the shoulder. He was placed at the medium to medium/heavy level according to his functional capabilities at that time. (RX 13)

The petitioner did not treat for any of his left extremity symptoms following April 11, 2008. The petitioner never had surgery. He started a course of vocational rehabilitation in 2008 following the results of the FCE.

At trial, the petitioner did not testify as to how he was currently feeling with respect to his left arm, nor what activities of daily living or other activities might or could have been affected by this injury.

Cervical Spine Treatment

The petitioner testified that he did not have any treatment with respect to his cervical spine until 2007. (TX 54) Indeed, the medical records indicate the first time the petitioner complained of cervical pain was on March 29, 2007 to Dr. Goldflies (PX6) This was nearly two years following the work injury. At that time, an EMG was recommended. This was performed on April 27, 2007 and was essentially normal with mild irritability present in the C5-6 paravertebral muscle.

The petitioner was first seen by Dr. Kiokemeister on June 9, 2010. (PX 3) The treatment notes of that day indicate that the petitioner reported pain in his neck since May 2005. This is in direct contradiction to the medical records of Dr. Goldflies as well as the petitioner's testimony at the hearing in 2015. At that time, it was recommended that the petitioner undergo a CT scan of his neck due to diagnosis of cervical degenerative disk disease and cervical spinal stenosis. According to Dr. Kiokemeister's November 3, 2010 note, the CT scan revealed degenerative changes at C5-7 and "borderline spinal stenosis at the level of C6-7." (PX 3) The petitioner has continued to see Dr. Kiokemeister on a regular basis, through at least 2015, wherein the doctor prescribes medications. It must be noted that nearly every single report by Dr. Kiokemeister indicates that the petitioner is "alert, oriented, and cooperative with the interview" throughout the petitioner's five years of treatment with him. There are no opinions regarding causation in Dr. Kiokemeister's medical records, nor are there any opinions with regard to the petitioner's ability to return to work throughout the records. (PX 3)

On September 23, 2010, the petitioner was seen by Dr. Mirkovic for a medical evaluation pursuant to Section 12 of the Act, at the request of the Respondent. (RX 6) Dr. Mirkovic indicated that causation as relates to the petitioner's cervical spine condition is based on the credibility of the medical records versus the credibility of the petitioner. He stated that if the medical records are to be believed, then there is no causal relationship between the accident and the petitioner's cervical spine condition. Dr. Mirkovic also suggested a functional capacity evaluation would be appropriate to determine the petitioner's capabilities. (RX 6)

The petitioner was scheduled for a second Section 12 medical examination with Dr. Mirkovic on February 7, 2012. (RX 7) Dr. Mirkovic indicated the petitioner does not need any further treatment for his cervical spine as the petitioner has denied further epidural steroid injections or surgical treatment. He indicated that the petitioner has reached MMI for his cervical condition and can return to work at a sedentary level with occasional lifting of 10 to 15 pounds. These restrictions were recommended pending a formal functional capacity evaluation.

The petitioner underwent a functional capacity evaluation at Doctors of Physical Therapy on May 8, 2012. (RX 9) The testing was found to be valid, and placed the petitioner at the sedentary level of work, with no lifting greater than 10 lbs. The petitioner stated that he had countless other physical conditions between 2008 (the original FCE putting him at the medium to medium-heavy level of work) and 2012 which would cause him to have a worse outcome for the 2012 FCE. (TX 75) To that end, the petitioner testified:

Q: Was there any other physical conditions that might have caused you to perform more poorly [on the FCE] in 2012 than in 2008?

A: Probably countless numbers of them.

Q: Like what?

A: I don't know. (TX 74-5)

On February 13, 2013, Dr. Goldflies authored a report indicating that the petitioner was offered a position as a night watchman. It was indicated that in May of 2012 the petitioner underwent an FCE and the petitioner's ability to perform the job of night watchman should be guided by the FCE based on the ability to perform sedentary work. (PX 6)

At trial, the petitioner did not testify as to how he was currently feeling with respect to his neck, nor what activities of daily living or other activities might or could have been affected by this alleged injury.

Psychological Treatment

Prior to the work accident in 2005, the petitioner had treated for depression, anxiety and panic attacks. According to the records of Dr. Nora, the first note where the petitioner complained about depression was dated on June 27, 2001. (PX 7) On August 29, 2004, Dr. Nora authored a note indicating that the petitioner suffered from anxiety disorder, and that with job related stress, his health was deteriorating both mentally and physically. Later, on August 31, 2004, it was indicated that the petitioner was "getting fearful of leaving the house." It indicates that day that the petitioner is developing panic attacks and anxiety. (PX 7)

There was no psychological treatment, evaluations or other related complaints for many years following the injury. The petitioner reached MMI for his left arm injury on April 11, 2008 and was released to work with restrictions of no lifting greater than 55 lbs. These restrictions did not allow the petitioner to return to his regular job for the City of Chicago. It was not until the petitioner completed his shoulder treatment and began vocational rehabilitation efforts that he began having psychological complaints since 2004.

According to the medical records from Dr. Clark (PX 4), the petitioner was first seen by her on August 12, 2008. This was the first time since the accident (over three years) that the petitioner was seen by a psychologist or mental health professional. At that time, the petitioner and his wife presented for marital therapy. The petitioner complained almost exclusively of health issues relating to his heart. Later, in December of 2008, the petitioner discussed his hopelessness that his disability will heal or that he will be able to return to work. The petitioner testified that he began treatment with Dr. Clark in 2008. At that time, the petitioner testified that he exaggerated his condition to Dr. Clark. (TX 58)

The petitioner then came to see Dr. Krupica, who works at the same practice as Dr. Clark, and treatment began on August 16, 2010. At that time, the petitioner told Dr. Krupica that he "did not suffer from depression/anxiety . . . before an accident at work in May of 2005." (PX 2) This is in direct contradiction to the medical records of Dr. Nora which indicated the petitioner was indeed treating for depression and anxiety and panic disorders prior to his work accident (PX 7). Dr. Kurpica's medical records do not seem to document all of her treatment for the petitioner as there are only a few reports contained in the subpoenaed records. Dr. Krupica testified that she did not review any medical records regarding the petitioner's treatment prior to her treatment, and she was not aware of any psychological treatment prior to the work accident in 2005. (PX 1, p. 46)

Dr. Krupica authored a letter dated November 2, 2011 indicating that prior to the accident of May 2005, the petitioner did not have any psychological problems, however, following the accident, the petitioner has been diagnosed with depression, anxiety disorder, and has indicated that the petitioner cannot return to work *"for the foreseeable future."* It is indicated throughout the psychological records that the petitioner does not believe that he can lift greater than 5 pounds. (PX 7)

Dr. Krupica testified that she did not think that the petitioner could drive due to his medications, however admitted that she is not a medical doctor, nor does she prescribe medications. (TX 97) Dr. Krupica also testified that she believed the petitioner was slow, unfocused and his cognitive functioning was impaired. (PX1, p. 20)

Dr. Krupica reviewed the MMPI testing that Dr. Ganellen performed and indicated that Dr. Ganellen's interpretation was contrary to the MMPI manual in interpreting the results. (PX 1, p. 22) She further testified that "I cannot think of an instance where he would be employable right now given the level of depression and medication he is on." (PX 1, p. 33) However, in Dr. Nora's medical records (PX 7), there is an email written from Dr. Krupica dated 2/23/13 asking about the job offer that was made to the petitioner by the Department of Water (RX 10). There is no indication in her email that the petitioner should not work or should not respond to the job offer. This is in direct contradiction to her testimony where she indicated that she would not recommend the petitioner return to work at this time (PX 1, p. 33).

The petitioner treated with Dr. Florence, a psychiatrist, from September of 2010 through the present. (PX 5) While Dr. Florence's records demonstrate the petitioner's diagnosis of anxiety and depression, and chronicle the petitioner's medications, there is no indication as to a causal relationship opinion, nor is there any indication that the petitioner should remain off work due to a psychological condition.

The petitioner was seen by Dr. Ganellen for a neuropsychological evaluation on May 4, 2012. (RX 1) Dr. Ganellen testified that he reviewed the medical records, and also discussed with the petitioner his prior treatment. The petitioner told Dr. Ganellen that, "he had been

treated for anxiety and stress before he was injured in 2005 because of the pressures related to his job for the City." (RX 1, p. 16) Dr. Ganellen continued in his testimony that when he questioned the petitioner about when he first became depressed, the petitioner told him that it was when he was laid off by the City during the winter before his 2005 work accident. (RX 1, p. 16)

Dr. Ganellen also testified as to his thoughts regarding the petitioner manipulating the results of the objective testing that was provided to him. Regarding the WAIS test, Dr. Ganellen indicated that the petitioner's level of intellectual functioning was lower than expected, and that, "there is no reason to think, for instance, that an injury to a person's neck or arm or pain related to an injury of that nature would cause lowering of scores on intellectual functioning." (RX 2, p.30)

Dr. Ganellen testified in response to Dr. Krupica's allegations, that he did not interpret the clinical scales of the MMPI test. He stated that he reviewed the validity scales, and found them to be outside of the acceptable levels. As such, he could not interpret the MMPI clinical scale results. He testified that the petitioner was:

> motivated or invested in trying to convince me, through the tests, that he was disabled. I mean, the very poor scores on the memory tests, the lower-than-expected scores on the other cognitive tests, intellectual functioning, as well as the MMPI-2, all indicate a deliberate exaggeration of difficulties in his psychological function. So what that indicates is that his motivation was to prove that he is disabled. (RX 1, p. 44-5)

Indeed, Dr. Ganellen further opined that, "it seems clear he's motivated, as I said before, to try to demonstrate that he can't work." (RX 1, p. 49) He testified that it would be beneficial for the petitioner to return to work, and it would be positive for the petitioner psychologically. (RX 1, p. 50) Indeed, the petitioner testified that he does feel somewhat better when performing volunteer work (TX 73)

Dr. Ganellen testified that he has extensive expertise regarding MMPI testing, stating that he has taught the test to Ph.D. Psychology interns at Michael Reese Hospital from 1987-1995, and at Northwestern for about 5 years. He also had testified regarding several publications he had written on the subject of malingering and detection of same using the MMPI test, and he is the President of the Society for Personality Assessment. (RX 1, p. 53-4)

Dr. Ganellen testified that the petitioner's psychological condition existed in spite of the work injury, indicating that the petitioner was troubled by anxiety, stress and depression both before and after the 2005 injury. (RX 1, p. 43) He did state, however, that the inability to work and chronic pain could exacerbate the petitioner's depression. (RX 1, p. 76)

Contrary to the opinions of Dr. Krupica, Dr. Ganellen stated that:

> he did not appear drowsy, he was not sedated, he was not slowed down, he responded appropriately in terms of, you know, his pace of responding, he spoke clearly, he expressed a great deal of emotion in terms of his, particularly, anger and resentment at the city. There was no indication that there was anything that affected his presentation during the two-and-a-half-hour clinical interview, and he did not appear to be sedated during the time that I saw him and administered the tests." (RX 1, p. 47)

Similarly, this Arbitrator was able to observe the petitioner during two mornings of testimony, and agrees with Dr. Ganellen in his opinion that the petitioner was not sedated or slowed down. The petitioner responded to all questions clearly and appropriately, though did express a considerable level of resentment towards his employer.

Dr. Tuder, a board certified psychiatrist, a medical doctor, was also able to examine the petitioner on February 24, 2012. He testified that he performed a psychiatric evaluation of the petitioner, but deferred to Dr. Ganellen for the neuropsychological testing, as that was not his area of expertise. He explained that the petitioner was complaining of cognitive difficulties, but there was very little evidence of that in his clinical interview, and wished to obtain a more objective assessment through neuropsychological testing. Dr. Tuder stated that the petitioner was exaggerating his psychological symptoms based on the testing performed by Dr. Ganellen. (RX 2, p. 19) Dr. Tuder also stated that the petitioner's psychological condition was causally related to the accident because the pain that he was living with due to the physical injury was impacting him psychologically.

Dr. Tuder did indicate, however, that once the petitioner's litigation was resolved, that he would most likely see a marked improvement in his symptoms, and the need for psychological counseling related to the work injury would cease. He indicated that he may need further counseling due to personal or family issues, but he indicated that once the litigation is settled or resolved, that he would no longer need counseling as a result of the work injury. (RX 2, p. 22)

Dr. Tuder further testified that the petitioner could return to work from a psychological standpoint. He stated that returning to work would unquestionably improve the petitioner's psychological condition. (RX 2, p. 22-23)

Job Search

The petitioner began vocational rehabilitation through Vocamotive on November 18, 2008, following the petitioner's release from treatment and FCE for his left arm condition. (RX 12) At that time, an initial vocational interview was performed. According to the Vocamotive report, it was indicated that it is not appropriate to find that the petitioner is permanently and totally disabled. It indicated that the petitioner is employable in a range of occupations consistent with sedentary duty activities all the way through medium/heavy duties (which was appropriate based on the FCE that was recently performed in 2008). The initial report indicated

that the petitioner could be employed earning anywhere from $9.00 hourly to $16.00 hourly. A rehabilitation plan was submitted by Joseph Belmonte on Janaury 23, 2009 based on his initial assessment. Vocational testing was undertaken on March 26, 2009 by Jim Boyd at Vocamotive, and several jobs were outlined in the report based on the petitioner's testing and capabilities. (RX 12)

The petitioner stated that he was compliant with the demands of vocational rehabilitation. He stated that he attended "most" of the vocational rehabilitation meetings that were scheduled for him. (TX 63) According to the Vocamotive records, however, the petitioner was not compliant with the training required. Indeed, the vocational report dated April 1, 2009 indicated that between March 1, 2009 and April 1, 2009, the petitioner had missed 7 out of 10 appointments and left early from one appointment. He did not call in keyboarding scores as he was required to do. He did not progress in computer training. (RX 12)

According to the July 27, 2009 Vocamotive report, the vocational experts opined that that the petitioner was employable, but he was not complying with the vocational rehabilitation program, including participating in only 33% of the meetings and failing to progress in computer training, and that vocational rehabilitation was being terminated based on same. The attached labor market survey indicated that the petitioner could earn approximately $11.00 per hour. (RX 12)

The petitioner testified that he then began looking for work, and believed that he could do a job between 2010-2013. (TX 72-3) The petitioner also testified that he did volunteer work between 2011 and 2015 which made him feel better. (TX 73)

On October 11, 2012, a letter was sent to the petitioner from the Department of Water management offering him a position as a watchman. (RX 10) Ashley Pak testified credibly that she prepared and signed the letter and placed it in the US Mail. (TX2 9-10) The petitioner testified that he did not receive the letter and therefore did not appear for the job. When the Committee on Finance realized that the petitioner had not reported for a light duty job offer that was made to him, maintenance benefits were suspended as of February 8, 2013 according to respondent's exhibit 5.

The petitioner testified that he never received the October 11, 2012 letter from the Department of Water, however when he found out about the job, he went to the Department to see if he could still apply, however the position was already filled (TX 66). The petitioner testified that he was willing and able to try the job. (TX 67) When asked if he was offered a watchman job at the time of trial, if he would try it, the petitioner testified that he would. (TX 75)

Procedural History

This matter was specially set for hearing on June 6, 2013. At that time, a pre-trial with Arbitrator O'Malley took place. The petitioner's benefits were previously reinstated to "wage differential benefits" based on the petitioner's representation that he would be willing and able to perform the job previously offered in the letter of October 11, 2012. According to the "differential" payment ledger, benefits began on April 15, 2013. (RX 4) Shortly thereafter, the petitioner's representation by Mr. Spingola was terminated by the petitioner, and the petitioner retained the services of Mr. Candiano. The petitioner testified that since he hired Mr. Candiano, no 19(b) petitions for immediate hearing were filed, and nothing was done on his case for a year. (TX 72)

The respondent then filed a motion to dismiss on December 16, 2014 for the March 24, 2014 status call before Arbitrator Luskin due to the petitioner's failure to move the matter forward to a hearing for a year. (RX 11) The matter was set for trial on April 9, 2014 and was then again specially set for trial on June 11, 2014 because the petitioner's attorney requested additional time to set depositions in the case. At that time, the petitioner stated that it was his understanding that in order to have his benefits changed, he would need to proceed to trial. (TX 71) Eventually, the petitioner did schedule the deposition of Dr. Krupica which took place on August 18, 2014. Subsequently. the depositions of Drs. Ganellan and Tuder took place on December 18, 2014, and March 6, 2015, respectively.

The matter was dismissed on August 7, 2015. Even though five months had passed since the depositions were completed in this case, the petitioner still did not take steps to prosecute his claim. Eventually, the matter did finally proceed to trial on December 1, 2015.

CONCLUSIONS OF LAW

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

There are three separate injuries claimed in this case, the left arm, the cervical spine and a psychological condition. Each will be addressed separately.

Left Arm

Regarding the petitioner's left arm, this Commission has already concluded that the petitioner's condition was causally related to the work accident of May 31, 2005. The petitioner underwent a conservative course of treatment and underwent a functional capacity evaluation on April 9, 2008 which showed that he could return to work at the medium to medium-heavy level. (RX 13) It must be noted that the petitioner did not testify as to how his left arm currently feels, and whether he feels as though he has any current deficits as relates to that body part. The

respondent has not provided any evidence that the petitioner's condition as relates to his left arm only is not causally related to the original accident. Therefore, in keeping with the prior findings of this Commission, the Arbitrator finds that the petitioner's condition as relates to his left arm, is causally related to the accident.

Cervical Spine

Regarding the petitioner's cervical spine condition, the Arbitrator finds that this condition is not causally related to the accident of May 31, 2005. In support of this finding, the Arbitrator relies on the following facts:

First, a hearing was previously had before Arbitrator Galicia in this case on May 12, 2006. According to Aribtrator Galicia's Decision, there was no mention of any issues regarding the petitioner's cervical spine condition. (PX 12) The decision indicates that the petitioner had complaints of left forearm pain only that might or could have been related to a metal plate that was placed there previously. The arbitrator found that the petitioner's condition relating to his left arm was causally related to the work accident; however there was no mention of any pain or treatment relating to the cervical spine at that time. Further, the petitioner testified that he told the truth about how he was feeling during that hearing. (TX 51)

Second, while there is an opinion in the record indicating that the petitioner's cervical spine condition is causally related to the original accident date of May 31, 2005 (Dr. Goldflies), this opinion is without credibility. There is no evidence that the petitioner treated or had any complaints regarding his cervical spine for two years following the injury. There is no indication that the cervical issues are a sequelae of the petitioner's left forearm complaints. Finally, Dr. Mirkovic indicated that based on a review of the medical records, that the petitioner's condition relating to his cervical spine is not related to the accident because the petitioner had no complaints regarding his cervical spine for two years following the accident. (RX 7) While Dr. Mirkovic indicates that if the petitioner's story is to be believed then causal relationship may be made, it is clear in the medical records that there were no cervical complaints for two years. Further, the petitioner did not testify or ask this Commission for benefits as related to his cervical spine during his testimony approximately one year following the accident. (PX 12) Based on a review of the medical records as well was the prior decision rendered in this case, the Arbitrator finds the petitioner's version of the history regarding his cervical complaints dating back to May 31, 2005 to be not-credible.

Therefore, in light of the fact that there were no complaints or treatment to the petitioner's cervical spine for two years following the injury, the Arbitrator finds that the petitioner's condition as relates to his cervical spine is not causally related to the May 31, 2005 accident.

Psychological Condition

The arbitrator finds that the petitioner's psychological condition is, in part, causally related to the injury of May 31, 2005, and characterizes the condition to be a temporary aggravation of a pre-existing condition, which should resolve or improve with the conclusion of this litigation. In support of this finding, the Arbitrator relies on the following facts:

The medical records from Dr. Nora clearly show that the petitioner had a pre-existing psychological condition before the May 31, 2005 accident. (PX 7) The petitioner was noted to have depression, anxiety, fear of leaving the house and panic attacks. It should be noted that the petitioner did not reveal this prior condition to any of his physicians, and specifically reported to Dr. Krupica that he did not suffer from any psychological problems prior to the accident. (PX 1, 2) Following the accident, the petitioner did not undergo any psychological treatment or evaluations until 2008 when the petitioner was evaluated by Dr. Clark, primarily for marital problems. (PX 4) The petitioner did not begin any psychological treatment until he was determined to be at MMI for his left arm condition, and around the same time that vocational rehabilitation was to begin.

There are three opinions in the record as far as whether or not the petitioner's condition of ill-being with regard to his mental state is causally related to the accident. It appears as though there is basic agreement between Drs. Krupica, Ganellen and Tuder that the work injury did, at least, contribute to his symptoms of anxiety and depression. Both Drs. Ganellen and Tuder indicate that the petitioner had a pre-existing psychological condition, namely depression and anxiety, for which he was treating prior to the work injury. (RX 1, 2) They both indicate that the petitioner's work injury, namely, the inability to return to his prior job and provide for his family, aggravated his pre-existing condition. While Dr. Krupica did not have the benefit of reviewing the petitioner's prior records, she opined that the petitioner's ongoing psychological condition is causally related to the accident. (PX 1)

The arbitrator finds the opinions of Drs. Ganellen and Tuder to be the more persuasive and credible opinions contained in the record with regard to the petitioner's psychological condition. The reasons they are more credible are, first, Drs. Ganellen and Tuder were aware of the petitioner's pre-existing psychological condition and were more prepared to render an opinion regarding causation based on same. (PX 1, 2)

Second, Drs. Ganellen and Tuder are more qualified practitioners. Namely, Dr. Ganellen has an extensive resume regarding his expertise in personality assessment and neuropsychology and a significant history of publications and teaching on the subject. (RX 1) Dr. Tuder is a board certified psychiatrist and medical doctor who is qualified to discuss not only the petitioner's psychological condition, but also his medications and how they affect him. (RX 2) Dr. Krupica offered a 2-page curriculum vitae which indicates that she is simply in private practice with no teaching experience, publications, or any specific or special expertise in personality assessment or behavioral therapy. (PX 1)

Third, Dr. Krupica attempted to discredit Dr. Ganellen's findings and administration of the MMPI test, among other tests administered to the petitioner, however it is clear by Dr. Ganellen's testimony that it is Dr. Krupica who misunderstood the findings, and accused an expert in MMPI testing of failing to follow interpretation protocol. (RX 1, PX 1)

Finally, while it is clear that Dr. Krupica has treated the petitioner for quite some time, the arbitrator cannot place any credibility on her testimony regarding the petitioner's abilities in light of the fact that her descriptions of the petitioner being slow, cognitively impaired and lethargic, do not correlate to any other finding in any other medical record, or the petitioner's demeanor at trial. (PX 1) Dr. Kiokemeister indicated that during every single one of his visits, the petitioner was alert, oriented and cooperative. (PX 3) Drs. Ganellen and Tuder indicated that the petitioner was alert and cooperative and participated in their examinations willingly and sometimes energetically. (RX 1, 2) At trial, the petitioner underwent several hours of direct and cross examination alertly, and answered questions clearly and animatedly.

While there is general agreement between the physicians regarding causation of the petitioner's psychological condition, where the practitioners differ is the nature and extent of the disability, which will be addressed later.

Therefore, based on the totality of the records, and the credible opinions of Drs. Ganellen and Tuder, the arbitrator finds that the petitioner sustained a temporary aggravation of a pre-existing condition of anxiety and depression.

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

The arbitrator finds that the treatment rendered to the petitioner regarding his left arm and psychological condition were reasonable and necessary, but that the treatment to the petitioner's cervical spine is unrelated to the accident, and therefore, not reasonable or necessary.

The petitioner submitted medical bills from Dr. Kiokemeister totaling $486.93. Due to the fact that Dr. Kiokemeister only treated the petitioner for the cervical spine, these medical bills are not awarded.

The petitioner submitted medical bills from Dr. Goldflies totaling $69.74. This appears to correlate to the petitioner's final visit with Dr. Goldflies wherein the doctor indicated that the petitioner can return to work within the FCE restrictions. As such, Medical bills in the amount of $69.74 are awarded pursuant to the Illinois Fee Schedule.

The petitioner also claimed out of pocket medical payments, but did not specify an amount, or to which physician these payments were made. As such, the petitioner has failed to prove by any evidence whatsoever, that any amount is due to him for out of pocket expenses.

WITH RESPECT TO ISSUE K, WHAT TEMPORARY BENEFITS ARE OWED, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that the petitioner is entitled to temporary total disability benefits from June 1, 2005 through the FCE date for the petitioner's physical condition for his left arm of April 9, 2008 a period of 148 1/7 weeks at the rate of $746.63 per week. The petitioner then began a period of vocational rehabilitation, and performed a self-directed job search after vocational rehabilitation had been terminated, and therefore is awarded maintenance benefits from April 10, 2008 through October 11, 2012, the date the City of Chicago sent a letter offering a job as a watchman for the Department of Water. (RX 10) The petitioner claims he did not receive the letter, but if he did, he would accept the job. As such, maintenance benefits are awarded through the date of the job offer of October 11, 2012. The maintenance period is a total of 235 1/7 weeks, awarded at the rate of $746.63 per week.

The record shows that the respondent paid $149,329.76 in TTD benefits and $150,377.27 in maintenance benefits. Respondent shall receive a credit against the above award for temporary benefits for all amounts paid.

No further temporary benefits are awarded. In support of the arbitrator's decision regarding temporary benefits, the Arbitrator relies on the following facts:

With respect to temporary total disability benefits, these benefits are awarded to persons who are temporarily and totally disabled from performing their job. In this case, the petitioner was temporarily and totally disabled beginning on the date of accident. Those benefits were previously awarded by Arbitrator Galicia, and the Arbitrator reiterates the award for purposes of completeness and consistency. The petitioner then completed treatment for his left arm and was placed at MMI for same on April 9, 2008 pursuant to an FCE. (RX 13)

The FCE showed the petitioner could not return to work at his regular position as a cement mixer, and vocational rehabilitation began at that time. As such, because the petitioner was no longer temporarily and totally disabled, but engaged in a vocational rehabilitation program, he was then entitled to maintenance beginning on April 10, 2008. While the petitioner did begin psychological treatment around that same time, there is no indication in the medical records that he should have been precluded from looking for work or working at all. Vocational rehabilitation was terminated on July 27, 2009, but the petitioner did continue a self-directed job search from June 9, 2010 to June 20, 2013, which would also entitle him to maintenance benefits. (PX 9)

During the time of the petitioner's job search, a job offer was mailed to him by Ashley Pak of the City of Chicago Water Department indicating that a position of watchman was being offered to the petitioner. (RX 10) Ms. Pak testified credibly that she wrote the job offer letter herself, signed the letter, placed it in an envelope, added postage, and placed the letter in the US Mail. (TX2 9-10) The petitioner claims that he never received the letter, however he also testified that he had no problems with his mail in October of 2012. (TX 65) Whether or not the petitioner received the letter or not, the petitioner testified that he would have accepted the job. (TX 67) He further testified that if he was offered the job today, he would attempt the job. (TX 75) He testified that he is willing to work, and that he has performed some volunteer work which does make him feel better. (TX 73) As such, the petitioner's maintenance benefits are awarded through the date of the job offer by the City of Chicago.

WITH RESPECT TO ISSUE L, WHAT IS THE NATURE AND EXTENT OF THE PETITIONER'S INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that the petitioner is entitled to benefits in the amount of 40% loss of use of a man as a whole pursuant to Section 8(d)(2) because the petitioner suffered a loss of occupation. In support of the decision, the arbitrator relies on the following facts:

It does not appear as though there is a dispute as to the fact that the petitioner cannot return to work as a cement mixer for the City of Chicago. Multiple functional capacity evaluations note that the petitioner's capabilities fall short of the heavy level of his previous job. (RX 9, 13) In light of same, the respondent initiated vocational rehabilitation for the petitioner. Further, it is clear that the petitioner can return to work in some capacity as regards his left arm condition, though it must be noted that the petitioner did not testify as to how he is currently feeling with regard to his left arm. No information was provided by the Petitioner as to what activities he can or cannot do currently, or how his arm affects his ability to perform his activities of daily living. There is a question as to the nature and extent of how much his psychological condition has disabled the petitioner. As such, the question of fact left to be determined is whether the petitioner is entitled to benefits pursuant to Section 8(d)(2) for a job change or loss of occupation, wage differential benefits pursuant to Section 8(d)(1), or permanent total disability benefits.

First, the petitioner has failed to prove by a preponderance of the evidence that he is permanently and totally disabled, either medically or pursuant to the odd-lot theory. The petitioner is not permanently and totally disabled medically. Every psychological practitioner in this case has indicated that the petitioner would benefit significantly from returning to work. The petitioner himself testified that he is willing and able to return to work at this time, and indicated that he would accept a job with the City of Chicago if one were offered to him. Clearly, the petitioner does not believe himself to be totally disabled from working. Only Dr. Krupica has advised that the petitioner should not return to work, however her opinion holds little to no credibility on the subject. First, Dr. Krupica admitted that returning to work may benefit the

petitioner. (PX 1, p. 33) Second, she did not advise the petitioner to not accept a job offer when it was presented in her email of February 23, 2013. (PX 7) Finally, Dr. Krupica seems to rely on the petitioner's lethargic and sloppy presentation to her and the number of medications he is on in coming to her conclusion that he should not work, however every other physican has indicated that the petitioner is actually alert, oriented and cooperative, and appeared to be so during his testimony as well, not to mention the fact that Dr. Krupica is not qualified to make assessments regarding the petitioner's medications and their effects since she is not a licensed physician.

The petitioner is not permanently and totally disabled based on the odd-lot theory. In order to prove entitlement to benefits based on this theory, the petitioner must show a diligent but unsuccessful job search, or show that due to his age, experience and education, he could not find work in a reasonably stable labor market. There is no vocational testimony or opinion in the record that the petitioner cannot find work due to his age, experience or education. Indeed, Vocamotive identified many jobs in stable labor markets for the petitioner, even during a recession. (RX 12) There is also no evidence of a diligent but unsuccessful job search. While the petitioner submitted several years' worth of job search logs, there is no vocational opinion indicating that his search was diligent. According to the job logs, the petitioner phoned an average of 4-6 businesses per week, and it appears as though the vast majority of those businesses were not hiring. There is very little, if any, evidence that the petitioner made any in-person contacts with employers who were actually hiring, or filled out any job applications or submitted any resumes to any potential employers. Despite the minimal attempts at a job search the petitioner's job search was successful, in that he was offered employment by the City of Chicago on October 11, 2012. (RX 10) This is a job offer that the petitioner allegedly did not receive on time, however the petitioner has very clearly testified that he is ready, willing and able to work, and would accept the job if it were offered to him today. The petitioner's testimony clearly demonstrated that even he does not feel as though he is permanently and totally disabled. As such, both theories as relates to permanent and total disability fail.

Next, the petitioner failed to prove by a preponderance of the evidence that he would be entitled to wage differential benefits pursuant to Section 8(d)(1) of the Illinois Workers' Compensation Act. First, there was no credible evidence submitted indicating what the petitioner would be earning if he was currently working his former job as a cement mixer in order to base a wage differential award. Second, while the Vocamotive reports did show some impairment of wage earning capacity, the reports are dated in 2009, which was during a recession suffered by this country. There is no current evidence showing what wages the petitioner might or could be earning in the labor markets outlined by Vocamotive. The petitioner did not agree with counsel for respondent as to the wages he might have been earning in the position as a watchman for the City of Chicago, stating that he did not know what that position paid. (TX 68) As such, there is no numerical or even theoretical basis upon which the arbitrator can award wage differential benefits.

Finally, the petitioner did prove that he is entitled to benefits pursuant to Section 8(d)(2) of the Illinois Workers' Compensation Act, due to a loss of trade or occupation. It is not disputed that the petitioner cannot return to his regular job for the City of Chicago based on his physical capabilities. As such, an award of 40% loss of use of a man as a whole is appropriate.

Therefore, the arbitrator finds that the petitioner is entitled to an award of 200 weeks of compensation based on the PPD rate of $567.87, the maximum PPD for the injury date, because the petitioner sustained a loss of 40% loss of use of a man as a whole due to a loss of occupation pursuant to Section 8(d)(2) of the Illinois Workers' Compensation Act.

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

The respondent claims it paid $149,329.76 in TTD benefits. The petitioner agreed to the amount paid. As such, the respondent is awarded a credit of $149,329.76 for TTD benefits paid.

The respondent claims it paid $150,377.27 in maintenance benefits. The petitioner agreed to the amount paid. As such, the respondent is awarded a credit for $150,377.27 for maintenance benefits paid.

The respondent claims it paid $57,930.48 in wage differential benefit payments. The petitioner agreed to the amount, however disputed the characterization of the payment made as wage differential payments. According to the payment screens submitted by respondent, it does appear as though $57,930.48 was paid as a "differential" according to the log. While it is true that the petitioner has not proven up any entitlement to wage differential benefits, it appears as though the respondent was paying the petitioner a monthly disputed amount due to the fact that the issues in the case had not been resolved, and rather than paying zero benefits, paid an amount that would theoretically be commensurate with a wage differential between what the petitioner might have been earning as a cement mixer, versus the amount he would have been paid if he was working as a watchman for the City of Chicago. Whether or not this was a proper characterization of benefits paid to the petitioner, a benefit amount commensurate with assumed permanency was paid to the petitioner in the amount of $57,930.48, and the respondent is awarded this credit which may be applied against the TTD, Maintenance or Permanency award made in this case.

The respondent has continued to pay the petitioner "differential" benefits since the date of the December 1, 2015 trial. Respondent shall be due a credit for all benefits paid. Between December 1, 2015 and February 10, 2016, an additional $5,508.01 has been paid. This amount has been stipulated to on the record by counsel by petitioner.

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

The petitioner's petition for penalties and fees is denied. In support of this decision, the Arbitrator relies on the following facts:

First, the Arbitrator's award for TTD benefits totals $110,607.90. The respondent paid TTD in the amount of $149,329.76 through March 31, 2009, even later than the petitioner's MMI date. There is no evidence in the record that these benefits were delayed or unpaid in any way, and the respondent's payment log shows consistent payments being made throughout the petitioner's period of temporary total incapacity.

Second, the Arbitrator's award for Maintenance totals $175,564.71. The respondent paid maintenance benefits totaling $150,377.27, through February 8, 2013, longer than the maintenance award. The respondent also overpaid or mischaracterized the TTD payments made, so taking the balance of TTD added to the maintenance payments made, the total paid to the petitioner during the awarded maintenance period is $189,099.13. The petitioner testified that some of the payments were late, however was unable to testify as to how late they were, and how many payments were made on an untimely basis. The respondent's maintenance log shows ongoing consistent payments made for maintenance benefits.

Finally, the petitioner claims that penalties should be awarded because the respondent reduced the petitioner's rate to a "wage differential" rate in February of 2013. The petitioner's penalties petition in this regard is without merit. First, the petitioner effectively refused a job offer made in October of 2012. This is enough for the respondent to have terminated benefits as of that date, and the arbitrator has awarded benefits consistent with this theory.

Next, the petitioner claims that the respondent failed to pay benefits in violation of Arbitrator Galicia's decision. The decision awarded TTD benefits to the petitioner from 6-1-2005 through 5-12-2006. There is no evidence that the respondent failed to pay the arbitrator's award. Further, it appears as though there have been significant delays in moving this matter to trial can reasonably be attributed to petitioner. The petitioner testified that he did not file a single 19(b) request for hearing since his hiring of Mr. Candiano. (TX 72) In fact, the respondent had filed a motion to dismiss in March of 2014 because nothing had been done on the case since Mr. Candiano was hired to represent the petitioner almost a year earlier. (RX 11) Respondent represented to this court in its response to the petitioner's petition for penalties that it relied upon the petitioner's representations that he would work as a watchman for the City of Chicago, and that the petitioner was aware that he needed to proceed to trial in order to change his benefits. It appears as though respondent paid the petitioner "wage differential" benefits in good faith based on the petitioner's representations as well as Arbitrator O'Malley's recommendations. The petitioner did not, in the period of time between October 11, 2012 and December 1, 2015, provide any medical records or off-work slips or job logs to the respondent which indicated a need that TTD or maintenance should have been paid, nor did the petitioner file any petitions for hearing pursuant to Section 19(b), nor did the petitioner proceed to hearing at any time when this

matter appeared for trial in those many years because it is above the line. In fact, the petitioner's petition for penalties was only filed on the day of the December 1, 2015 hearing.

In light of the arbitrator's findings that the petitioner's benefits should have terminated on October 11, 2012, that the respondent continued to pay the petitioner was above and beyond what was required by the law. Further, since the petitioner made no effort to prove up benefits at any point between October 2012 and December of 2015, the respondent could have been paying zero benefits during this period of time without penalty.

Therefore, in light of the above facts, the petitioner's request for penalties and fees is hereby denied.

FEE PETITION

Mr.Spingola presented evidence that he represented the Petitioner in this matter until his motion to withdraw on April 12, 2013. Prior to that time he expended an exorbitant amount of money on medical records. He did not provide those records to the Petitioner when he withdrew as counsel, nor did he transfer the records to the new attorney, Mr. Candiano, when he filed his appearance. Mr. Candiano then obtained copies of the medical records from the providers. Since the Petitioner is going to be charged for two sets of the same medical records they shall be billed at Mr. Candiano's cost for both the attorneys.

Mr. Spingola did represent the Petitioner successfully at a hearing pursuant to §19b in May of 2006, which obtained benefits for the Petitioner. Not much happened on the file after that until the case was dismissed and then was reinstated. Once Mr. Candiano entered the case it was prepared to move forward to trial which included taking depositions of the doctors and the usual preparations. Mr. Candiano represented the Petitioner at the depositions as well as at the trial.

Based upon the evidence and the arguments of counsel the Arbitrator finds that the fee should be portioned with 1/3 going to Mr. Spingola and the remaining 2/3 to Mr. Candiano. Petitioner shall reimburse Mr. Candiano for the costs of obtaining the medical records and shall reimburse Mr. Spingola an equal amount for the medical records he obtained. Mr. Candiano is entitled to re-imbursement for any other costs associated with preparing the case for hearing on the Petition for adjudication of benefits as well.

ORDER OF THE ARBITRATOR

The petitioner's condition as relates to his left arm and psychological condition are causally related to the accident.

The respondent shall pay $69.74 in outstanding medical bills (Dr. Goldflies).

The respondent shall pay TTD in the amount of $746.63 per week for a period of 148 1/7 weeks from June 1, 2005 through April 9, 2008.

The respondent shall pay maintenance benefits in the amount of $746.63 per week for a period of 235 1/7 weeks from April 10, 2008 through October 11, 2012.

The respondent shall pay permanent partial disability benefits in the amount of $567.87 for a period of 200 weeks because the injuries sustained resulted in a loss of 40% loss of use of a man as a whole pursuant to Section 8(d)(2) for a loss of trade/occupation.

The petitioner's petition for penalties is denied.

Fee Petition:

The fee should be portioned with 1/3 going to Mr. Spingola and the remaining 2/3 to Mr. Candiano.

Petitioner shall reimburse Mr. Candiano for the costs of obtaining the medical records and shall reimburse Mr. Spingola an equal amount for the medical records he obtained.

Mr. Candiano is entitled to re-imbursement for any other costs associated with preparing the case for hearing on the Petition for adjudication of benefits as well.

Deborah L. Simpson

Signature of Arbitrator

February 22, 2017
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF LaSALLE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LONNNIE KENT,

Petitioner,

18IWCC0634

vs.

NO: 14 WC 10185

CITY OF MENDOTA,

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 jurisdiction, notice, causation, temporary total disability, and permanent partial disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Findings of Fact & Conclusions of Law

1. Petitioner testified he was 53 years old, retired, and he worked as a police officer for Respondent 26 years full-time and thereafter two years part time. He began working for Respondent as a patrol officer. His duties consisted of patrolling the streets, answering calls, answering ambulance calls, making traffic stops, and running radar. Most of the time he was riding in a marked squad car. Four to six hours of his eight-hour day was riding in the squad car.

2. While he was driving with his right hand, his left arm was resting on the edge of the window. While he was driving with the left hand, his right arm was resting on the console. While resting on the console, his arm would be bent at a 90-degree angle. He was promoted to Lieutenant. However, his job still entailed riding in the squad car.

3. Petitioner explained that the radar gun weighed about eight pounds and he would hold it with both hands at shoulder level and point it at oncoming traffic. He used both hands to operate the radar gun, which was controlled with a pistol grip. He pulled the trigger with the index finger of his right hand. He "would take time each day to run the radar." He would point the radar gun at cars he felt were speeding and depress the trigger for a few seconds. He estimated that he operated the gun "probably a hundred times or something like that."

4. Petitioner also activated lights and sirens, probably at least thousands of time in his 26 years as a policeman. In such situations, he was tense and would grip the steering wheel tightly. When they are available, police cars also accompany ambulances on calls. They are required to assist the EMTs on the calls, including performing CPR, stopping bleeding, loading/unloading patients on gurneys. Again, he could have done such procedures thousands of times over his career.

5. All but the last two years of his career, he engaged in training sessions, which lasted two to four hours. It involved cuffing techniques. Officers would cuff each other's hands behind their backs. He estimated that he cuffed suspects hundreds if not thousands of times. One has to grasp their hands together with one hand while putting on the cuffs with the other. He has to control the suspect for the suspect's safety as well as the officer's. Take down techniques were also part of the defense tactic training. In such actions, you're "basically grasping and pushing and locking your arms and getting them taken down to the ground" and then "go right into the handcuffing."

6. Petitioner also used batons. "At one point" he had a metal baton, which was expandable "that you would have to jerk your wrist and grasp it out of your holster, and you take it, and snap it and jerk your wrist to get it to expand and hold." He estimated that in his career he had to physically subdue a combatant "hundreds of times, at least." Petitioner was also issued a gun, which was a Smith & Wesson 45 caliber semi-automatic. It weighed a bit over three pounds when fully loaded. He had to practice with the gun to meet state qualifications. At times he practiced monthly, and sometimes he would practice every couple of months.

7. Petitioner explained that he would unsnap the holster, draw the gun, hold the gun at shoulder length with both hands grasping tightly to stabilize the gun, shoot, and return the gun to the holster. He was sure that he had to fire his gun at least 30 to 50 times for each certification. The process took over an hour. In practice he could shoot 150 to 200 times. He fired hundreds of rounds a year. He purchased some ammunition himself for the training. He also had to open cell doors, which were not electronically locked. The key was six to eight inches long. He had to grasp the key and turn it. He estimated he operated cell doors thousands of time in his career.

8. The last 13 years of his tenure, Petitioner was a lieutenant. He had to review reports on a computer and, if anything was missing, communicate with the authors of the reports. He estimated he used a keyboard several hours a day, but still had his patrol duties.

9. Petitioner testified that Dr. Vitello was incorrect in his estimate of the weight of the gun, the number of times Petitioner discharged it, that the cell doors had electronic locks, and that as lieutenant he did not perform street-level duties.

10. Petitioner testified he began noticing symptoms of tingling, numbness, and dropping things in 2009. He went to Dr. Mitchell, who sent him for an NCV with Dr. Szymke. It was his understanding that the test showed "some damage, but at that point it wasn't something that needed any intervention or any surgery." He was able to continue his normal job duties. His condition progressively got worse. Petitioner began having difficulty with his weapon qualification. That required him to practice more.

11. Petitioner returned to Dr. Mitchell. He referred him for another EMG and recommended bilateral carpal tunnel syndrome ("CTS") and cubital tunnel syndrome ("CUTS") surgery. He had surgery on the right side on December 19, 2012. In a follow up visit, he and Dr. Mitchell discussed his job activities. Petitioner changed his mind about the cause of his condition after that conversation and concluded it was work-related. Dr. Mitchell issued a causation opinion letter, which Petitioner gave to Respondent to start a workers' compensation claim. He had left-sided surgery on December 11, 2013, which was after his retirement on November 4, 2013.

12. Petitioner was on light duty for the last one and a half to two years of his career because of a nonwork-related shoulder injury. He did not file a workers' compensation claim for that injury. In light duty he "was doing the daily operations of the department, which would include the report writing and proofreading of reports." He was still operating cell doors and qualifying for the use of his weapon.

13. Petitioner also testified that currently he loses strength and sensation in his fingers. He tries not to put his "arms on the window ledge" because he still gets pain in his arms. "If it's there for a period of time," he gets numbness in his fingers. He also tries to keep his arms off desks.

14. On cross examination, Petitioner estimated that as lieutenant he performed patrol duties about 50% of the time. However, in the rest of his career he would perform patrol duties 60% to 75% of the time. He had to get state weapon certification once per year. He practiced more than required by Respondent to assure that he would qualify. When he was on light duty he practiced only a very few times because of his shoulder surgeries.

15. Petitioner agreed that he complained to Dr. Michell of numbness/tingling in his arms in 2009 and that he had the first EMG in 2009. He was a lieutenant at that time. His job duties between 2009 and 2012 aggravated his symptoms. Petitioner never filed a WC claim previously. As lieutenant, Petitioner had a supervisory role over patrolmen.

16. Petitioner was aware of Respondent's policy that work-related injuries needed to be reported as soon as possible. Petitioner understood the reasons behind that policy. In 2009, he did not associate the connection between his work activities and his CTS/CUTS.

17. Petitioner agreed that he did not report the "accident" until January 17, 2013, after his first surgery and he was retired at the time of his second surgery. He did not engage in defense training or patrol duties while he was on light duty.

18. Respondent called Thomas Smith, who was Respondent's Chief of Police for 19 years. He testified that officers need to be weapon-qualified once a year; "it's a 50-round session" shot at three different distances. They try to have weapon training twice a year at a minimum. If possible with budget constraints, they would train "as often as possible." Some officers perform additional training on their own. Respondent does not reimburse officers who pay for additional ammunition for training.

19. Respondent's policy for work-related injuries is to be reported as soon as possible. Petitioner was on light duty from July of 2011 to his surgery in December of 2012. In light duty he did a lot of administrative work and went to a lot of meetings. While on light duty, Petitioner may have had to open a cell door for a suspect who bailed out. But that would be "no more than once a week." A cell is occupied "probably once or twice a week."

20. On cross examination, Chief Smith testified that prior to being police chief for Respondent he was a policeman for Schaumberg for 23 years. He agreed that a patrol officer spent six hours or more operating a squad car, regularly ran radar, responded to calls with lights/sirens, and participated in defense/weapons training. The cell doors are operated manually and are not electronic. He agreed that Dr. Vitello was mistaken about the weight of a gun, the amount a patrolman practices shooting, and number of shots fired in training.

21. In his job, Chief Smith monitored injuries sustained by policemen. He was aware of which policemen were compensated under the Workers' Compensation Act. He has known of at least one police officer under his command who suffered from CTS or CUTS. He was compensated under workers' compensation.

22. On redirect examination, Chief Smith testified that he believed the officer was compensated for CTS. He did not recall anybody being compensated for CUTS.

23. The injury report was issued on January 17, 2013. Sergeant Kellen reported that Petitioner had severe CUTS and CTS from repetitive motion of the upper extremities, "prolonged desk work (computer) and prolonged driving, prolonged bending of elbows and wrists to do desk work and driving." There is no accident date noted.

24. Dr. Mitchell testified by deposition on June 24, 2015. He is a certified general orthopedic surgeon. He "came into contact" with Petitioner in later 2012. He "became aware" of Petitioner in 2011 when he had shoulder surgeries. In 2012, Petitioner complained of numbness/tingling in his arms and that he was dropping things. Petitioner reported that his symptoms were getting worse. An EMG showed moderate bilateral CUTS and bilateral CTS.

25. Petitioner reported being a policeman for many years and was nearing retirement. He also reported that in his job he did a lot of driving, a lot of office work, and practice with his pistol "quite frequently." Because of the moderate-to-severe CUTS, which was beginning to affect his every-day activities, Dr. Mitchell recommended bilateral CUTS surgeries. He also figured that if they were going to do the CUTS surgeries, they might as well take care of the CTS at the same time.

26. Dr. Mitchell formed an opinion on the causation of Petitioner's condition, and he dictated a letter to that effect. He believed the letter was in response to Petitioner asking him for an opinion on the casual relationship between his work status and his injuries.

27. On cross examination, Dr. Mitchell seemed unaware whether he saw Petitioner in 2009, but then noted his records showed he saw Petitioner as early as 2000. He then found the records indicating he sent Petitioner for an EMG in 2009. He was diagnosed with bilateral CUTS at that time. Dr. Mitchell would not comment on Petitioner's desk work activities as a cause of CTS and noted that "prolonged keyboarding and things like that, you know, are not causative." He didn't know the frequency or type of repetitive hand movements Petitioner had while shooting at the range.

28. In his driving activities only bending of the elbow and resting on objects in the car could contribute to CTS or CUTS. He had no specific information of how much Petitioner drove in his job or his specific motions while driving. Dr. Mitchell agreed that Petitioner was either off work completely or on desk-duty only since July of 2011 because of his shoulder surgeries.

29. Besides being overweight, Dr. Mitchell did not see any co-morbidity in Petitioner's record. He could not remember whether he smoked, and he did not believe he was diabetic or prediabetic. Petitioner reported complete recovery and no residual symptoms after his CTS/CUTS surgeries.

30. On redirect examination, Dr. Mitchell testified that Petitioner's 2009 EMG was "essentially negative." However, there was some decreased velocities over the elbows, and "was close to becoming" CUTS. It was borderline.

31. On re-cross examination, Dr. Mitchell testified that in 2009 Dr. Szymke noted that Petitioner "was being evaluated for complaints of nocturnal heaviness, paresthesia, and searing right shoulder pain." In 2012, he also referred to nocturnal paresthesia.

32. The record includes a letter from Dr. Mitchell to Respondent dated January 15, 2013. He noted that he treated Petitioner since June of 2011. Initially he was treated for his shoulder. In the course of that treatment he had increased numbness/tingling in his arms. An EMG showed severe CUTS and CTS. "His job duties at work consist of prolonged sitting at a desk and prolonged driving and repetitive motions to his bilateral upper extremities." The prolonged bending of his elbows and wrists doing desk work required of him in his job description had contributed to his development" of CUTS and CTS.

33. Dr. Vitello testified by deposition on July 18, 2016. He was a hand/upper extremity surgeon, board-certified in orthopedic and hand surgery. He sees about 100 patients a week and performs surgery on hands and arms exclusively. He performs about 10 surgeries a week. He did not examine Petitioner, but he reviewed his medical records beginning June 28, 2011. He also reviewed a narrative report from Dr. Mitchell. He understood that Petitioner was alleging work-related CUTS and CTS.

34. Dr. Vitello opined that neither Petitioner's condition of CUTS nor CTS were causally related to his job as police lieutenant. He noted that Petitioner never worked at regular duty since his shoulder surgery on August 16, 2011. "So fast forwarding through January of 2014, at the conclusion of the records, nothing he was doing involved a combination of heavy, forceful, or repetitive use of the hands or elbows, which could be correlated with the development of" CTS of CUTS. Even prior to his shoulder surgery, the job activities related to Dr. Vitello did not establish a combination of heavy, forceful, and repetitive gripping, pushing, pulling, or use of hands or arms. "Therefore, the alleged activities of driving, sitting at a desk, typing, routine work, does not contribute to the development of" CTS or CUTS.

35. Dr. Vitello also testified that knowing that Petitioner had to qualify with a handgun on a range from time to time, would not affect his opinion, because "occasionally qualifying with your weapon is not prolonged, heavy, forceful, and repetitive use of the" arms.

36. On cross examination, Dr. Vitello estimated that he performed between 75 and 100 CTS & CUTS surgeries combined. He was requested to perform the review by Respondent's lawyers, which provided the medical records. He did not recall whether he was provided a job description. However, he treats policemen and understands what they do. He has not diagnosed any policeman/patient as having CTS or CUTS. Dr. Vitello acknowledged that if he had examined Petitioner he probably would have asked him to attribute specific injuries to specific job activities. Dr. Vitello was not opining that there was any misdiagnosis or unreasonable treatment.

37. Dr. Vitello was shown an exhibit which was informational material from the American Society For Surgery of the Hand, which Dr. Vitello considered an authoritative source. He was read "Pressure: The nerve has little padding over it. Direct pressure (like leaning the arm on an armrest) can press the nerve." Dr. Vitello noted that the material was meant for laypeople "so they have to make this quite simple." "Having pressure on the inside of your elbow does not in itself cause" CUTS. Dr. Vitello agreed that keeping an elbow bent for a prolonged period can stretch the nerve. However, "long periods" and "bent" are not defined. CTS and CUTS can be progressive but is not necessarily progressive. The majority of cases resolve without surgery.

38. Dr. Vitello did not know how long Petitioner was a policeman, how long he drove squad cars resting his elbows on the window ledge/center console, the type of gun he used, or whether he was right-handed or left-handed. He knew that a radar gun weighed seven pounds. He knew that because he treats police officers. He guessed a gun would weigh 16 to 20 ounces.

39. The amount a policeman practices with his gun varies, but some are required to practice once a month. He guessed that officers had to qualify twice a year and would shoot 25 to 50 rounds in qualifying tests. Shooting does involve forceful grasping/gripping "for that brief period of time, but it is not a combination of heavy, forceful, and repetitive." He did not know the specifics of defense tactics training, but he agreed that it involved spurts of forceful activities, and he believed Petitioner had such training throughout his career. Nevertheless, it did not involve repetitive activity. Accumulation of such activities does not make the activities repetitive. If such activities were the cause of CTS and CUTS, every policeman would have those conditions.

40. Dr. Vitello has treated jailers and sheriffs. However, he was not familiar with the locking mechanisms at Respondent's police department. He believed that "in this day and age with some of the electronic devices and how things are electronically monitored, it would be very similar to opening or unlocking any kind of lock with a key and then pulling the jail door open and closing it." If all the locks were mechanical, that would not change his opinion.

41. On redirect examination, Dr. Vitello reiterated that Petitioner was on sedentary work restrictions from at least July of 2011 up to his first CTS surgery in 2012. In light duty, Petitioner would not have engaged in firing his gun repetitively, opening/closing jail-cell doors, or driving for extended periods. He did not believe that lieutenants performed street-level patrol activities on a regular basis.

42. Respondent submitted into evidence an impairment rating under AMA Guides dated December 5, 2015 issued by Dr. Li. Dr. Li noted that CTS and CUTS have the same general rating. One diagnosis has a full rating while the other diagnosis was ½ of that rating. Dr. Li did not have the EMG to evaluate in his rating. He considered his condition moderate on the left and mild on the right. Based on quick dash scores, Dr. Li rated Petitioner's impairment under AMA Guides to be 7.5% of the left arm and 6% of the right arm. That translated into 13.5% of an arm, or 8% of the MAW.

The Arbitrator found that Petitioner sustained his burden of proving adequate notice, acceptable and timely manifestation date, and that therefore the Commission had jurisdiction to arbitrate the instant case. The Commission affirms the Arbitrator on those issues and adopts those portions of the Decision of the Arbitrator.

The Arbitrator found accident/causation of both CUTS and CTS based on Petitioner's testimony which established activities that she believed constituted prolonged repetitive activities which caused or aggravated his CTS/CUTS. She also noted that Petitioner was a credible witness and the opinions of Dr. Mitchell were more persuasive than those of Dr. Vitello. In that regard, she noted Dr. Vitello's apparent inaccurate assumptions about the frequency of Petitioner discharging his gun, the type of cell doors at the police jail, and the patrol-related duties of police lieutenants.

Respondent argues the Arbitrator erred in finding accident causation. It stresses that Petitioner was not engaged in the allegedly harmful activities since July 14, 2011. It also notes that Dr. Mitchell did not have a good grasp of Petitioner's work activities and in contrast, Dr. Vitello testified credibly, and he had a better basic understanding of the job activities of police officers than Dr. Mitchell.

The Arbitrator was correct that Dr. Vitello may have been mistaken about certain aspects of the specifics of Petitioner's job. However, Dr. Mitchell did not exhibit any greater understanding of the job activities of police officers. In general, the Commission is more apt to accept Dr. Vitello's opinion regarding the basic causes of arm neuropathies than Dr. Mitchell's. The literature seems to indicate that some repetitive and forceful activity is necessary to develop upper extremity neuropathies.

In addition, Petitioner's testimony that he did not know initially that his condition was work-related suggests that he did not notice any increase of symptoms while engaged in the allegedly offending activities. It also appears that Petitioner's job activities were no different than any other police officer. Therefore, under the opinions of Dr. Mitchell and the finding of the Arbitrator any policeman who develops CTS and/or CUTS could successfully argue the conditions were work-related.

In looking at the record as a whole, the Commission concludes that Petitioner successfully sustained his burden of proving his bilateral CUTS was causally related to his work activities, but he did not sustain his burden of proving his CTS was so causally related. Petitioner testified that he drove with one hand and rested his other elbow on the console or window ledge. At least that testimony provides some evidence particular to Petitioner that may not be associated with the job of a police officer generally. In addition, Petitioner provided some literature about the association of pressure on the ulnar nerve and CUTS, and even Dr. Vitello agreed that such pressure can stretch the nerve.

On the other hand, it is more difficult to describe his work activities as involving repetitive forceful activities of his hands. Petitioner and Dr. Mitchell seem to suggest that repetitive hand usage alone is sufficient to establish a repetitive traumatic accident. However, even Dr. Mitchell noted that keyboarding is not a causative factor in developing CTS. Interestingly, Petitioner's activities that may be most conducive to developing CTS could be shooting his gun and using the radar gun. However, he did not even mention those activities in his accident reports. In fact, the only activities he relates to his hand/wrist condition are desk (computer) work, repetitive motions, and bending his wrists while driving. Such omission suggests that Petitioner did not suffer any increase of symptoms with those activities. Therefore, the Commission finds that Petitioner proved his CUTS condition is compensable, but he did not prove that his CTS condition is compensable. The Commission modifies the Decision of the Arbitrator accordingly.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $812.80 per week for a period of 2&1/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

18IWCC0634

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $727.88 per week for a period of 75.9 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the loss of the use of 15% of the right arm 15% of the and left arm.

IT IS FURTHER ORDERED BY THE COMMISSION that the Commission vacates the Arbitrator's award of medical expenses and orders Respondent to pay only the medical expenses for treatment of his bilateral cubital tunnel syndrome under §8(a) of the Act, pursuant to the applicable medical fee schedule.

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

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

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

DATED: OCT 25 2018

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

DLS/dw
O-10/10/18
46

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

18IWCC0634

KENT, LONNIE
Employee/Petitioner

Case# **14WC010185**

CITY OF MENDOTA
Employer/Respondent

On 6/6/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1621 APLINGTON KAUFMAN McCLINTOCK
THOMAS L McCLINTOCK
160 MARQUETTE ST PO BOX 517
LaSALLE, IL 61301

0507 RUSIN & MACIOROWSKI LTD
THOMAS P CROWLEY
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

18IWCC0634

STATE OF ILLINOIS)
)SS.
COUNTY OF LaSalle)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

LONNIE KENT
Employee/Petitioner

v.

CITY OF MENDOTA
Employer/Respondent

Case # **14** WC **10185**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **JESSICA A. HEGARTY**, Arbitrator of the Commission, in the city of **OTTAWA**, on **1-26-17**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **12-19-12,** 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 **$62,088.33**; the average weekly wage was **$1,213.14**.

On the date of accident, Petitioner was **49** 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 **$37,181.50** under Section 8(j) of the Act.

ORDER

- Respondent shall pay $41,561.83 in medical expenses consistent with Petitioner's Exhibit #5.
- Respondent shall pay Petitioner TTD for 2 and 1/7 weeks at the rate stipulated to by the parties.
- The Arbitrator finds that Petitioner sustained permanent partial disability under Section 8(d)2 of the Act as follows:

a.	Left cubital tunnel syndrome	15% Arm
b.	Right cubital tunnel syndrome	15% Arm
c.	Left carpal tunnel syndrome	10% Hand
d.	Right carpal tunnel syndrome	10% Hand

(See the attached addendum for the Arbitrator's analysis pursuant to Section 8(d)2)

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

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

Jessica C. Kogut

Signature of Arbitrator

6-1-17

Date

JUN 6 - 2017

STATE OF ILLINOIS)
) SS
COUNTY OF LASALLE)

BEFORE THE WORKERS' COMPENSATION COMMISSION
OF THE STATE OF ILLINOIS

LONNIE KENT,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	**No. 14 WC 10185**
	)	
CITY OF MENDOTA,	)	
	)	
Employer/Respondent.	)	

ADDENDUM TO THE DECISION OF THE ARBITRATOR

Petitioner, a retired police officer having served twenty-six (26) years with the Mendota, Illinois, Police Department, alleges he sustained repetitive, upper extremity injuries while employed by Respondent.

Petitioner testified that roughly half of his 26 years were spent as a patrol officer whose duties included patrol, radar enforcement, issuing speeding tickets, apprehending subjects, firearm qualification exercises and training related to the use of batons, handcuffs and control of combative suspects.

Petitioner testified that he drove his squad car 4 to 6 hours per 8 hour shift, with his left arm, bent in a 90-degree position, resting on the window ledge. At times while driving, he would switch positions and similarly rest his right elbow on the middle console.

Petitioner's patrol activities required him to activate his siren and lights for high speed auto pursuits as well as ambulance and domestic calls. Petitioner testified he would become tense, physically, in these situations and would tightly grasp the steering wheel of his squad car. He testified that he activated his squad car lights and siren thousands of times in his 26-year-long career with Respondent.

With regard to radar enforcement duties, Petitioner would grasp an 8 lb. radar detector, activate the trigger with his index finger and hold the radar gun up at shoulder level with his arm extended straight, pointed in the direction of a vehicle, for a few seconds then lower the radar gun releasing the stress on his upper extremity. He claims that he performed this maneuver approximately a hundred times per day as a patrol officer.

Petitioner further testified as to the upper extremity physical requirements associated with his other duties including issuing speeding tickets, apprehending suspects (which occasionally required the use of forcible restraint) and firearm qualification exercises.

The Petitioner was also required to assist ambulance and fire calls, where he administered CPR and/or first aid, as well as help load and unload patients onto gurneys. He claims that over his 26 year police career, he performed this activity thousands of times.

Petitioner also manually placed cuffs on or released cuffs from individuals hundreds of times over the course of his police career. During his career, Petitioner estimates he physically subdued combative suspects hundreds of times and locked or unlocked a jail cell door thousands of times.

13 years before his retirement, the Petitioner was promoted to the position of Lieutenant where he supervised the operations of the police department. His new job duties involved more administrative work, utilizing a computer and keyboard for several hours per day in addition to the same duties, training, etc. as described above.

In 2009, Petitioner began experiencing nocturnal tingling in both hands, for which, he consulted with Dr. Robert Mitchell, an orthopedic surgeon. An EMG study performed in October, 2009, suggested bilateral cubital tunnel syndrome, but was essentially a normal study. (Rx.2).

By 2012, Petitioner's bilateral tingling, numbness and parethesias had progressed. He testified that he began dropping objects and noticed a decrease in strength with his work activities. He returned to Dr. Mitchell and a second EMG, performed on November 26, 2012, confirmed bilateral cubital and carpal tunnel syndrome. (Rx.2).

After review of the updated diagnostics, Dr. Mitchell recommended and later performed a right cubital tunnel release, ulnar nerve transposition with medial epicondylectomy and right median open carpal tunnel release. at Illinois Valley Community Hospital on December 19, 2012, the alleged accident date. (Px. 1, Ex. 3; Rx.4).

Following the surgeries, Petitioner was restricted from work until January 3, 2013, when he returned to light duty work for Respondent. The Petitioner continued to perform his job until he retired on November 4, 2013.

On December 11, 2013, the Petitioner underwent carpal and cubital tunnel release surgery performed by Dr. Mitchell. The Petitioner had retired at the time of his second surgery and therefore was not restricted from work in any capacity by the treating doctor.

On his Application of Adjustment of Claim, Petitioner alleged December 19, 2012, the date of the first surgery, as the accident date. Petitioner testified that on that date Dr. Mitchell discussed causation with Petitioner's wife, who relayed the information to Petitioner, at which time, the casual connection between his injuries and his employment became apparent to Petitioner.

A written report of injury was filed with Respondent on January 17, 2013.

Dr. Mitchell, testified by way of deposition, that prolonged, repetitive job duties including driving with his elbow in a bent, flexed position, the repetitive use of firearms, and being seated at a desk for long hours, with his elbow bent, were causally related to Petitioner's bilateral cubital and carpal tunnel maladies and his need for surgery. (Px. 1).

On cross-examination, Dr. Mitchell confirmed that the Petitioner was diagnosed with bilateral cubital tunnel in October of 2009. (Px. p.15). Dr. Mitchell also confirmed that the Petitioner was restricted from work or

placed on light duty from July 14, 2011 through the date of his claimed accident of December 19, 2012. (Px. 1, 15-17). Additionally, on cross-examination, Dr. Mitchell testified he had no information regarding Petitioner's job duties while he was on restricted work that may have contributed to his bilateral carpal tunnel condition nor did he have information regarding the type of repetitive movements involved in operating Petitioner's firearm. (Px. 1, 17-18).

Dr. William Vitello performed a records review on behalf of the Respondent, after which, he opined that Petitioner's duties as a police officer would not cause, contribute to, or aggravate a bilateral cubital tunnel or carpal tunnel condition. The doctor did not believe Petitioner's work duties involved the type of prolonged, heavy, forceful or repetitive use of the upper extremities to cause such conditions. (Rx. 1). Dr. Vitello further noted that the Petitioner was restricted to light duty, desk work or completely off duty from July 2011 through December 2012, and therefore there would not be performing forceful, repetitive, or stressful duties that could cause, contribute or aggravate Petitioner's upper extremities. (Rx.1).

Tom Smith, Police Chief for the City of Mendota for the past 19 years, testified on behalf of the Respondent in this matter. Chief Smith testified that police officers under his command were required to qualify only one time per year with their firearm, however, there may be one or two other times during the year that the officers would engage in firearm training and practice depending on budgetary constraints. The police officers were not required nor reimbursed for any additional outside practice or firearm training.

Chief Smith testified consistent with the Petitioner's testimony and medical records offered in this matter that the Petitioner was restricted to light duty, desk work, or completely restricted from duty from July 14, 2011 through the date of his initial surgery of December 19, 2012 due to unrelated bilateral shoulder treatment. Chief Smith testified that during this period, the Petitioner was engaged in primarily administrative duties, including reporting, budgeting, and attending meetings on behalf of the police department for the City of Mendota. Officer Kent was not required to go out on police emergency calls, ambulance runs or any other pursuit type calls during the period that he was restricted from full duty police work.

With respect to permanency, Petitioner testified he has bilateral weakness in his hands and arms that he notices when performing functions such as using a screwdriver. Petitioner also experiences numbness in his fingers that he notices when he rests either arm on a window ledge, desk top, or car.

CONCLUSIONS OF LAW

Accident & Causal Connection

The Arbitrator finds that Petitioner has sustained his burden of proof with respect to accident and causal connection.

The record establishes that the Petitioner served with the Mendota, Illinois, Police Department for twenty-six (26) years. For roughly half of that time, his daily job duties as an active patrol officer included:

- Driving his squad car, where his arms would rest, bent at a 90 degree right angles, on the window ledge and center console of his for as many as six (6) hours per shift.

- Engaging in high speed pursuit and other activities where Petitioner activated the lights and siren of his squad car where his hands would tightly grip the steering wheel due to situational stress.

- Conducting radar enforcement where Petitioner would grip, hold and activate the trigger of an eight (8) pound radar gun for three (3) to four (4) hours, approximately a hundred times per day.
- Participating in regular firearm practice and qualification exercises requiring repetitive use of a 3-lb. firearm.
- Participating regularly in defensive tactics training, physically subduing combative arrestees.
- Loading and unloading patients of varying weights onto gurneys.
- During his later years Petitioner continued to perform street level law enforcement duties, but also spent many hours per day at a computer with his hands and elbows bent, resting on his desk while he utilized a keyboard or mouse in performance of his administrative duties.

By 2009, Petitioner began experiencing nocturnal tingling in both hands for which he consulted Dr. Robert Mitchell, an orthopedic surgeon. An EMG study in October, 2009, suggested bilateral cubital tunnel syndrome, but was essentially a normal study. At this time Petitioner made no connection between his upper extremity complaints and his work duties.

By 2012, Petitioner's complaints of bilateral tingling, numbness and parethesias had progressed to a point where he began dropping objects and had difficulty qualifying with his service weapon. A second EMG, on November 26, 2012, confirmed that Petitioner's condition had progressed to definite bilateral cubital and carpal tunnel syndrome which required surgery on December 19, 2012. Petitioner testified that following that surgery, Dr. Mitchell discussed causation with Petitioner's wife, who relayed that information to Petitioner. Dr. Mitchell later advised Petitioner that the condition of ill being involving Petitioner's arms and hands was directly related to the physical demands of his employment. Petitioner testified that that was the first time that he connected his employment duties to his condition of ill being.

The Arbitrator found Petitioner presented as a credible witness whose demeanor came across as honest and straight forward.

Dr. Mitchell treated Petitioner's bilateral carpal and cubital tunnel condition from the time Petitioner first experienced bilateral, nocturnal tingling until 2013, including a right cubital tunnel release, ulnar nerve transposition with medial epicondylectomy and right median open carpal tunnel release. Dr. Mitchell personally interviewed and examined Petitioner on many occasions.

Dr. Mitchell, testified by way of deposition, that prolonged, repetitive job duties including driving with his elbow in a bent, flexed position, the repetitive use of firearms, and being seated at a desk for long hours, with his elbow bent, were causally related to Petitioner's bilateral cubital and carpal tunnel maladies and his need for surgery. (Px. 1).

The Arbitrator found Dr. Mitchell's opinions more persuasive than Dr. William Vitello who did not examine or interview the Petitioner.

Additionally, Dr. Vitello based his opinion on certain assumptions which were rebutted at the hearing by Petitioner's testimony and the testimony of Respondent's witness, Chief Tom Smith:

a. The weight of a .45 cal Smith & Wesson semi-automatic service revolver. (16-20 oz. vs 3 lbs.) (RX 1, p. 29)

b. The extent of pistol practice and qualifications. (2x per year vs 12). (Id. at 31).

c. Pistol rounds discharged at practice/qualifying. (25-50 vs 150). (Id.).

d. Electronic cell door locks at the Mendota Police Department. Electronic vs manual. (Id. at 36).

e. Police lieutenants not performing street level duties. (Id. at 39).

f. Having never found a police officer who suffered job related carpal tunnel or cubital tunnel syndrome. Respondent's witness, the Mendota Chief of Police, identified another Mendota Police officer as well as himself. (Id. at 21).

The Arbitrator adopts the opinions of Petitioner's surgeon and finds that Petitioner's prolonged, repetitive job duties including driving with his elbow in a bent, flexed position, operating a radar gun, the repetitive use of firearms, and being seated at a desk for long hours, with his elbow bent, are causally related to Petitioner's bilateral cubital and carpal tunnel maladies and his need for surgery.

The Arbitrator agrees that the above-mentioned job duties that Petitioner performed for 26 years were sufficiently forceful, exertional and repetitive to constitute a cause or an aggravating cause of the repetitive, bilateral injuries at issue.

Notice

The Act requires a claimant to provide notice to his employer not later than 45 day after the accident. (820 ILCS 305 §6(c). The Arbitrator notes that on January 15, 2013, Dr. Mitchell wrote to Petitioner's employer indicating that Petitioner's bilateral cubital and carpal tunnel maladies were the result of the prolonged repetitive requirements of his job duties. (PX. 1; PX 3). In addition, a written report of injury was filed with the employer on January 17, 2013 which is nearly 30 days after the surgery to correct his right carpal tunnel and right cubital tunnel conditions was performed.

The Arbitrator finds that Petitioner provided proper notice pursuant to the Illinois Workers' Compensation Act.

Medical Bills

Petitioner's Exhibit #5 shows the following medical expenses:

Illinois Valley Community Hospital	$21,956.33
Illinois Valley Orthopedics	$9,845.00
Peru Anesthesia	$3,037.50
Methodist Medical Group	$4,401.00
Mendota Community Hospital	$2,322.00
Total	$41,561.83.

The Arbitrator finds the above expenses reasonable and necessary to treat Petitioner's bilateral cubital and carpal tunnel conditions which the Arbitrator has found to be related to Petitioner's employment.

The Arbitrator finds that Respondent is entitled to an 8(j) credit of $37,181.50 for group medical payments, leaving a balance of $4,379.83.

TTD

The parties stipulated that Petitioner was off work from December 19, 2012 to January 3, 2013, representing 2 and 1/7 weeks. Accordingly, Respondent shall pay Petitioner TTD for 2 and 1/7 weeks at the rate stipulated to by the parties.

Nature and extent of the injury

The Arbitrator has considered the following factors set forth in Section 8.1(b) of the Act:

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that the record contains an impairment rating by Dr. Lawrence Li of a total right upper extremity impairment of 7.5% on the left, 6% on the right. The Arbitrator notes that this level of impairment does not necessarily equate to permanent partial disability under the Worker's Compensation Act, but instead is a factor to be considered in making such a disability evaluation. While the Arbitrator has carefully considered the AMA ratings she believes the other statutory factors support a more significant permanent partial disability award for the injuries Petitioner sustained. The Arbitrator therefore assigns less weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner was employed as a police officer at the time of the accident and has since retired. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 49 years old at the time of the accident. The Arbitrator gives greater weight to this factor as Petitioner has many years left in which he will deal with the permanent physical impairments he sustained as a result of the accident at issue.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that the Petitioner is retired and therefore gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner underwent bilateral cubital tunnel releases with medial epicondylectomy and open carpal tunnel release. The records of Dr. Robert Mitchell, Illinois Valley Community Hospital, the physical therapy notes of Mendota Community Hospital document Petitioner's continuing difficulties with hand and arm weakness, loss of sensation in both hands and pain at the elbows. The Arbitrator gives greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability under Section 8(d)2 of the Act as follows:

e.	Left cubital tunnel syndrome	15% Arm
f.	Right cubital tunnel syndrome	15% Arm
g.	Left carpal tunnel syndrome	10% Hand
h.	Right carpal tunnel syndrome	10% Hand

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DIANA SMITH,
Petitioner,

18IWCC0635

vs.

12 WC 44499

THE REPUBLIC OF TEA,
Respondent.

OPINION AND DECISION ON PETITION FOR REVIEW PURSUANT TO §§19(h)/8(a)

This matter comes before the Commission on Petitioner's Petition for Review Pursuant to Sections 19(h)/8(a) of the Act. A hearing was held in Mt. Vernon on May 4, 2018 before Commissioner Simpson. The parties were represented by counsel and a record was taken.

Findings of Fact & Conclusions of Law

1. Petitioner testified that she sustained a work-related injury to her neck on October 24, 2012. Her claim was adjudicated on May 7, 2015. She had a slip and fall accident at work "back in January" but did not file a Workers' Compensation claim for that accident and her condition returned to baseline. She had no other accidents or injuries after the accident on October 24, 2012.

2. Since the decision, she received additional treatment from Dr. Gornet for injuries sustained in the work-related accident. He prescribed medication, physical therapy, and she had two injections. These treatments did not improve her condition. Dr. Gornet has recommended surgery for her neck. She also went to a §12 medical examination with Dr. Robeson at Respondent's request.

3. Petitioner also testified that currently, she had constant pain in her neck which radiates down the left side. Her symptoms increase with repetitive activity and any activity overhead. She was still employed by Respondent as a top sealer operator. All day she changes "out the top seals that go on different teas that come through" her machine. She guides rolls of top seals, puts them on spindles, screws them down, locks down the machine, and hits go. Every aspect of her job involves use of her hands and arms. In addition, several times a day she has to lift two to three-pound objects overhead.

4. On cross examination, Petitioner agreed that she had two surgeries on her left shoulder. She saw Dr. Gornet twice in 2013 prior to her shoulder surgeries. At that time, it was her understanding that her problems were coming from her shoulder and not her neck. She did not see Dr. Gornet again after 2013, until August of 2017. Petitioner filled out an accident report regarding, and sought medical treatment for, her slip-and-fall accident in January. She fell on her left arm. She thought she put her arms out to break her fall.

5. She did not have any problems with her arm or neck related to that fall, but she thought the fall "irritated" her. The condition of her neck, scapula, and shoulder blade area are the same after that fall. She went to an emergency department after the fall and saw her primary care physician about a week later. No specific treatment was recommended for that injury.

6. Petitioner saw Dr. Gornet three times since August 2017, the last time in February. She was aware that he recommended a two-level disc replacement. Her pain primarily is in her neck area, but her left arm and shoulder blade area are also sore. The pain goes down her arm and she has some numbness, but not all the time. She does not have symptoms on the right side. When she has to lift overhead in her job it is about five or six inches over her head and her elbows are fully extended.

7. The Arbitration decision was issued on February 8, 2016. The heading of the decision specifies it deals with "Nature and Extent Only." The Arbitrator awarded Petitioner 95.1 weeks of permanent partial disability benefits representing loss of 17.5% of the person-as-a-whole for injuries to her left shoulder and loss of 10% of her left thumb.

8. The decision indicates that on January 3, 2013, Petitioner treated with Dr. Gornet for radicular neck pain complaints. An MRI on February 18, 2013 showed disc bulging C4-7 resulting in foraminal stenosis, characterized as moderate at C4-5 and severe at C5-6 and C6-7. She had physical therapy and her neck symptoms improved. However, her scapula and left shoulder pain persisted. Dr. Gornet referred her to Dr. Mall for evaluation of her shoulder.

9. Dr. Mall diagnosed left shoulder biceps tendonitis, upper border subcapularis tear, biceps subluxation, and SLAP tear. An injection and physical therapy failed to provide long-term relief. Dr. Mall declared conservative treatment to have failed and recommended surgery.

10. Petitioner had a medical examination with Dr. Emanuel pursuant to §12 of the Act. He opined that Petitioner's repetitive work activities aggravated pre-existing arthritis of the acromioclavicular joint causing biceps tendonitis and bursitis. He agreed that Petitioner was a surgical candidate. However, after seeing a video of Petitioner's work activities he thereafter issued an addendum report in which he changed his causation opinion.

11. After Dr. Mall again recommended surgery, Respondent sent Petitioner to surgery with Dr. Emanuel. He performed arthroscopic subacromial decompression and distal clavicle resection. Dr. Emanuel noted that Petitioner had persistent complaints despite post-operative physical therapy. Nevertheless, he released Petitioner to full duty as of February 25, 2014.

12. Petitioner returned to Dr. Emanuel on March 25, 2014 and reported persistent left shoulder pain and swelling and pain in her ring finger. He noted that Petitioner was making slow progress after surgery and recommended three weeks of physical therapy. On March 22, 2014, Dr. Emanuel noted that Petitioner had not had the recommended physical therapy, she was working full duty, and she had pain with certain movements. He noted "her physical exam did not make sense. Her subjective complaints did not match objective findings." He declared her at maximum medical improvement, released her to full duty, and released her from his care.

13. Petitioner returned to Dr. Mall three days later. She reported that her shoulder was worse than it had been prior to surgery. On examination, Dr. Mall diagnosed continued biceps tendonitis and noted possible carpal tunnel and cubital tunnel syndromes. He ordered an EMG/NCS which was consistent with median neuropathy consistent with "electrical residual from a previously more severe involvement" without active radiculopathy or ulnar neuropathy. On June 19, 2014, Dr. Mall performed arthroscopic partial synovectomy, subcoracoid decompression/coracoplasty, open biceps tenodesis, and open AC joint resection.

14. The medical records of Dr. Mall reveal that on June 26, 2015, he noted that Petitioner's trigger finger left thumb returned after relief from a prior cortisone injection. Dr. Mall opined that her condition was related to her work injury and administered another.

15. On July 24, 2015, Petitioner reported she was doing well and had no current triggering of her left thumb. Because she was asymptomatic, Dr. Mall decided not to do anything. However, if triggering recurred, he would recommend trigger-finger release.

16. On May 19, 2017, Petitioner returned and reported left-thumb pain which was arthritic. He recommended a brace and anti-inflammatories. If she did not improve, he would recommend an injection.

17. Dr. Mall felt that her pain might emanate from her cervical spine and had referred her back to Dr. Gornet. The records of Dr. Gornet reveal that on August 24, 2017, Petitioner returned to him for symptoms he deemed to again be related to her work injury of October 24, 2012. She reported persistent pain in her neck, left trapezius, left shoulder, and posterior scapula with weakness in her left arm. He noted that an MRI taken that day showed left-sided disc protrusions at C4-5, to a lesser extent at C3-4, and possible a subtle protrusion at C6-7, "but for the most part [he] did not feel this [was] particularly significant." He referred Petitioner for injections and physical therapy and prescribed medication. He released her to work at full duty.

18. On November 30, 2017, Petitioner returned to Dr. Gornet after an injection at C3-4 and C4-5. They did not provide sustained relief. Her main symptom was pain in the left trapezius, left shoulder, and between her shoulder blades with occasional arm pain. Dr. Gornet recommended disc replacement at C3-4 and C4-5. He again opined that her condition was related to her accident on October 24, 2012, as there were no intervening slips, falls, or other trauma.

19. On February 22, 2017, Petitioner reported a fall in January caused a flare up of her symptoms. She did not believe the new accident changed the location or character of her symptoms, but her symptoms were "certainly much more severe." Dr. Gornet reiterated his recommendation for two-level disc replacement.

20. An MRI taken on August 28, 2017 showed a small disc protrusion "extending towards the foramina at C3-4 and C4-5, more prominent at C3-4 where either C4 root could be affected but the left C5 root could also be affected at that level," and a small protrusion at C6-7 without cord compression or root involvement.

21. Dr. Gornet testified by deposition on March 13, 2018. He is a board-certified orthopedic surgeon specializing in spine surgery. He last saw Petitioner in 2013 was on April 22. At that time, he noted that she continued to have cervical radiculopathy and he requested an MRI. It was Dr. Gornet's understanding that after he last saw Petitioner after that visit, she continued to treat with other doctors for her left upper extremity.

22. The next time he saw her was on August 4, 2017, he believed on referral back from Dr. Mall. He noted that there was often overlapping symptoms that can emanate from either the shoulder or cervical spine, so he works closely with his "shoulder colleagues." At the time he saw her in 2017, she already had two shoulder surgeries. Dr. Gornet obtained a new MRI which "clearly revealed again left-sided protrusions, C4-5 and C3-4." He diagnosed that her disc pathology caused referred pain into her trapezius, neck, and shoulders, particularly the left shoulder. Dr. Gornet continued to believe her condition was causally related to her work accident and recommended injections. Based on the outcome of the injections, Dr. Gornet recommended disc replacements C3-5.

23. Dr. Gornet last saw Petitioner on February 22, 2018. At that time, she was still symptomatic and wanted to proceed with surgery. She reported a recent fall, but Dr. Gornet opined that the fall had no bearing regarding his treatment recommendations. He noted that the new MRI showed the same pathology as the MRI in 2013. Dr. Gornet disagreed with Dr. Robeson's assessment that Petitioner had only mild disc bulges, "which would tend to indicate just a degenerative problem. She has lateralizing pathology both central and lateral more to the left, and [he thought] that that fits with her referred pain into her trap and shoulder." He noted the continued symptomology after shoulder surgeries by two excellent surgeons, Dr. Emanuel and Dr. Mall, indicated that the source of her pain went beyond her shoulder. On the issue of causation, Dr. Gornet

stated: "there's no other plausible explanation" for her condition other than the work accident.

24. On cross examination, Dr. Gornet agreed that he saw Petitioner twice in 2013. From the beginning he believed she had some problems with her neck, but that more of her symptoms emanated from her shoulder. He never took her off work for her neck and referred her to Dr. Mall. Something happened on October 24, 2012, that caused symptomology, but he did not know whether that was an acute trauma or repetitive trauma.

25. Dr. Gornet agreed that the examination finding he dictated in 2013 were similar to the findings he dictated in 2017. The examinations were relatively benign with subtle findings. He agreed with Dr. Robeson's conclusion that there was no big interval change in the MRI findings in 2013 and 2017, showing very little degenerative changes. He noted that the cervical pathology does correlate some of her shoulder symptoms and he was confident that he could address some of that pain with his recommended surgery. However, there may be some residual pain from her shoulder after his recommended surgery. That would be within the purview of Dr. Mall or Dr. Emanuel. He did not believe additional physical therapy would be beneficial, due to the nature of, and long-standing duration of, her condition.

26. Dr. Robeson testified by deposition on April 26, 2018. He has been a board-certified orthopedic surgeon since 1991. He performed a §12 examination on Petitioner on January 10, 2018 and reviewed about a "two-inch stack" of medical records he was provided. At the time of the examination she had had two shoulder surgeries. Upon examination she had subjective tenderness on the left side of the neck, the site of the trapezius. Her range of motion was normal, but extreme range of motion of the neck caused pain.

27. Petitioner reported she had injections prior to the examination, which did not provide any relief. He reviewed the MRI films from 2013 and 2017. They were of good diagnostic quality. The 2013 MRI was virtually normal with no evidence of bulges or protrusions. The 2017 MRI was very similar with minimal bulging at C3-4 and C4-5, and the disc was slightly narrower at C6-7. He did not dispute that Petitioner suffered an injury, but he believed the "majority of the injury involved her shoulder" and some of her symptoms can be referable to her shoulder. The fact that she did not respond to the injections suggests that her cervical pathology was not causing her pain.

28. Dr. Robeson felt that while she might have injured her neck, she was not a surgical candidate, she had treatment that was sufficient to treat the condition, and no additional treatment was indicated. Dr. Robeson thought that the recommended two-level disc replacement was "overkill" considering her "mild pathology" and the lack of response to injections. He opined that she could work at her regular job at full duty with regard to her cervical spine.

29. On cross examination, Dr. Robeson testified Petitioner reported "some fleeting relief but no sustained relief" from the injections. He agreed that Petitioner's accident caused some aggravation of her underlying degenerative disc disease, some conservative treatment was required, but no additional treatment was necessary because of the lack of response to injections and the minimal objective pathology.

Petitioner argues that the record clearly establishes that her current condition of ill-being was still causally related to her work accident on October 24, 2012. She also stresses that the causation opinion of Dr. Gornet was persuasive and related her condition to objective pathology, while Dr. Robeson simply relied on the similarity of the MRI results from 2013 and 2017. Petitioner seeks the award of additional medical, including the prospective treatment recommended by Dr. Gornet. Respondent argues that Petitioner's cervical condition is a new condition unrelated to her accident. It stresses that Petitioner did not complain of neck pain at her 2013 visits to Dr. Gornet and did not testify about neck pain in her initial arbitration hearing. It also stresses that Dr. Gornet agreed that the objective evidence concerning her cervical condition did not change appreciably according to the MRIs of 2013 and 2017.

After reviewing the entire record before us, the Commission concludes that Petitioner's condition of ill-being of her thumb is causally connected to the work accident, but she failed to sustain her burden of proving that her cervical condition is causally related to her work accident. First, both parties agree that the objective MRI findings of the cervical spine did not change materially between 2013 and 2017. The Arbitrator noted that Petitioner's neck pain resolved after physical therapy and the Commission finds no reason to disturb that finding. It is also interesting to note that the Arbitrator apparently did not award any permanency for any alleged neck injury. In addition, the Commission notes that Petitioner did not return to Dr. Gornet for any shoulder/cervical symptoms for more than four years. There is nothing in the record to suggest that she either sought any treatment for, or had any complaints concerning, her neck and/or cervical spine for that four-year period. Finally, the Commission finds the opinion testimony of Dr. Robeson more persuasive than Dr. Gornet about Petitioner's cervical condition.

IT IS THEREFORE ORDERED BY THE COMMISSION, that Petitioner's Petition pursuant to §8(a) of the Act is granted regarding the condition of ill-being of her thumb but is denied regarding the condition of ill-being of her cervical spine.

IT IS FURTHER ORDERED BY THE COMMISSION, that Petitioner's request for Respondent to authorize and pay for current and/or prospective medical treatment for the condition of ill-being of her cervical spine is denied.

IT IS FURTHER ORDERED BY THE COMMISSION, that Respondent pay the outstanding bills for the treatment of her thumb condition rendered by Dr. Mall.

IT IS FURTHER ORDERED BY THE COMMISSION, that Respondent authorize and pay for any prospective treatment for her thumb recommended by Dr. Mall.

18IWCC0635

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 25 2018

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

DLS/dw
O-10/10/18
46

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Dawn Munoz,

Petitioner,

vs.

NO: 14 WC 9589

Country Maids & Maintenance,

18IWCC0636

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 accident, notice, causation, medical expenses, temporary total disability and prospective medical expenses, reverses the Decision of the Arbitrator and denies Petitioner's claim for compensation, for the reasons stated below.

Findings of Fact

Petitioner, a 49-year old house cleaner, testified that she had worked for Respondent cleaning homes for around 7 or 8 months. (T.10). She noted that her job generally involved "… cleaning the whole home which pertained to every room of the home. You washed floors on your hands and knees; you dusted: you vacuumed; cleaned stove, every part of the home." (T.10). She agreed that she would also need to carry cleaning supplies and equipment, noting that "[y]ou had your basket with all your cleaning products. You had a vacuum cleaner. You had step stools, sometimes depending on the home. You had a long duster to do fans and high places." (T.10-11). She estimated that her equipment all told might weigh 40 pounds. (T.11).

Petitioner agreed that on 1/14/14 she suffered an injury in the workplace. (T.11). She noted that on "[t]hat particular day I had two homes. The first one was not regularly my assigned schedule… That day also I was with another employee. The first home we went to of course in

the winter time. It had a steep incline driveway to the home that was winter, they did not shovel or salt anything at this particular home so you had to carry all of your equipment, supplies, proceeded to go in, clean the home, left and then proceeded to go to the second home." (T.11-12).

Petitioner agreed that she suffered her workplace injury in the second home. (T.12). She stated that "I went to the room that I normally did. I started to wash the floor after I did dusting and cleaning in the one room. And when I was on my hands and knees, all of the sudden I couldn't press down and my right side the pain just started to shoot up, and I had numbness and tingling and I didn't know where the pain was coming from because it was like my neck down my arm, back. I didn't know if it was going up or going down. Because it was all at one time and then the right side of my, I don't know if that's your shoulder blade or whatever back here." (T.12). She noted that "I got the numbness and tingling when I got down to do another area, that's when I felt it got numb. And then I had the tingling and the pain just started radiating." (T.13). She indicated that the numbness and tingling was "[i]n my right hand going up to my elbow" and that "[t]he pain was in my neck and like I said I don't know if this is my shoulder blade or whatever and my back and down – all this right side ..." (T.13). For the record, it was noted that Petitioner was indicating her right side and behind her right shoulder. (T.14). She noted that she had pain in her neck/shoulder all the way down on the right side and numbness in the right arm up to her elbow and hand. (T.14).

Petitioner noted that she continued working that day and finished her shift. (T.14). She also noted that on 1/17/14 she called the owner of Country Maids, Cheryl, and reported her workplace injury. (T.14-15). She indicated that she called her on the phone and "... told her what had happened at the home and that I thought something serious was going on and I needed to call and go in and see a doctor." (T.15). She stated that Cheryl told her to "... keep her posted, updated." (T.15).

Petitioner testified that she first sought treatment the following week when she visited Dr. Aftab Khan on 1/23/14. (T.16). In an office note on that date, Dr. Khan recorded that "[p]atient has been a house keeper for the past 10 months she does a lot of heavy lifting, mopping, vacuuming, dusting. Dexa shot given left arm. She presented with hand pain. In addition, she presented with shoulder pain. It is located on the right shoulder. It is described as aching and sharp. The patient also has presented with neck pain. The symptoms began following a specific injury injury [sic] at work she is a house keeper." (PX3). Dr. Khan's diagnoses included injury/contusion to the hand, neck and shoulder. (PX3). Petitioner was prescribed Naprosyn and instructed to return in one week. (PX3). X-rays of the cervical spine performed on that date revealed spondylosis or prominent anterior osteophytes at C6-C7 with no fracture or subluxation. (PX3).

In an office note dated 1/30/14, Dr. Khan recorded that the "[p]atient is feeling a lot better still has pain neck area and right forearm pain. She presented with neck pain. The symptoms began following a specific injury[.] Patient cleans nursing home and houses. In addition, she presented with arm pain. It is located right forearm." (PX3). Dr. Khan's diagnosis included neck sprain/strain and lower back pain. (PX3). She was prescribed Naprosyn and instructed to return in 90 days. (PX3).

Petitioner agreed that Dr. Khan ordered her off work and prescribed physical therapy. (T.17). She noted that she continued to treat with Dr. Khan in February and March of 2014 and that she continued to experience the same symptoms during that time, including "... the excruciating pain and the numbness and tingling." (T.18). She agreed that she also remained off work during that time. (T.18).

In an office note dated 2/6/14, Dr. Khan recorded that "[p]atient has seen the physical therapy for her neck, shoulder and arm pain on her right side. Therapy inform[ed] patient that she will be feeling sore for the next couple days. Work injury. She presented with neck pain. The symptoms began following a specific injury [sic] work injury. In addition, she presented with shoulder pain. It is located on the right shoulder. It is described as aching. The patient also presented with arm pain. It is located right arm and right forearm. It is described as aching." (PX3). Once again, she was given a diagnosis of lower back pain and neck sprain/strain, prescribed medication and told to return in 90 days. (PX3).

In an office note dated 2/20/14, Dr. Khan recorded that the "[p]atient continued to have neck and right arm pain. Patient had to put physical therapy on hold do [sic] to soreness and sharp pain. She presented with back pain. The symptoms began following a specific injury [sic] work injury. Injured site: lower back. In addition, she presented with neck pain. The symptoms began following a specific injury [sic] work injury. The patient also presents with arm pain. It is located right arm and right forearm. It is described as sharp pain and numbness." (PX3).

In an office note dated 2/26/14, Dr. Khan recorded that "[p]atient still under a lot of pain. Neck, right shoulder, arm pain and it[']s getting worst [sic]." (PX3).

Petitioner stated that she eventually received a phone call from Mark, Cheryl's husband, on 2/28/14 at which time "[h]e said they were going to take me off the work schedule." (T.20). However, she noted that Mark did not tell her that she was terminated at that time. (T.20-21). She also indicated that on 2/26/14 "... Cheryl had called to say that she was in the neighborhood, Morris, where I live and she wanted to pick up all the cleaning supplies and equipment from me." (T.21). Petitioner agreed that Cheryl thereupon did just that. (T.21).

In an office note dated 3/13/14, Dr. Khan recorded that "[p]atient continues to have back, neck, right shoulder, right arm pain and she continues to gain weight." (PX3). The diagnoses included neck sprain/strain and contusion of shoulder region. (PX3). It was noted that "[w]e requested authorization for the mri [and] advised no work for now." (PX3).

An MRI of the cervical spine performed on 3/21/14 revealed multilevel cervical spondylosis. (PX3). Specifically, mild right-sided foraminal stenosis due to uncontrovertebral arthropathy was noted at C2-C3; mild left-sided foraminal stenosis due to spondylitic bulge and left uncovertebral arthropathy at C3-C4; no disc herniation or stenosis at C4-C5; a broad-based disc bulge with small bilateral foraminal disc protrusions resulting in moderate left foraminal and moderate-to-severe right foraminal stenosis with no significant central stenosis at C5-C6; a broad-based spondylitic bulge with central disc protrusion resulting in moderate right foraminal and mild central stenosis at C6-C7; and no disc herniation or stenosis at C7-T1. (PX3). An MRI of the thoracic spine also performed on 3/21/14 was interpreted as being unremarkable. (PX3).

In an office note dated 3/27/14, Dr. Khan recorded that the "[p]atient continues to have back, neck, right shoulder pain." (PX3). Dr. Khan's diagnoses included neck sprain/strain and contusion of the shoulder region. (PX3). It was also noted that "mri explained to patient [and] refer pt to neuro surgeon." (PX3).

Petitioner agreed that she received a dexa-steroid injection in March of 2014. (T.21-22). However, she indicated that the injection did not relieve any of her symptoms. (T.22).

Petitioner visited Dr. Anthony Rinella at Illinois Spine & Scoliosis Center on 4/10/14. (T.22-23). In a report on that date, Dr. Rinella recorded that Petitioner was a "... 49-year-old cleaning specialist who has had tenderness in her neck extending down her right arm into her hand after a work related injury on 01/14/14. On that day she was performing her typical duties when the pain began. Her pain began in the trapezial area and slowly worked its way into the hand. She has no left-sided symptoms. She underwent a course of physical therapy beginning in 02/2014 that made her symptom[s] worse." (PX6). Following his examination and review of the cervical and thoracic spine MRIs performed on 3/21/14, Dr. Rinella's impression was 1) cervical strain – work related, and 2) cervical spondylotic radiculopathy. (PX6). He recommended epidural steroid injection at C6-7 "... to assess the degree to which narrowing is causing radicular symptoms. We will not pursue physical therapy as this has made her worse in the past. She would benefit from at least 5 visits of acupuncture at Silver Path. She will remain off work until her next evaluation in 6 weeks." (PX6). In a separate "Work Restrictions" form dated 4/10/14, Dr. Rinella indicated that Petitioner was off work until her next evaluation. (PX6).

On 4/22/14, Dr. Khan recorded that the "[p]atient continues to have right arm, right shoulder, neck pain and numbness. Patient pain level is an 8. She presented with abnormal test results. The results are for the following test(s): radiology report. The results are described as slightly abnormal." (PX3). The diagnoses were neck sprain/strain and contusion of shoulder region. (PX3). Petitioner was prescribed Naprosyn and instructed to return in 90 days. (PX3).

At the request of Respondent, Petitioner visited Dr. Jay Levin on 7/30/14 for purposes of a §12 evaluation. (RX1). In a report prepared at that time, Dr. Levin recorded that Petitioner "... cleans residential homes and changes sheets, dusts, vacuums, washes floors on her hands and knees, and occasionally moves furniture. She carries the vacuum, buckets, dusters, and chemicals to each location and lifts up to 50#. She works 37 hours/week... She denies any previous work-related injuries or any injuries/complaints/x-rays/MRIs/medical treatment referable to her cervical spine or right shoulder prior to an occurrence on January 14, 2014... She states that on that date, she believes it was a Tuesday, she had 2 homes to clean that were not her usual sites. She cleaned the first house which was on a hill, and she had to carry the vacuum and cleaning supplies up the hill and then back down once she was finished. She was 'fine' while cleaning that house. While she was washing the floors on her hands and knees at the second house, she felt numbness/tingling in her right arm and pain from the right side of her neck into her right shoulder and down into her right wrist and hand. She was able to finish that house, and she continued to work the rest of the week, but she had difficulty sleeping at night following that occurrence. On Friday she reported the injury." (RX1). Following his examination and review of the medical records, Dr. Levin noted that "... an MRI of her right shoulder is required to rule out local shoulder pathology. I am attaching herewith a prescription for such a study." (RX1).

An MRI of the right shoulder preformed on 8/22/14 was interpreted as revealing 1) mild supraspinatus tendinopathy with no evidence of a rotator cuff tear, and 2) mild degenerative bone marrow signal and mild edema within the humeral head and no fracture seen. (PX3).

In a report dated 8/28/14, Dr. Rinella recorded Petitioner "... continues to have tenderness in her trapezial areas that radiate into her elbow region and occasionally into her proximal forearm. She has numbness in her 3 fingers on the radial aspect of her hand. She rates her pain between 9-10/10 on a 10-point analog scale. We have discussed epidural steroid injections in the past. To date nothing has been approved by her insurance company." (PX6). Dr. Rinella's impression was 1) cervical spondylotic radiculopathy, and 2) right shoulder impingement-improvement. (PX6). Dr. Rinella noted that "[i]t is clear that Ms. Munoz had degenerative changes most notably at C6-7. However, these were aggravated by the work related injury on 01/14/14 causing a C6 and C7 radiculopathy. We discussed various treatment including physical therapy, epidural steroid injections, and surgical intervention. We discussed surgery because she is now more than 8 months from her injury and feels as though her pain is progressive. She is happy with her progress from a shoulder perspective. Therefore, I will refer her to Dr. Patel for an epidural steroid injection at C5-6 and C6-7. The main goal is to set expectations as to whether surgical intervention would be beneficial. Based on her symptoms, I believe the majority of her symptoms are related to a radiculopathy as opposed to her shoulder impingement... She will follow-up with me in 6 weeks and remain off work until that time" (PX6). In a "Work Restrictions" form dated 8/28/14, Dr. Rinella indicated that Petitioner was scheduled for follow-up on 10/8/14 and was off work until her next evaluation. (PX6).

Petitioner agreed that Dr. Rinella referred her to Dr. Sharma for an epidural steroid injection. (T.24). However, she indicated that Dr. Sharma never performed that injection because her claim wasn't approved. (T.24).

In an office note dated 9/10/14, Dr. Samir Sharma recorded that Petitioner had been referred by Dr. Rinella for C5-6 and C6-7 ESI. (PX8). Dr. Sharma noted that Petitioner located her pain primarily in the right, mid and lower cervical spine and that "[t]he pain radiates to the right shoulder, mid-scapular right, and right upper arm. She characterizes it as constant, severe, and aching, shooting, stabbing, pulling, throbbing, radiating, numb, tingling. This is an acute episode with no prior history of back pain. She states that the current episode of pain started after the injury dated 01/14/14. The event which precipitated this pain was Patient was washing the floor and noticed pain in her neck. She finished the day and finished the rest of the week through pain... Associated symptoms include stiffness that is persistent, radicular right arm pain and numbness in the right hand." (PX8). Dr. Sharma indicated that Petitioner was to return for a cervical trans-foraminal epidural steroid injection under digital subtraction angiography, under fluoroscopic guidance. (PX8).

In a progress note dated 10/2/14, Dr. Khan recorded complaints of sore throat, cough and sinus problems as well as chest congestion and ear ache. (PX3). The assessment was acute bronchitis and acute serous otitis media. (PX3). No mention is made of any neck, right shoulder/arm complaints or conditions. (PX3). The same complaints and assessment were recorded at the time of her follow-up visit to Dr. Khan on 10/8/14. (PX3).

In a report 1/23/15, Dr. Levin, Respondent's §12 examining physician, noted that the MRI of the right shoulder he had recommended was performed on 8/22/14. (RX2). He indicated that this study revealed "... age appropriate findings with mild rotator cuff tendinitis, no evidence of rotator cuff tear and changes in the humeral head consistent with degenerative change." (RX2). Dr. Levin also stated that he did not agree with Dr. Rinella's interpretation of the 3/21/14 MRI as revealing a disk herniation at C6-C7. (RX2). He likewise noted that he respectfully disagreed with Dr. Rinella's recommendation for "... surgical intervention to the cervical spine as it relates to a work related injury of January 14, 2014..." (RX2). Dr. Levin also theorized that "[t]his examinee could very well have sustained no injury at all from the occurrence of January 14, 2014 because she did not comment in the record of Dr. Khan on January 23, 2014 of a specific date January 23 [sic], 2014 or specific details as described to me on July 30, 2014... If she sustained any injury at all, it would have been a strain to the cervical spine or right shoulder... If she sustained any injury it was her right shoulder strain and a cervical myofascial strain from the occurrence of that event." (RX2). He also believed that Petitioner would have reached MMI within 4 weeks post-injury. (RX2). He also noted that Petitioner could have worked "... in clerical modified work from the date of the occurrence" and that she could have worked in "... a full duty capacity 10 days thereafter." (RX2). Finally, Dr. Levin opined that "[t]here is no role for any surgical intervention of the cervical spine from the occurrence of January 14, 2014. She does not require any additional medical care or treatment referable to that occurrence." (RX2).

Petitioner testified that she returned to Dr. Rinella on 8/27/15, or almost a year to the day after her last visit. (T.25,36). She agreed that her symptoms had not changed in the interim and that she was still experiencing pain and tingling. (T.25). She also agreed that at the time of this visit Dr. Rinella examined her and continued to recommend that she undergo surgery. (T.25-26). She noted that the surgery he described to her was a three-level disk replacement. (T.26). She agreed she continued to have follow-up visits with Dr. Rinella in 2015 and 2016. (T.26-27). She also indicated she never received the injections or surgery recommended by Dr. Rinella. (T.27).

In a report dated 8/27/15, Dr. Rinella's physician assistant Douglass Stevens recorded that Petitioner "... returns today to discuss her continued posterior and right upper trapezial/upper extremity symptoms from her work injury (01/14/15 [sic]). She currently scores her pain at 9/10... She is currently not taking any medications due to extreme financial difficulties." (PX6). Mr. Stevens noted that Dr. Rinella had recommended epidural steroid injections as well as an anterior cervical discectomy and fusion at C5-6 and C6-7 but that "[n]one of this has been approved by her Workmans' Compensation Carrier. She is quite frustrated with that fact that her treatment recommendations have not been approved. She has been placed off work at every visit thus far, and has questions regarding what possible restrictions could be written should a light duty scenario be offered." (PX6). The impression was C5-C6 and C6-C7 cervical disc herniations with associated cervical pain and right upper extremity radiculopathy and weakness with right wrist extension." (PX6). It was noted that "[c]urrent recommendations remain a right-sided epidural steroid injection at the C6-C7 level. Surgical recommendations remain a C5-C6 and C6-C7 anterior cervical discectomy and fusion... She will remain off work at this time. However, should a light duty scenario become available, reasonable work restrictions would include a 5-pound lifting restriction, no over-the-shoulder lifting, no climbing and no repetitive use of the right upper extremity. It is my hope that we can move forward as soon as possible with the treatment recommendations, as Ms. Munoz is quite uncomfortable and her symptoms correlate well with

findings described on her cervical imaging. Otherwise, we look forward to seeing her back in 4 to 5 [weeks] [or] on an as needed basis." (PX6).

In a report dated 9/30/15, physician assistant Stevens recorded that "Ms. Munoz returns today to discuss her continued posterior cervical and right upper trapezial/upper extremity symptoms present since her work injury (01/14/14). She currently scores her pain at a 6-7/10." (PX6). Mr. Stevens noted that "[c]urrent recommendations remain a right-sided epidural steroid injection at the C6-C7 level. Surgical recommendations remain a C5-C6 and C6-C7 anterior cervical discectomy and fusion. She will continue to utilize Ultram and Flexeril as previously described… Light-duty restrictions will be considered should they become available." (PX6).

In a "Quick Report" dated 9/30/15, Dr. Rinella noted a diagnosis of "C5-6 and C6-7 Disc herniation with cervical pain and radiculopathy." (PX6). Dr. Rinella recommended epidural steroid injections at C6-7 on the right side and surgical intervention in the form of "C5-6 and C6-7 ACDF." (PX6). Petitioner was to remain off work until her next evaluation scheduled for 11/6/15. (PX6).

In a report dated 11/6/15, physician assistant Stevens recorded that "[t]he frequency of her symptoms have increased since her 09/30/15 office visit. She currently sores [sic] her pain at a 7/10… She is quite frustrated as we continue to wait authorization for a multi-level cervical fusion as previously recommended by Dr. Rinella… She has been off work thus far as she states there is no light-duty available but states she would be willing to try a light-duty situation should it become an option." (PX6). Mr. Stevens noted that the surgical recommendation remains as previously described. (PX6). The same status and recommendation for surgery was noted in reports by Mr. Stevens dated 3/11/16, 4/29/16, 6/10/16, 9/29/16, and 11/10/16. (PX6).

Petitioner testified that no doctor had released her back to work since Dr. Khan placed her off work in January of 2014, and that she has remained off work to the present day. (T.27). She testified that she is still experiencing symptoms to this day, noting that "… as of right now you can see I'm moving back and forth. I can't do anything for a long period of time. I can't sit; I can't stand; I can't lay [sic]." (T.27-28). She stated that "[t]he pain gets more intense" when she sits, stands or lies down for any period of time, noting that she is feeling pain in "[t]he same spots as beginning. It starts in my neck and it goes down. It's my right in my back down my arm and my neck." (T.28). However, she noted that she was not experiencing any numbness or tingling on the day of trial. (T.28). She also stated that these symptoms have affected her daily living, noting that "I can't do anything I would normally do. Just on a daily basis like I had stated. If I have the pain constantly. But if I go to make dinner I do the dishes or laundry, anything like that, it puts the pain at a higher level. I have to space everything out and take breaks." (T.30). She indicated that she has not returned to work since she was placed off work by Dr. Khan, and that she has not received any disability benefits from her employer while she has been ordered off work. (T.30).

On cross examination, Petitioner agreed that she cleaned homes and that part of her job duties involved washing floors. (T.32-33). She indicated that she would wash floors every day, and that she would clean two homes a day, noting that "[o]nce in a great while there might be 3. It was basically 2." (T.33). She agreed that she would wash the floors at each home on her hands and knees. (T.33). She noted that the time it would take her to do this would depend on the size

of the home, noting that "... like I said every home you went from an average size home to a huge home." (T.33). She also agreed that she has not worked since the alleged accident on 1/17/14. (T.34). She indicated that she has not had any other jobs, including side jobs, noting that "I can't clean. I'm lucky to clean my own house." (T.34-35).

Petitioner testified that due to her injury she "... can't lift anything heavy and I can't do anything for long periods of time. I can't hold my right arm for a long period of time." (T.39). She indicated that these are the same limitation she had when she was treating with Dr. Rinella in 2015. (T.39)-40).

As far as problems with daily living, she agreed that she has trouble lifting objects and holding her arm up as well as cleaning up and making meals. (T.42). She explained that "[a]fter I do either cooking the meal or whatever you want to call a chore, my pain gets more intense." (T.42). She noted that to alleviate this she "... usually takes breaks. I lay [sic] down and I have the prescription, I have the pain pills and the muscle relaxers that I was prescribed." (T.42). She indicated that the number of breaks "... depends on what I do and don't do and I don't do everything all in one day. I break everything up. One day is just laundry, another day you know, will be doing dusting or something like that. And I have to take breaks if I just do one table which I use my left side – my left hand, I have to take a break say every 15 minutes." (T.43).

Dr. Rinella testified that he is a board certified orthopedic spine surgeon and that he first saw Petitioner on 4/10/14. (PX9, pp.4,6). He noted that at that time he "... diagnosed her with a cervical sprain and a cervical spondylotic radiculopathy due to the work-related injury of January 14, 2014." (PX9, pp.10-11). In terms of treatment options at that time, Dr. Rinella indicated that "[w]e typically recommend physical therapy, but she obviously already attempted this in February of that year and it made her symptoms worse. The next step was an epidural steroid injection at the C6-7 level which was the more narrow level on the right side. We talked about acupuncture in terms of muscular relief, and I believe she brought that up. And she would remain off work until her next evaluation in four to six weeks." (PX9, p.11).

Dr. Rinella testified that he next saw Petitioner on 8/28/14 at which point "... she had already failed conservative management, and right now we are approximately seven – almost – well, it really eight, almost nine months out from her injury. And I told her that, you know, the vast majority of patients heal within six months. And on some level in injuries of this type, we get a little bit ahead of ourselves just in case surgery were necessary down the road so the insurance company can perform whatever necessary secondary evaluation and things of this sort. So really our focus was the epidural steroid injections, but I made it clear not that she was almost nine months out, that the likelihood that she was in the 90 percent that get better on their own was getting smaller and smaller over time just because we were so far out from her injury at this point." (PX9, pp.12-13). He agreed that he continued to keep her off work at that time and referred her for an ESI. (PX9, pp.13-14).

Dr. Rinella testified that Petitioner was next seen, this time by his assistant Doug Stevens, on 8/27/15. (PX9, p.14). Dr. Rinella noted that "[a]pparently, no treatment really had been approved at that point, and she was frustrated because we were really at a standstill. That was most likely the reason why the gap in treatment because we just couldn't get anything done." (PX9,

p.15). Dr. Rinella testified that as of the date of his deposition (9/16/15), "... we are still trying to follow the same path we did before. The difference is now that, you know, we are obviously a year and a half or more out from her injury, I'm no longer wondering if she's going to be in the 90 percent that gets better within one year... [I]f she gets the epidural steroid injection and says, well, this is an incredible improvement in my symptoms, she could have more confidence in the surgical procedure we discussed. But I didn't really expect an epidural at this point to remove the pain on a permanent basis. So we talked again about a C5-6 and C6-7 anterior cervical discectomy and fusion. This is based on the disk herniations at both levels we discussed previously. We talked about Ultram and Flexeril as far as nonnarcotic pain medications... [and] we talked about being off work. If she had to return to work – because she was very concerned about the financial situation – I was willing to set her at a five-pound weight restriction with no over-the-shoulder lifting, no climbing ladders and things of this sort or repetitive activities with her right arm. We were trying to cater to her because of her financial scenario." (PX9, pp.15-16).

Dr. Rinella testified that "I believe with a high degree of medical certainty that the work-related injury of January 14, 2014, was either the cause or an aggravating factor of her right-sided C6 and C7 radiculopathies which – for which I'm recommending the two-level cervical fusion." (PX9, p.18). When asked the basis for his opinion, Dr. Rinella stated that "... basically, her symptoms have been very consistent throughout all of her treatment. They really haven't changed at all. The close proximity between my evaluation and the consistency of all of her evaluations both objectively and subjectively gives me the high confidence that ...the injury that caused the – at a minimum the disk herniations to become symptomatic, but it may have caused them to either be enlarged or caused all together from the injury itself." (PX9, p.19).

When asked whether his bills were fair and reasonable, Dr. Rinella indicated that "[t]hey are based on the workmen's compensation fee schedule for our community." (PX9, p.19).

On cross examination, Dr. Rinella indicated that "probably 40 percent" of his practice involves cervical spondylotic radiculopathy. (PX9, p.20). He testified that "... arm pain is extremely common. Obviously, initially, I know they have a pinched nerve. I don't exactly know which one it is depending on whether or not the MRI's are available. In her case the MRI's were available. So I knew exactly what it was. So this is an extremely common reason why people come to see me." (PX9, p.21).

When asked whether it was true that Petitioner did not give him a history of a specific incident that caused her pain when he first saw her, Dr. Rinella noted that "... she told me the date of the injury. I guess she didn't give me the time... [T]his is common. What happens is people are doing some process. Cleaning specialists do a lot of lifting, manipulation of beds and things of this sort, and as a result, they develop a pain. They initially think it's just a muscular issue, and then all of a sudden it starts to work its way towards the shoulder and over the day it works towards the arm. And so it's not like she fell off a building and then that happened. She was just doing her typical activities and for whatever reason that day this progression that took a couple of hours initiated." (PX9, pp.21-22). However, he noted that she experienced the pain "... while working for sure. She gave me a basic idea. I didn't include it in here, and I don't want to quote it exactly. I know she does, you know, lifting and cleaning of these sorts. I don't know exactly what she was lifting or what it was. I don't think it was quite that clear. It was more she runs a very busy work

environment, and it was just the repetitive nature of common things that did it that day." (PX9, p.22).

Dr. Rinella agreed that age could be a risk factor "[i]n theory", noting that "[p]atients are more likely to have arthritic processes over age 40 than under, but it happens in all age groups." (PX9, p.22). He also conceded that there may be a correlation between this kind of diagnosis and previous neck injuries, if the latter included radiating arm symptoms, were treated by specialists or had some kind of MRI confirmed issues. (PX9, p.23). He also noted that "[i]n theory" genetics could also be a risk factor, but that practically speaking it isn't, noting that "[i]t's more low back genetics that I think affect things like spinal stenosis. If she had some congential abnormalities, some different type of bone structure, I'd say she was more likely to have trouble, but her anatomy was very normal. So I wouldn't bring in the genetic component on her." (PX9, p.23).

Finally, Dr. Rinella agreed that he had no contact with the patient between 8/28/14 and 8/27/15, at least in terms of office visits – however, he could not speak to any calls to his office since he did not have any of the nursing records. (PX9, pp.23-24).

Dr. Levin testified that he is also a board certified orthopedic surgeon and that he examined Petitioner on 7/30/14. (RX3, pp.6-8). He noted that at that time he felt "... additional imaging studies of her right shoulder was important to rule out a local shoulder pathology, and a prescription was given for that test." (RX3, p.14). Dr. Levin indicated that an MRI of the right shoulder was subsequently performed on 8/22/14 which he interpreted as revealing "... minimal tendinitis of no clinical significance" in the rotator cuff, "mild arthritis" at the AC joint with "[s]ome degenerative changes of the humeral head" and "... some mild bicipital tendinitis." (RX3, p.15). Dr. Levin testified that "[t]he findings on the study are age-appropriate findings with mild rotator cuff tendinitis, no evidence of rotator cuff tear, and changes in the humeral head consistent with degenerative change." (RX3, pp.15-16).

Dr. Levin noted that Petitioner's subjective complaints at the time of his examination on 7/30/14, specifically posterior and localizing right shoulder pain, "... could be consistent with the local right shoulder pathology." (RX3, p.16). However, he indicated that his interpretation of the MRI was not consistent with a single traumatic event as described by the Petitioner. (RX3, p.16). Instead, he agreed that it was more associated with a degenerative condition based on her age as well as "... hand dominance..." (RX3, p.16).

In addition, Dr. Levin testified that he reviewed the cervical MRI dated 3/21/14. (RX3, p.17). He agreed that his interpretation of that MRI was basically consistent with that of radiologist Biren Patel. (RX3, p.17). Dr. Levin indicated his interpretation included 1) arthropathy at the uncovertebral joints at C2-C3; 2) degenerative annular bulging more towards the left at C3-C4; 3) degenerative disc changes at C4-C5; 4) mild degenerative disc changes with degenerative annular bulging and foraminal stenosis bilaterally on a bony basis at C5-C6, and 5) severe degenerative disc changes, central annular bulging, and foraminal stenosis on a bony basis at C6-C7. (RX3, p.18). He noted that "[t]he findings are consistent with multiple-level degenerative changes at the level of the disc and the uncovertebral joints." (RX3, p.18). He indicated that these objective findings "could" match the subjective complaints of the Petitioner, but that "I personally think that the patient's diagnosis in totality of the information, including the alleged mechanics of injury, is

more soft tissue strain, but arthritis of the neck would give you neck pain." (RX3, p.18).

When asked whether he believed Petitioner sustained a work injury on the day alleged, Dr. Levin testified that "[f]rom her history and the way she described it to me on July 30th, 2014, … and assuming that to be accurate, then she certainly could have." (RX3, p.19). However, he noted that "[t]he facts that are not consistent with that are the initial medical records of Dr. K-H-A-N, which, in fact, did not, from my interpretation of those records, describe the incident that she stated occurred…" (RX3, pp.19-20).

In addition, with respect to causation, Dr. Levin opined that "[b]ased upon her subjective complaints in the records and [noted on the date of his exam on] July 30th, 2014, those subjective complaints are not consistent with the diagnosis from that event…" (RX3, p.20). Dr. Levin also noted that "… the recommendation for treatment following the event for those diagnoses will be a course of physical therapy of 10 visits for both conditions." (RX3, pp.20-21). In addition, he indicated that Petitioner's return-to-work time frame would be "[a]nywhere from zero to – in clerical modified work, based upon the attachment that I placed in this report, which is relied upon according to the AAOS workers' compensation course, a course of physical therapy of 10 visits with return to work best practice guidelines in clerical modified work anywhere from zero days to 10 days." (RX3, p.21).

Dr. Levin agreed that the MRIs taken in this case show age-appropriate findings inconsistent with the examinee's clinical complaints. (RX3, p.21). However, he indicated that Petitioner's subjective complaints four weeks after the alleged accident were not inconsistent with her condition, noting that considering other individual patient factors "… their complaints can last for double that period of time. So if we get out eight weeks, everything should be gone." (RX3, pp.21-22). Dr. Levin noted that in his report he stated that Petitioner would have reached MMI "… within four weeks post injury. Again, subject to my previous comments, it could be four to six weeks post injury." (RX3, p.22). He also indicated that he believed Petitioner could return to work full duty "… within 10 days or so post injury." (RX3, pp.22-23).

Dr. Levin testified that "[t]he treatment recommendation that I've described in my testimony today and my report are reasonable, recommended for this condition. Since my last visit with this examinee was July 30th, 2014, if any treatment has been outside of that, then, in fact, I would tell you that does not appear to be generally appropriate. But since I've not seen this person since July 30th, 2014, I could only comment to the treatment that was provided to that period of time." (RX3, p.23). Dr. Levin indicated that he would not recommend any surgical intervention in this matter, and that he did not believe she needed any additional medical care or treatment. (RX3, pp.23-24).

On cross examination, Dr. Levin agreed that at the time of his examination Petitioner denied any injuries, complaints or treatment prior to 1/14/14 relating to the cervical spine or right shoulder. (RX3, p.25). He also agreed that the records he reviewed had no reference to any prior injuries, complaints or treatment relative to the cervical spine and right shoulder. (RX3, p.25). He likewise agreed that Petitioner had positive findings at the time of his physical exam on 7/30/14, including pain with active abduction and tenderness in the trapezius. (RX3, pp.26-27). He also agreed that she had increased pain with "wall push-off", which he stated "[c]lassically …

indicate[s] some shoulder pathology or neurologic etiology related to the shoulder." (RX3, p.27). In addition, he noted that "[t]here was tenderness in the midportion of the midline cervical and lower cervical areas… and some right medical trapezius tenderness…" (RX3, p.28).

With respect to the MRI performed on 3/21/14, Dr. Levin agreed that they showed degenerative annular bulging at C5-C6 and degenerative bulging at C6-C7. (RX3, p.28). He also agreed that one reason he felt it was possible that there was no work injury was the fact that there was a nine-day gap in treatment. (RX3, p.29). He agreed that another reason was that Dr. Khan's 1/23/14 note did not specify the work injury, explaining that "[i]t wasn't consistent with the specific details she told me of that injury [during his exam] on July 30th, 2014." (RX3, pp.29-30). Along these lines, he stated that "… there always is a possibility that there's not a direct relationship between an injury which was told to me more accurately than in more proximate time to a treating doctor." (RX3, p.31).

When asked whether Petitioner was still experiencing symptoms of a muscular strain when he examined her in July 2014, Dr. Levin testified that "… one could come to that conclusion that she was symptomatic in concert with her subjective complaints. I also believe that … the mechanism of injury and the diagnosis that I've described on January 14, 2014, should have resolved by the date of July 30th, 2014." (RX3, p.31).

Conclusions of Law

The burden is on the party seeking an award to prove by a preponderance of credible evidence the elements of his claim, particularly the prerequisites that the injury complained of arose out of and in the course of the employment. *Illinois Institute of Technology v. Industrial Commission*, 68 Ill.2d. 236, 369 N.E.2d 853, 12 Ill.Dec. 146 (1977).

In the present case, Petitioner claims she was injured as a result of an incident that allegedly occurred on 1/14/14. However, the Commission notes that Petitioner failed to describe an adequate mechanism of injury in support of her claim. More to the point, Petitioner simply testified that she was on her hands and knees washing a client's floor when she experienced pain, numbness and tingling in her neck and down her right arm. She did not testify as to which hand she was using, much less the time she spent performing this activity, the motion she was using or the force she was exerting. The Commission finds this insufficient proof that Petitioner suffered an acute injury as the result of a specific, identifiable accident on 1/14/14.

Furthermore, the Commission notes that it does not appear Petitioner is claiming that her injuries were the result of repetitive trauma, even though Dr. Rinella seems to base his causation opinion on the fact that "[c]leaning specialists do a lot of lifting, manipulation of beds and things of this sort… [and] [s]he was just doing her typical activities and for whatever reason that day this progression that took a couple of hours initiated." (PX9, pp.21-22). The Commission finds Dr. Rinella's opinion along these lines wholly unconvincing, especially given the fact that he admittedly did not understand the specific activities associated with Petitioner's job. Indeed, Dr. Rinella testified that "I know she does, you know, lifting and cleaning of these sorts. I don't know exactly what she was lifting or what it was. I don't think it was quite clear. It was more she runs a very busy work environment, and it was just the repetitive nature of common things that did it

that day." (PX9, p.22). Once again, the Commission notes that this was not Petitioner's theory of recovery, and even if it was, she failed to sustain her burden of proving by a preponderance of the credible evidence that her job duties were sufficiently repetitive in nature so as to warrant compensation. Along these lines, the Commission chooses to rely on the opinion of Respondent's §12 examining physician, Dr. Levin, over those offered by Dr. Rinella.

Accordingly, the Commission finds that Petitioner failed to prove that she sustained accidental injuries arising out of and in the course of her employment on 1/14/14 and failed to prove that her current conditions of ill-being relative to her neck and right shoulder are causally related to said alleged accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's award is vacated and Petitioner's claim for compensation is hereby denied.

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

DATED: OCT 2 6 2018
o: 8/22/18
TJT/pmo
51

Michael J. Brennan

Kevin W. Lamborn

DISSENT

I dissent. I believe that Petitioner provided an entirely adequate description of the acute injury she sustained on 1/14/14 when she was on her hands and knees scrubbing a client's floor, which she noted was a regular part of her job duties. She also testified, without refutation, that she dusted, vacuumed, cleaned the stove and "every part of the home", and that she would have to carry cleaning supplies and equipment weighing approximately 40 pounds to the homes she was assigned to. On the date in question, she had already completed the cleaning of a large home that was not on her regular schedule and was obviously performing a task that was part and parcel to her job as a house cleaner. Why Petitioner would be required to provide a more detailed description of "the mechanism" of injury is beyond me, given that it is entirely reasonable to assume that as a necessary adjunct to being on one's hands and knees scrubbing floors one would have to utilize one's upper extremities in the process.

Furthermore, I believe that in addition to a single, identifiable event that either caused or aggravated her underlying condition, Petitioner also proved by a preponderance of the evidence

that she sustained repetitive-trauma type injuries that arose out of and in the course of her employment, manifesting itself as of the date of accident, based on Ms. Munoz's credible testimony as to the duties associated with her job as well as the persuasive opinion of Dr. Rinella.

For the foregoing reasons, I would affirm the Arbitrator's finding of accident and causation, and award benefits accordingly. However, I would modify the Arbitrator's decision to show that Petitioner was entitled to temporary total disability from 1/23/14 through 8/28/14, or the date of MMI, for a period of 31-1/7 weeks.

Thomas J. Tyrrell

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

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Loleta Black,

Petitioner,

vs. NO: 16 WC 37745

18IWCC0637

State of Illinois Department of Human Services,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 18, 2017, is hereby affirmed and adopted.

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

18IWCC0637

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 26 2018
TJT:yl
o 10/23/18
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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

BLACK, LOLETA
Employee/Petitioner

Case# **16WC037745**

ST OF IL DEPT OF HUMAN SERVICES
Employer/Respondent

18IWCC0637

On 9/18/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.14% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2553 McHARGUE, JAMES P LAW OFFICE
MATTHEW C JONES
123 W MADISON ST SUITE 1000
CHICAGO, IL 60602

5604 ASSISTANT ATTORNEY GENERAL
DAVID CHRISTENSEN
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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

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

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

SEP 18 2017

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

18IWCC0637

BLACKSTATE 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
19(b) & 8(a)

Loleta Black
Employee/Petitioner

v.

State of Illinois Dept. of Human Services
Employer/Respondent

Case # **16** WC **37745**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Wheaton II (Elgin)**, on **July 13, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, December 1, 2016, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $47,627.84; the average weekly wage was $915.92.

On this date of accident, Petitioner was 52 years of age, *single* with no dependent children.

Respondent *has* paid all reasonable and necessary charges for all reasonable and necessary medical services[1].

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

As agreed, Respondent is entitled to an unknown credit under Section 8(j) of the Act[2]. *See* AX1.

ORDER

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner has established that she sustained a compensable injury on December 1, 2016 as claimed as well as a causal connection between the injury at work and her ongoing condition of ill-being.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $610.61/week for 31 & 3/7th weeks, commencing December 6, 2016 through July 13, 2017 as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from December 1, 2016 through July 13, 2017, and shall pay the remainder of the award, if any, in weekly payments.

Prospective Medical Treatment

As explained in the Arbitration Decision Addendum, the Arbitrator awards the prospective medical care in the form of bilateral knee surgeries and cervical and lumbar MRIs as prescribed by Dr. Silver and Dr. Khan pursuant to Section 8(a) of the Act.

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[1] The parties stipulated that any issue relating to unpaid medical expenses would be determined at a later hearing, if necessary. *See* AX1.

[2] *See* FN1.

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

September 1, 2017
Date

SEP 18 2017

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

Loleta Black
Employee/Petitioner

v.

State of Illinois Dept. of Human Services
Employer/Respondent

Case # **16** WC **37745**

Consolidated cases: **N/A**

FINDINGS OF FACT

The issues in dispute include whether Petitioner sustained a compensable accident on December 1, 2016, whether there is a causal connection between Petitioner's current condition of ill being and her alleged accident, and whether Petitioner is entitled to prospective medical treatment in the form of bilateral knee surgeries and cervical and lumbar MRIs as prescribed by Dr. Silver and Dr. Khan. Arbitrator's Exhibit[3] ("AX") 1. The parties have stipulated to all other issues. AX1.

Background & Accident

Loleta Black (Petitioner) testificd that she was employed by State of Illinois Department of Human Services (Respondent) and had been so employed for 3½ years as a Case Worker. Petitioner testified that she had no left knee, low back, or neck injuries or treatment prior to this incident at work.

On December 1, 2016, Petitioner testified that she went to work at the office in Villa Park. When she arrived, she clocked in and had to traverse three flights of concrete stairs from the entrance of the building to reach her office on a lower level. This area is not open to the general public. Petitioner testified that while she was descending the stairs, she slipped and fell at approximately 8:00 a.m. on the second flight of stairs. Petitioner explained that she fell backwards and hit her tailbone then she went forward and hit both of her knees on the stairs. Petitioner testified that her pant legs were wet, so she assumed there was water on the ground. She testified that her tailbone and back area was also wet. Petitioner testified that she was wearing winter boots with good tracking at the timc of her fall. Immediately after the fall, Petitioner felt pain in her knees and in her back.

Petitioner testified that she fell a couple of stairs above where the safety cone and chair is located. PX10. She explained that she would see the safety cone placed on the stairs approximately two-to-three times per week. She also reviewed several photographs showing different angles of the stairwell in which she fell. PX8-PX10. Petitioner testified that she believed that there was water damage and missing ceiling tiles causing a leak. She also testified that there were sometimes leaks throughout the building and on the stairs two-to-three times per week. Petitioner testified that she noticed water on the stairs approximately five times while she worked for Respondent.

Petitioner testified that there were people coming down the stairs. Petitioner testified that Dr. Daniel Williams saw her fall. Dr. Williams did not testify at the hearing. Petitioner explained that when she got to the bottom of the stairs he asked her whether she was ok, and she responded "no" she was not ok. Petitioner eventually got up

[3] The Arbitrator similarly references the parties' exhibits herein. Petitioner's exhibits are denominated "PX" and Respondent's exhibits are denominated "RX" with a corresponding number as identified by each party.

and, after sitting for some time, she went to tell her supervisor, Ms. Reed, that she could not start work or see any customers because she slipped and fell. Petitioner testified that Ms. Reed did not ask her why she slipped and fell.

Medical Treatment

An ambulance was called at 8:47 a.m. PX1. Petitioner reported bilateral knee pain and that "she was walking down the stairs in the stairwell at work when she slipped and fell down the last two steps." *Id.* Petitioner was taken to the emergency room at Elmhurst Hospital. PX2. She reported "tripping and falling today at work and landing on her knees." *Id.* Petitioner was diagnosed with a back strain and knee strain. *Id.*

Petitioner saw Ronald Silver, M.D. on December 6, 2016. PX3. He noted Petitioner's report that she was "walking into her work place down the stairs tripped and fell falling down the stairs twisting and striking both of her knees as well as injuring her neck and back." *Id.* On physical examination, Dr. Silver noted severe soft tissue swelling and inflammation bilaterally in her knees, as well as bilateral positive McMurray's tests and medial joint line tenderness. *Id.* He ordered MRIs, due to concern about bilateral cartilage damage, and prescribed anti-inflammatory and pain medication. *Id.* Dr. Silver also placed Petitioner off work and referred her to Dr. Khan for treatment regarding her neck and back. *Id.*

Petitioner underwent the recommended MRIs on December 14, 2016. PX3. The interpreting radiologist found lateral and medial meniscal tears, small joint effusions, peripatellar soft tissue swelling, presumed to be posttraumatic soft tissue bruising, in both of Petitioner's left and right knees. *Id.*

December 21, 2016

On December 21, 2016 Petitioner had an accident at home. She explained that she was coming into her building when she tripped over a red salt bucket causing her to fall and hit her neck and her head. Petitioner sought treatment at Elmhurst Memorial Hospital. She testified that this incident did not affect her knee pain or low back, although she did have increased neck pain before it returned to the same level as before this incident. Petitioner testified that she had no other medical treatment for the head or neck because of this incident at home.

Continued Medical Treatment

On December 22, 2016, Dr. Silver noted his review of Petitioner's MRIs showed tearing of both medial and lateral menisci in both knees. PX3. He prescribed arthroscopic surgery "due to [Petitioner's] work injury of December 1, 2016." *Id.* Dr. Silver kept Petitioner off work. *Id.* Petitioner also underwent physical therapy from December 22, 2016 through February 8, 2017 as recommended by Dr. Silver at ATI. PX4. Petitioner testified that the physical therapy did not help her much.

Petitioner also testified that Dr. Silver also referred her to Dr. Khan for her neck and low back pain. *See also* PX3. Petitioner saw Dr. Khan and he recommended MRIs of both the cervical and lumbar spine because of Petitioner's lack of response to conservative treatment. PX7. Petitioner testified that she has yet to undergo these MRIs. *See also Id.*

On January 19, 2017 and March 7, 2016, Dr. Silver indicated that he was still awaiting approval for the prescribed bilateral arthroscopic surgeries to repair Petitioner's torn medial and lateral menisci in both knees due to her work accident. PX3; PX7. He kept Petitioner off work. *Id.*

On April 18, 2017, Dr. Silver noted that Petitioner continued to have medial and lateral joint line tenderness bilaterally with effusions in both knees during her physical examination. PX3; PX7. He continued to recommend surgery due to her work accident and kept Petitioner off work. *Id.* As of May 25, 2017, Dr. Silver maintained that Petitioner required bilateral knee surgery to repair the torn medial and lateral menisci in both knees caused by her injury at work. *Id.*

On June 29, 2017, Dr. Silver acknowledged that Petitioner "did have some discomfort in her right knee in August and September of 2016 that was treated with four weeks of physical therapy and a course of Naprosyn and the problem resolved itself and she was asymptomatic prior to her work accident of December 1, 2016." PX3; PX7. Petitioner's physical examination remained abnormal. *Id.* Dr. Silver kept Petitioner off work and continued to recommend bilateral knee surgeries and MRIs. *Id.*

Ms. Reid

Janet Reid (Ms. Reid) testified that she worked for Respondent for 13 years and is employed as the Human Services Case Manager. Ms. Reid testified that she was Petitioner's supervisor. Her work schedule was 8:30 a.m. to 5:00 p.m.

On December 1, 2016, Ms. Reid entered through the employee entrance before 8:30 a.m. Ms. Reid reviewed Respondent's Exhibit 1, which contains photographs of the employee entrance. She also reviewed Petitioner's Exhibits 8, 9, and 10. Ms. Reid testified that these photographs are of the employee entrance. Petitioner's Exhibit 8 shows a missing tile. Ms. Reid was not aware how long the tile had been missing and she cannot tell from the photographs where the missing tile would be. She testified that she arrived at work approximately 5-10 minutes before Petitioner, but she did not recall anything unusual about or on the stairs. Ms. Reid further testified that Petitioner's Exhibit 10 reflects a cone, but she was not aware whether there was a cone on the stairs on the alleged date of accident. She explained that there is a cone present when the stairs are wet or when the floor is mopped by custodians, which is usually done later in the afternoon.

Ms. Reid testified that Petitioner went to her office and told her that she fell down the stairs and hurt her knee. On cross examination, Ms. Reid testified that her job does not involve the maintenance of the stairwell.

Ms. Dickerson

Nicole Dickerson (Ms. Dickerson) testified that she was employed by Respondent in Villa Park as a Human Services Case Worker. She testified that she arrived at work at about 8:15 and entered through the employee entrance at 8:25 a.m. on the alleged date of accident.

Ms. Dickerson reviewed Respondent's Exhibit 1 and testified that it shows the employee entrance. She did not recall anything unusual about the stairs or on the stairs. Ms. Dickerson testified that she arrived around the same time as Petitioner and entered the building before Petitioner. She testified that Petitioner fell while they were walking down the stairs, but she did not see Petitioner fall. Ms. Dickerson testified that she heard a stumble, turned around, and observed Petitioner on the first landing. She testified that she asked Petitioner if she was ok to which Petitioner responded, "yes, I think I just missed a step." Ms. Dickerson recalled Petitioner having her work bags and coffee, but testified that the coffee did not spill.

Ms. Dickerson also reviewed Respondent's Exhibit 2 and testified that this is her statement about the events of December 1, 2016. She further reviewed Petitioner's Exhibits 8, 9 & 10. She testified that the missing tile

contained in those photographs had been there throughout the time that she worked for Respondent and the watermark had been there for as long as she could remember. PX8. According to Ms. Dickerson, the missing tile reflected in Petitioner's Exhibit 9 and Respondent's Exhibit 1 on page 3 is located above the first landing.

On cross examination, Ms. Dickerson testified that her exchange with Petitioner was short, approximately 30 seconds. After she and Petitioner signed in, she went to her desk and 30 minutes later she was asked if she saw Petitioner fall, to which she responded no. Ms. Dickerson was then asked to write a report, which she did. *See* RX2. She acknowledged that the report does not indicate whether the stairs were wet or dry.

Mr. Gurley

Edward Gurley (Mr. Gurley) testified that he was employed by Respondent on December 1, 2016 at Villa Park as an Office Manager. He handled the business side of the office, security, grounds, payroll, equipment. In his position, he would have been notified of any condition with the stairs. He worked 8:30-5. On the alleged date of accident, he arrived at roughly 9:00 a.m. through the employee entrance.

Mr. Gurley reviewed Respondent's Exhibit 1 and testified that it contains photographs of the employee entrance to the office. Mr. Gurley testified that he examined the stairs and did not notice anything unusual about the stairs on the alleged date of accident. When he arrived, he saw paramedics attending to Petitioner and was told that Petitioner fell down the stairs. Mr. Gurley did not speak with Petitioner about the incident.

Mr. Gurley also reviewed Petitioner's Exhibits 8, 9 and 10. He testified that the cone reflected in the photographs is used by maintenance people, sometimes to prop a door open, or the custodial crew to alert people that the area was wet. PX10. The custodial staff usually mops in the afternoon around 2:00 p.m. to 2:30 p.m. Mr. Gurley testified that the missing tile reflected in the photographs had been missing for five years. The watermark had also been there for a long time as well. Mr. Gurley testified that he does not recall any leaks on the stairs.

On cross examination, Mr. Gurley testified that if there are plumbing issues or problems someone would let him know and he would notify the landlord. The stairs are located below ground because the office is in the basement. Mr. Gurley was not aware of plumbing repairs relative to water damage in the stairwell on the date of accident. Mr. Gurley testified that in the winter, it is possible that people track in water. He also acknowledged that there are about 100 employees that all come in at about 8:30 a.m. After examining the stairs, Mr. Gurley did not document the condition of the stairs in one way or another.

Additional Information

On cross examination, Petitioner testified that after her accident she has been to Africa to visit a friend and to Texas to see her sister.

Regarding her current condition, Petitioner testified that she remains in a lot of pain in the neck and back. Petitioner testified that she wishes to undergo the knee surgeries and have the low back and neck MRIs that have been recommended.

In rebuttal testimony, Petitioner testified that she is certain that she slipped on something wet, but she is not certain about the source of the water.

ISSUES AND CONCLUSIONS

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

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

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

The parties' dispute centers on whether there was water on the employee stairwell on which Petitioner claims to have slipped. Given the totality of this record, the Arbitrator finds that Petitioner has established that she sustained a compensable injury on December 1, 2016 as claimed. In so concluding, the Arbitrator finds Petitioner's testimony to be credible and uncontroverted by Respondent's witnesses.

Petitioner testified that she slipped and fell on the stairs at work while descending the employee stairwell to arrive at her office within Respondent's facility located on the lower level of the Villa Park location. She testified that the area where she fell was wet. Specifically, Petitioner testified that after she fell her pant legs, tailbone and back areas were wet. Notably, the condition of Petitioner's clothing immediately after her accident is uncontroverted.

Notwithstanding, Petitioner was cross-examined about the exact flight of stairs within the stairwell on which she fell, and whether she observed water or another substance on the ground after she fell. Petitioner also provided contextual testimony explaining that she regularly saw a cone indicating that the floor was wet or that she observed water on the stairwell. On the alleged date of accident, she testified that she fell on the flight of stairs located a couple of stairs above where the safety cone and chair are normally located. Respondent presented the testimony of three witnesses. Petitioner and Respondent's witnesses testified about whether the cone was normally positioned and on what landing the cone was normally positioned. Petitioner and Respondent's witnesses provided slightly varied accounts of the exact location of Petitioner's fall on the alleged date of accident approximately nine months previously. However, Respondent's witnesses generally confirmed Petitioner's testimony about when and whether a cone or chair was used to alert employees to a slippery floor. More importantly, none of them witnessed Petitioner's fall or testified about the condition of Petitioner's clothing when they saw her immediately after the accident. The only witness to have documented any details of the accident or condition of the stairs did not comment one way or the other regarding water on the stairs.

Based on the totality of the record, the Arbitrator finds Petitioner's testimony to be credible and that she has established that she sustained a compensable injury at work on December 1, 2016 as claimed.

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

As explained above, the Arbitrator finds that Petitioner sustained a compensable accident at work on December 1, 2016 in reliance on Petitioner's testimony. However, the medical records and Petitioner's testimony also require further examination regarding her medical treatment and an allegedly intervening accident at home.

The medical records reflect that Petitioner received her first medical treatment immediately after the accident at work. Petitioner thereafter sought treatment from Dr. Silver, who diagnosed her with torn medial and lateral menisci in both knees. He prescribed bilateral arthroscopic surgeries to repair the conditions, and opined that they were caused by her accident at work. In addition, Petitioner underwent some conservative medical care related to neck and back complaints with Dr. Silver and Dr. Kahn. They recommended MRIs of both the cervical and lumbar spine. Petitioner worked without any need for medical treatment to the knees, neck or back that prevented her from working for a significant period of time before her accident on December 1, 2016. Moreover, no medical opinion was offered by Respondent pursuant to Section 12 of the Act in contravention of Dr. Silver or Dr. Kahn's opinions or recommendations for medical treatment to address the knees, neck or back. Thus, Arbitrator further finds the opinions of Dr. Silver to be persuasive and relies on the recommendations of both Dr. Silver and Dr. Kahn.

Notwithstanding, there was also evidence introduced regarding an incident at home. There is no evidence in the medical records that Petitioner's bilateral knee, cervical or lumbar conditions changed after the temporary exacerbation of symptoms in the neck noted at the time of her emergency room visit. Thus, the Arbitrator finds that this incident was *de minimus* and did not materially affect her medical condition after her December 1, 2016 accident at work such that it severed causal connection.

Based on all of the foregoing, the Arbitrator finds that Petitioner has established a continued causal connection between her bilateral knee, cervical and lumbar conditions and accident at work on December 1, 2016.

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

As explained above, the Arbitrator finds that Petitioner established that she sustained a repetitive trauma injury at work that manifested on December 1, 2016 and that her current condition of ill-being is causally related to her accident at work. Petitioner's condition has not improved thereafter such that her treating physicians, Dr. Silver and Dr. Khan, recommend bilateral knee surgery as well as MRIs of the cervical and lumbar spine to assess any conditions in the neck and back.

In consideration of the record as a whole, the Arbitrator awards the recommended prospective medical care in the form of bilateral knee surgeries and cervical and lumbar MRIs as prescribed by Dr. Silver and Dr. Khan pursuant to Section 8(a) of the Act as the treatment is reasonable and necessary to alleviate Petitioner from the effects of her injury at work.

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

In light of the causal connection analysis explained above, the Arbitrator turns to Petitioner's claim that she is entitled to temporary total disability benefits from December 6, 2016 through July 13, 2017.

"The period of temporary total disability encompasses the time from which the injury incapacitates the claimant until such time as the claimant has recovered as much as the character of the injury will permit, i.e., until the condition has stabilized." *Gallentine v. Industrial Comm'n*, 201 Ill. App. 3d 880, 886 (2nd Dist. 1990). The dispositive test is whether the claimant's condition has stabilized, i.e., reached MMI. *Sunny Hill of Will County v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130028WC at *28 (June 26, 2014, Opinion Filed); *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003). To show entitlement to temporary total disability benefits, a claimant must prove not only that he did not work, *but also that he was unable to work. Gallentine*, 201 Ill. App. 3d at 887 (*emphasis* added); *see also City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090 (5th Dist. 1996).

The record reflects that during the claimed temporary total disability periods Petitioner was either placed off work or under light duty work restrictions as imposed by Dr. Silver. Moreover, Petitioner's treating physicians documented Petitioner's subjective complaints and their objective findings that she was unable to perform her work during the claimed temporary total disability periods.

Thus, the Arbitrator finds that Petitioner has established that she was temporarily totally disabled during the claimed temporary total disability periods from December 6, 2016 through July 13, 2017. Respondent shall receive a credit for temporary total disability benefit payments made as agreed by the parties. *See* AX1.

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

Gerardo Mendez,

Petitioner,

vs.

NO: 15 WC 38041

18IWCC0638

ENCAP, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

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

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

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

DATED: OCT 2 6 2018
TJT:yl
o 10/23/18
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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

MENDEZ, GERARDO
Employee/Petitioner

Case# **15WC038041**

ENCAP INC
Employer/Respondent

18IWCC0638

On 9/19/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.18% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5755 COSTA IVONE LLC
ANTHONY IVONE
6847 W CERMAK RD
BERWYN, IL 60402

5687 POWELL & PISMAN
875 N DEARBORN ST SUITE 400
CHICAGO, IL 60654

0507 RUSIN & MACIOROWSKI LTD
JOHN A MACIOROWSKI
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

18IWCC0638

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)

GERARDO MENDEZ
Employee/Petitioner

v.

ENCAP, INC.
Employer/Respondent

Case # **15** WC **38041**

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 **DOUGLAS S. STEFFENSON**, Arbitrator of the Commission, in the city of **CHICAGO**, on **JULY 28, 2107**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **NOVEMBER 23, 2015**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**28,040.00**; the average weekly wage was $**540.00**.

On the date of accident, Petitioner was **32** years of age, ***single*** with **2** dependent children.

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

Respondent shall be given a credit of $**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

As detailed in the attached memorandum discussing the *Findings of Fact and Conclusions of Law*:

1) The Arbitrator finds the Petitioner failed to prove he sustained an accidental injury arising out of and in the course of his employment. As such, the Petitioner's claim is denied.

2) The Arbitrator also finds the Petitioner also failed to prove a causal connection between any accident and his present condition of ill-being. As such, the Petitioner's claim is denied.

3) The Arbitrator further finds the Petitioner's claims for medical bills and prospective medical care both are beyond his choice of two physicians and not supported by the relevant credible medical records and opinions. As such, the Petitioner's claims are denied.

4) The Arbitrator likewise finds the Petitioner's claim for TTD benefits is denied.

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

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

Signature of Arbitrator

September 19, 2017
Date

ICArbDec19(b)

SEP 19 2017

GERARDO MENDEZ v. ENCAP, INC.

15 WC 38041

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter was tried on a Section 19(b)/8(a) petition before Arbitrator Steffenson on July 28, 2017. (*Transcript* at 5). The issues in dispute were accident, causal connection, medical bills, prospective medical care, and TTD. (*Arbitrator's Exhibit* 1). The parties requested a written decision pursuant to Section 19(b) and agreed to receipt of this Arbitration Decision via e-mail. (*Arbitrator's Exhibit* (hereinafter, *AX)* 1).

FINDINGS OF FACT

The Petitioner was employed by Respondent as a laborer. (*Transcript* (hereinafter, *T.*) at 13). He acknowledged the ability to speak some English. (*T.* at 53). The Respondent was in the native landscape business. (*T.* at 99). Sarah Rozny, Office Manager for the Respondent, testified she could communicate with the Petitioner in English, and he could understand and respond in English. If any Spanish-speaking individual gave indication to Ms. Rozny that they did not understand a communication, Maribel, a Spanish-speaking receptionist with the Respondent, was available to translate. (*T.* at 100).

During 2015, the Respondent was performing federal contractor work and undergoing a workforce audit. The Respondent was instructed to verify all employees through E-Hire or E-Verify. (*T.* at 101). Jonathan Koepke, Vice President and General Manager for the Respondent, testified the Respondent previously only had put newly-hired employees through the E-Verify system and had not vetted existing employees through the system. However, due to the federal contract work and audit, the Respondent was required to put all employees through E-Verify system. (*T.* at 115-116). Of the Respondent's 60 employees, 10 could not be verified, including the Petitioner and his brother, David Mendez. (*T.* at 103). On November 20, 2015, Ms. Rozny held a meeting with these employees to inform them that their Social Security Number (SSN) was not verified and they would have eight (8) working days to provide the Respondent with the needed documentation. Maribel was present at this meeting to translate. The employees were advised that if they could not provide verification of their legal status, they would no longer be employed by the Respondent. (*T.* at 103-104).

Mr. Koepke noted a large portion of the Respondent's work was seasonal and typically ran from approximately April 1 to the end of November. (*T.* at 120-121). Ms. Rozny indicated the Petitioner was not scheduled to work Tuesday, November 24; Thanksgiving Day, November 26; nor Friday, November 27. (*T.* at 105). She further testified the Respondent's employees were instructed to report any accidental injury on the job to their supervisor and meet with her to fill out an accident report. They were advised of this policy during meetings that were conducted in Spanish as well as English. (*T.* at 102).

The Petitioner's brother, David Mendez, confirmed that the Respondent asked all employees for verification of their SSNs in November of 2015. (*T.* at 85). He further acknowledged that those employees who were informed that their if their SSNs were not valid would have eight days to correct it and, if unable to do so, would be let go. He indicated he was not able to produce a valid SSN nor was his brother capable of doing so. (*T.* at 85-86). Thus, neither one of them worked for the Respondent after Monday, November 23, 2015. Furthermore, any other workers who could not produce a correct SSN also were no longer working for the Respondent after that date. (*T.* at 86-87). The Petitioner initially denied a November 20, 2015 meeting wherein he was advised he was required to bring documentation of his legal eligibility to work. (*T.* at 62). However, he then acknowledged that he was told he could not work until he provided documentation that he was legally eligible in the country. (*T.* at 69-70). Ms. Razny and Mr. Koepke testified that Petitioner never provided additional documentation to establish his eligibility to work and therefore was considered terminated. (*T.* at 104, 118, and 122).

On Monday, November 23, 2015, the Petitioner was working under the supervision of Simon Haywood, a Project Manager for the Respondent, in North Barrington, installing stone along a creek that had sustained erosion along its banks. (*T.* at 124-125). Mr. Haywood indicated he could communicate with the Petitioner in English and the Petitioner would respond in English. (*T.* at 125). To counteract the erosion at the job site, the Respondent's employees were moving stone from a trailer to be installed along the creek bed. (*T.* at 126). Mr. Haywood testified there were a total of five individuals that day, including himself, three employees who were utilizing wheelbarrows to transport the stone to the creek, and the Petitioner, who filled the wheelbarrows with stone. (*T.* at 126).

The Petitioner advised Mr. Haywood between 9 and 9:15 a.m. that his back was sore. Mr. Haywood asked the Petitioner if he wanted to see a doctor, but he Petitioner declined. Instead, he sat for a while and then worked to the end of the shift around lunchtime. The stone he was loading into wheelbarrows was known as RR-5, ranging in size from 8 to 14 inches and

weighing from 20 to 40 pounds per stone. (*T.* at 129). Mr. Haywood and the four other employees arrived back at the shop between 1:00 p.m. and 1:30 p.m., at which time he asked the Petitioner how he was doing. The Petitioner indicated he was sore but okay. (*T.* at 130). Mr. Haywood testified the Petitioner never stated he hurt his back doing a specific job or activity. (*T.* at 127). He also indicated he received a text message from the Petitioner at 9:11 p.m. on November 23, 2015 asking where they had worked that day. (*Respondent's Exhibit* 8 and *T.* at 130-131). Mr. Haywood saw no mention by the Petitioner in any of those text messages of having sustained a specific work accident that day and the text messages were his last communication with the Petitioner. (*T.* at 131-132).

David Mendez attested the largest stones weighed between 70 and 80 pounds and would be loaded into a wheelbarrow one by one. (*T.* at 89-90). He stated that before lunchtime, while his brother, the Petitioner, was moving a stone, the Petitioner said, "Ouch", and reported to him he had injured his back. (*T.* at 83). David Mendez then told the Petitioner to report the episode to Simon. (*T.* at 83-84). After the Petitioner sat and rested for a period, he then resumed loading stones until work on the job was finished. (*T.* at 94).

The Petitioner testified he never had back pain before November 23, 2015. (*T.* at 55). Since then, he has had pain going down his left leg. (T. at 56). He asserted he told Mr. Haywood he had pain, he did not know quite what happened to him, and he was hurting. (T. at 58-59). The Petitioner sought medical care on November 23, 2015 at Kishwaukee Hospital. He provided a history of lifting a very heavy rock, well over 100 pounds, and developing pain and spasm in his lower low back. He did indicate problems with his back from time to time in the past. He also indicated to the Emergency Department staff that when he told his boss that his back was hurt they told him he should not come back to work and he was essentially fired. He also reported he only spoke Spanish. (*Petitioner's Exhibit* 1).

The Petitioner denied any tingling or numbness in the extremities. Straight leg raising and motor and sensory exams were found to be normal. He was referred to a Dr. Dhaval Thakkar in Sycamore, Illinois[1], with a low back strain diagnosis. (*Petitioner's Exhibit* (hereinafter, *PX*) 1). His discharge summary indicated he understood the importance of follow-up medical care and he was instructed to immediately return to the Emergency Department if his lower back symptoms increased. (*PX* 1).

[1] The Petitioner testified he resided in DeKalb, Illinois, at the time of his alleged work incident. (*T.* at 44).

Ms. Rozny testified she had no knowledge of the Petitioner's work injury claim until Mr. Koepke informed her the Petitioner had informed him of a workplace injury during the previous week. (*T.* at 105). Mr. Koepke testified that on December 1, 2015, he received a phone call from the Petitioner between 8:30 a.m. and 9:00 a.m. during which the Petitioner stating he would like to meet with Mr. Koepke as he had hurt himself on the job the week before. Mr. Koepke indicated he was not aware of the Petitioner being injured nor had accident report been filed, but the Petitioner was free to come in and speak with him and Ms. Rozny. (*T.* at 118-119). The Petitioner appeared later that day asserting he had hurt his back and wished to see a doctor. He was directed to Physicians Immediate Care pursuant to his request but could not explain why he did not prepare an accident report and notify the Respondent of his injury. (*T.* at 119). Mr. Koepke stated the Petitioner subsequently never returned to work for the Respondent and he did not submit the needed documentation of his legal eligibility to work for the Respondent. (*T.* at 120).

The Petitioner sought medical care from Physicians Immediate Care later that day (December 1) and he gave a history of developing back pain on November 23 between 10:00 a.m. and 11:00 a.m. while carrying rocks. A physical examination revealed the Petitioner moving with a great deal of pain and moving slowly as he mounted and dismounted the exam table. (*PX* 2). However, he also showed normal lower extremity strength bilaterally, normal gait and posture, no spasm or tenderness, no loss of lumbosacral lordosis, negative straight leg raising bilaterally, normal back range of motion, no extensor hallucis longus weakness, with lower extremity sensation intact and deep tendon reflexes 2+ and equal bilaterally. (*PX* 2). X-rays showed the joint space well maintained with no soft tissue swelling. A muscular exam revealed back pain with axial loading, skin hypersensitive to light touch over a wide area bilaterally, pain bilaterally when rotating the shoulders and pelvis in tandem.[2] (*Id.*). At the end of the appointment, the Petitioner was found fit for regular duty without restriction and released from care. (*Id.*).

After the Petitioner signed his Application for Adjustment of Claim on November 25, 2015, his attorney directed him to Dr. Naveen Tipirneni of Elmwood Park Immediate Health Care center for medical care. (*RX* 3 and *T.* at 63). On December 3, 2015, Dr. Tipirneni noted pain in the axial low back with no radiation to the lower extremity. Physical examination revealed no focal neurological deficits, gait normal, and decrease in lumbosacral spine flexion. Sensory examination, however, revealed no decreased sensation. He was diagnosed as having

[2] Dr. Julie Wehner, who evaluated Petitioner subsequently at the Respondent's request pursuant to Section 12 of the Act, noted these findings were consistent with symptom magnification. (*Respondent's Exhibit* (hereinafter, *RX*) 6).

lumbar disc displacement, myofascial lumbar pain and lumbago. He was given Norco, a TENS unit, and to start hot compresses and to start physical therapy. (*PX* 3).

The Petitioner participated in a physical therapy program from December 9 through December 17. During this course of therapy, he denied any radicular pain. At the time of his discharge from the physical therapy program on December 17, it was noted he had no improvement in his symptoms and manual therapy was noted to be difficult to perform due to hypersensitivity and guarding in the lumbar spine. (*PX* 4). The Petitioner returned to Dr. Tipirneni on December 18 where he reported he had pain in his lower back that did not radiate to either lower extremity and continued to use his TENS unit, moist heat, and "compounded ointment". (*PX* 3). He then began a course of home-based physical therapy that ran from December 29, 2015 through January 12, 2016. (*PX* 5). Dr. Tipirneni also prescribed a lumbar MRI study that was completed on January 2, 2016. The MRI revealed lumbar spondylosis with broad-based annular bulge asymmetric towards the left at L5-S1, grade 1 anterolisthesis of L5 on S1, and multilevel Schmorl's nodes. (*PX* 3). A final visit with Dr. Tipirneni took place on January 7, 2016 and Dr. Tipirneni indicated the Petitioner continued with pain in the axial low back with no radiation to the lower extremity. He recommended the Petitioner undergo a transforaminal epidural injection to address the Petitioner's pain symptoms and continued his off-work status. (*PX* 3).

The Petitioner, pursuant to a recommendation from his attorney, then sought medical care from Dr. Barnabas at Rand Medical on February 29, 2016. (*T.* at 66). He informed Dr. Barnabas his initial pain was localized, but began "going down his legs 15 days later and since then not better." (*PX* 6). Dr. Barnabas subsequently referred the Petitioner to Dr. Jain for a pain management evaluation that resulted in epidural injection treatments on March 18 and May 18 of 2016. (*PX* 7). During his initial evaluation with Dr. Jain on March 4, 2016, the Petitioner reported he was not working and his last date of work was November 23, 2015. Dr. Jain observed during his physical examination of the Petitioner that while he could toe walk and heel rise, the Petitioner was self-limited on deep knee bend secondary to subjective pain complaints. (*PX* 7). The Petitioner testified Dr. Jain's epidural injections provided no relief nor did the physical therapy program. (*T.* at 36-39).

At the time of his medical care with Dr. Barnabas, the Petitioner started a new job on February 20, 2016, driving a truck 8 to 9 hours and from 100 to 150 miles a day for an unidentified company that cleaned Target stores. (*T.* at 45-48). He held this position into May of 2016 and then started working through a temporary agency where he was placed with another company for two to three months and worked with cement bags weighing between 10 to 15 pounds. (*T.* at 49-50). After a subsequent stint with his cousin's handyman service, the

Petitioner secured his current full time employment position in February of 2017 at Haines Flooring where he moves flooring pieces on the production line. (*T.* at 51-52).

Dr. Barnabas also referred the Petitioner to Dr. Erickson on May 4, 2016. The Petitioner provided Dr. Erickson with his work history that included having then just started working a light duty job two weeks earlier. (*PX* 8). Dr. Erickson conducted a physical examination of the Petitioner and diagnosed his condition as L5-S1 segment consistent with atraumatic cause, primarily mechanical in nature rather than radicular. (*PX* 8). He referred the Petitioner for an SSEP study and the Petitioner subsequently returned on June 15, 2016 where his physical examination showed good strength and relatively normal sensation. (*Id.*). He told Dr. Erickson that his pain limited his sitting to 30 minutes at a time. Dr. Erickson again noted the Petitioner's pain was primarily mechanical in nature. (*Id.*).

Dr. Erickson's records then indicate the Petitioner returned to Dr. Erickson on "06/07/2017"[3] on both the doctor's office note and a Patient Status Form. (*PX* 8). In addition to indicating the Petitioner "CAN WORK with no restrictions", Dr. Erickson reported no new findings on neurological examination with no sensory or motor loss and his symptoms best characterized as mechanical back pain due to the spondylolisthesis. He also recommended a repeat MRI study of the Petitioner's lumbar spine. (*PX* 8). During the Petitioner's last visit with Dr. Erickson on June 21, it was noted the Petitioner was working full-time with no restrictions but great difficulty. Dr. Erickson reported the Petitioner's neurological exam "is relatively good". Dr. Erickson also discussed the Petitioner's June 17 MRI results, but he and the radiologist failed to compare that study to the Petitioner's prior MRI exam from January 2, 2016. (*Id.*) Instead, Dr. Erickson indicated a treatment option would be a fusion at L5-S1. (*Id.*). The Petitioner testified he continues to desire to move forward with Dr. Erickson's lower back surgical recommendation. (*T.* at 42).

Dr. Wehner evaluated Petitioner on February 15, 2016, pursuant to the Respondent's Section 12 request and with the aid of an interpreter. (*RX* 5). Dr. Wehner reported her physical examination of the Petitioner found marked dramatic pain with the lightest of palpation from L4 down to S1 and in the bilateral paraspinal area. (*RX* 5 at 2). Axial compression caused the Petitioner to begin shaking and buckling his knees, while axial rotation resulted in "very dramatic low back pain." (*RX* 5 at 2). He could bend to his mid-tibial level with his fingertips and began shaking. There was no paraspinal spasm. Straight leg raising was negative, and

[3] The Patient Status Form contains two entries of "6/7/17" for the Petitioner's date of service while the office note itself indicates "06/07/17". One incorrect entry could be attributed to a clerical error. Three distinct incorrect entries call into question Dr. Erickson's recordkeeping and attention to detail.

motor strength was 5/5. (*Id.*). Dr. Wehner noted her exam was consistent with the exam at Physicians Immediate Care of December 1, 2015, which also had positive Waddell signs indicative of symptom magnification behaviors. (*Id.*).

Dr. Wehner went on to note Dr. Tipirneni's December 3, 2015 evaluation, while observing the Petitioner's pain and range of motion complaints, also found the Petitioner had a normal gait pattern and normal clinical examination. She reviewed the January 2, 2016, MRI that showed diffuse disc space narrowing and disc desiccation and Schmorl nodes. There was an L5-S1 3 mm annular bulge, more severe towards the left, but commented "it is essentially a normal MRI." (*RX* 5 at 2). Dr. Wehner concluded the presence of marked symptom magnification and, based upon her examination, review of the MRI, and medical records, she opined the Petitioner was capable of regular duty work. (*RX* 5 at 3-4). She indicated the Petitioner required no further medical treatment as he reached maximum medical improvement at the time of his discharge from care by Physicians Immediate Care on December 1, 2015. (*Id.*).

Subsequently, Dr. Wehner reviewed additional medical records concerning the Petitioner's situation and authored supplemental reports on March 23, 2016 (*RX* 6) and November 16, 2016 (*RX* 7). She again opined the Petitioner's correct diagnosis was a lumbar strain and there was no indication for the need for epidural injections, physical therapy, and the SSEP study. (*RX* 7 at 2-5). She also asserted the Petitioner's April 11, 2016 EMG study was of questionable validity with no clinical correlation given the Petitioner's physical examination findings. (*RX* 7 at 4). Instead, Dr. Wehner continued with her opinion the Petitioner had long been at maximum medical improvement, exhibited "dramatic symptom magnification behaviors", and underwent multiple medical procedures and received ongoing medical care that she deemed "nonstandard" and not medically appropriate for the Petitioner's situation. (*RX* 7 at 4-5).

CONCLUSIONS OF LAW

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

Issue C: *Accident*

The Petitioner initially could not recall attending a meeting of Friday, November 20, 2015, wherein he was advised that he would need to prove documentation of his work status or be subject to termination. (*T.* at 62). However, his brother acknowledged that this meeting took place, and neither he nor his brother could provide the needed documentation and all

other workers in a similar fate last worked for the Respondent on November 23, 2015. The Petitioner later conceded that he was in fact not able to provide the documentation. (*T.* at 69-70).

The Petitioner claims that on Monday, November 23, 2015, while picking up a stone, he had back pain. He described the stone as weighing 100 pounds, while his brother indicated the stones would have weighed from 70 to 80 pounds and Mr. Haywood stated the stones weighed from 20 to 40 pounds. The Petitioner's brother testified the stones were being lifted by the Petitioner from the trailer into the wheelbarrow one at a time. The Petitioner then finished his workday. Mr. Haywood testified the Petitioner merely told him that his back was sore and did not allege a specific incident.

The Petitioner on his own went to Kishwaukee Hospital where he had negative straight leg raising, motor and sensory exam. He did not fill out an accident report for the Respondent. Mr. Koepke and Ms. Rozny stated their first notice of an alleged work incident occurred when the Petitioner called on December 1st indicating he was hurt the preceding week and wished to see a doctor. The Petitioner then was sent to Physicians Immediate Care where there were findings of symptom magnification and a discharge from medical care with a return to regular duty work. During his subsequent medical care, the Petitioner told his medical providers he was not working despite his subsequent testimony he started work in February of 2016 driving a truck eight to nine hours a day up to 150 miles per day. Specifically, he informed Dr. Jain on March 4, 2016 that he was not working, and his pain worsened while, among other things, driving. (*PX* 7).

Due to the sequence of events noted above, the lack of positive objective contemporaneous clinical findings, and evidence of symptom magnification, the Arbitrator does not find Petitioner's testimony to be credible and finds that Petitioner failed to prove accidental injury arising in and out of the course of his employment. As such, the Petitioner's claim for benefits under the Act is denied.

Issue F: *Causal connection*

As noted regarding **Issue C** above, the Petitioner's claim is denied due to the Arbitrator's finding the Petitioner failed to prove an injury arising out of and in the course of his employment with the Respondent. However, the Arbitrator also would note the Petitioner's present condition of ill-being is not causally related to his alleged injury because the findings and diagnosis by Kishwaukee Hospital, Physicians Immediate Care, and Dr. Wehner are more credible than those of Dr. Erickson, with whom the Petitioner wishes to treat, and only point to the presence of a lumbosacral strain.

Issue J: *Medical bills*

As noted regarding **Issue C** above, the Petitioner's claim is denied due to the Arbitrator's finding the Petitioner failed to prove an injury arising out of and in the course of his employment with the Respondent. However, the Arbitrator also would note the Petitioner offered into evidence *PX* 9, documenting $90,302.21 in medical bills. (*PX* 9). First, Section 8(a)3 of the Act indicates that an employee is entitled to a choice of two (2) physicians and any referrals within the chain.

However, in the present matter, the Petitioner first elected to treat at Kishwaukee Hospital. (*PX* 1). That facility then made a specific referral for the Petitioner to Dr. Thakkar, but the Petitioner elected not treat with Dr. Thakkar. Instead, the Petitioner admitted, on advice of his attorney, that he then commenced treatment with Elmwood Park Immediate Care. (*PX* 3 and *T.* at 63). This resulted in his second choice for medical treatment. The Petitioner then conceded, on the recommendation of his subsequent attorney, that he then started to treat with Dr. Barnabas and his subsequent referrals, including Dr. Jain and Dr. Erickson. (*PX* 6, 7, and 8 and *T.* at 66). This resulted in his third choice for medical treatment and, as such, the Arbitrator must find the Petitioner has exceeded his two choices of physicians under the Act. Accordingly, the Arbitrator denies the Petitioner's claim for medical benefits beyond his second choice of physicians.

Furthermore, the Arbitrator also would adopt the opinions of Dr. Wehner and Physicians Immediate Care that the Petitioner was not in need of any additional treatment beyond December 1, 2015 to cure or relieve him from the effects of any alleged accidental injury, said treatment not being medically necessary.

Issue K: *Prospective medical care*

The Petitioner's claim for prospective medical care in the form of any surgical procedure or lumbar fusion is denied considering the Arbitrator's findings above as to lack of an accidental injury and the Petitioner exceeding his choice of two physicians.

Issue L: *TTD*

The Petitioner's claim for temporary total disability benefits is denied considering the Arbitrator's finding above of a lack of accidental injury arising in and out of the course of employment.

Signature of Arbitrator

SEPTEMBER 19, 2017
Date

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Contreras,

Petitioner,

vs.

NO: 16 WC 9349

Fordham Condo. Assoc.,

Respondent.

18IWCC0639

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 all issues, and being advised of the facts and law, modifies the Decision of the Arbitrator and finds Petitioner's current condition of ill-being is causally related to the work injury. The Commission further modifies the Arbitrator's Decision and finds Petitioner is entitled to prospective medical treatment in the form of a neuropsychological evaluation and treatment necessary to facilitate Petitioner's return to work. The Commission further modifies the Arbitrator's Decision and finds Petitioner is entitled to additional temporary total disability benefits. 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 Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Findings of Fact

In the interest of efficiency, the Commission primarily relies on the Arbitrator's recitation of facts. As Petitioner's right shoulder injury is not in dispute, this Decision will only address Petitioner's alleged psychological injury. On March 9, 2016, Petitioner sustained an injury while helping an assistant engineer repair and install light fixtures on the 10th floor of a private parking garage. (Tr. at 16-19). Petitioner testified that the area was dark and there were cables and wires on the ceiling. *Id.* at 19. After some time spent checking wires and adding additional lighting, Petitioner climbed the ladder and began moving wires around. *Id.* at 23. Petitioner held on to a sprinkler pipe with his left hand and received an electrical shock when he touched a copper wire with his right hand. *Id.* at 23-24. Petitioner began shaking immediately after the shock. *Id.* He also immediately felt pain in his right shoulder and saw a white gold color. *Id.* Following the shock, Petitioner climbed down from the ladder and felt like his "right hand was hanging from a needle."

Id. at 24-25. He testified that the junction box carried 277 volts. *Id.* at 25-26.

Petitioner testified that he is not the same emotionally as he was prior to the date of accident. *Id.* He testified that he has trouble prioritizing his memory and has not returned to the "real David Contreras." *Id.* at 39. Petitioner testified that he sometimes zones out. Petitioner testified that he tries not to think about the accident because it upsets him. *Id.* Petitioner testified his relationship with his wife has changed because he does not feel like a man due to his unemployment. *Id.* He believes he needs a job that does not involve responsibility for large buildings. He also no longer wants to work around electricity. Petitioner testified, "I almost lost my life. I think—I'd rather have my life back emotionally. And not even have two arms. I'd rather have my emotion back." *Id.* at 40.

Dr. Shoshana, a clinical psychologist, first evaluated Petitioner on May 26, 2016. (PX 4 at 4). Beginning June 1, 2016, Dr. Shoshana initially met with Petitioner up to four times a week. Petitioner testified that he currently sees Dr. Shoshana once a week. Unfortunately, the doctor's treatment notes are sparse. On August 15, 2016, Dr. Shoshana wrote that Petitioner's symptoms of depression and anxiety significantly impacted his ability to perform at work and in other areas in his life. Dr. Shoshana recommended Petitioner undergo neuropsychological testing to determine the impact of the work accident on his cognitive capacity. He also recommended Petitioner see Dr. Nawaz to help manage his psychotropic medications and sleep problems. *Id.* Petitioner last saw Dr. Shoshana on June 5, 2017.

Expert Opinions and Testimony

Dr. Shoshana – Treater

Dr. Shoshana drafted a narrative report at Petitioner's request on November 21, 2016. (PX 4 at 14). He wrote that he began treating Petitioner for symptoms of PTSD, depression, and anxiety. Dr. Shoshana wrote that Petitioner is working on acquiring coping skills to reduce his anxiety, traumatic intrusive thoughts, and resume his pre-trauma levels of functioning. He indicated Petitioner is receiving cognitive behavioral therapy. Dr. Shoshana opined that Petitioner is unable to work and had a guarded prognosis. He noted some cognitive deficits consistent with Petitioner's symptoms had emerged and the doctor recommended Petitioner undergo a full neuropsychological evaluation. However, he did not identify the alleged cognitive deficits. *Id.*

Dr. Shoshana testified via evidence deposition on February 24, 2017. (PX 5). He specializes in posttraumatic stress, mood disorders, and anxiety. *Id.* at 6. His PTSD patients are generally soldiers returning from combat, victims of rape, and a few people injured on the job. *Id.* at 8. As a cognitive behavioral psychologist, he helps people process trauma and deal with it to reduce their symptoms of PTSD. *Id.* at 8-9. He testified that trauma triggers a flashback when a patient talks about it or something triggers it or is similar to the stimuli that the patient experienced during the traumatic event. *Id.* at 9. He testified flashbacks manifest in sleep interference, agitation, and changes in personality and mood. *Id.* The treatment is comprised of things like medication, making the person feel safe, and teaching the person to identify and be aware of signs prior to an episode or onset of symptoms. *Id.* at 10.

He testified that during his first session with Petitioner, Petitioner showed signs typical of someone who had sustained an electrical injury. *Id.* at 13. He testified that Petitioner exhibited a lot of fogginess, difficulty concentrating, and difficulty retrieving certain words. *Id.* He diagnosed Petitioner with severe anxiety and depression. *Id.* at 14. Dr. Shoshana testified that his chart notes are the entirety of his records, other than any letters he authored. *Id.* at 16. He testified that Petitioner still needs medications, including sleep medicine, an antidepressant, and medicine for anxiety. *Id.* at 17.

Dr. Shoshana testified that Petitioner's need for ongoing psychological treatment is causally related to the work accident because he had no knowledge of anything suggesting otherwise in Petitioner's history. *Id.* at 17-18. He testified that the proximity of Petitioner's symptoms to the work accident and the consistency of those symptoms with people who suffered an electrical injury support his conclusion. *Id.* at 18. Dr. Shoshana opined that Petitioner is unable to return to work as a maintenance man due to suspected cognitive deficits resulting from the electrocution. He also opined that returning to work might trigger or exacerbate some of Petitioner's PTSD symptoms. *Id.* at 19.

The doctor opined that Petitioner's condition is not permanent, but he could not predict when Petitioner would be able to work around electricity again. *Id.* at 20. He testified that a neuropsychological evaluation is necessary to properly determine whether Petitioner can return to work. *Id.* at 21-22.

Dr. Skarbek – Respondent IME

Dr. Skarbek performed a psychological evaluation of Petitioner at Respondent's request on November 18, 2016. (RX 1 at Ex. 2). He authored a report containing his findings on November 27, 2016. Dr. Skarbek reported Petitioner did not present with any problems related to attention or concentration. Petitioner also neither presented with, nor reported problems with, language comprehension, language expression, or reading. Dr. Skarbek noted Petitioner's speech rate and clarity as well as his memory for remote, recent, and immediate events were all within normal limits. He found no evidence of delusions, hallucinations, or thought disorder.

The scores on the validity scales Dr. Skarbek performed raised concerns of the possible impact of over-reporting of somatic and/or cognitive symptoms on the validity of the profile according to the doctor. He opined that Petitioner's scores indicated somatic and cognitive complaints and emotional and thought dysfunction. The doctor wrote that Petitioner reported a considerably larger than average number of somatic symptoms that people with genuine medical conditions rarely describe. Dr. Skarbek opined that Petitioner's reports of symptoms may have been worse than his actual symptoms.

Dr. Skarbek believed Petitioner endorsed symptoms related to several psychiatric conditions including depression, anxiety, mania, suspicious beliefs, and traumatic stress. He opined, "[Petitioner] is reporting a wide range of symptoms related to several mental health conditions and his report of symptoms are more consistent with a profile of an individual who would be a psychiatric inpatient or have more severe problems with day to day functioning." According to Dr. Skarbek, nothing in Petitioner's medical records supports his alleged symptoms

of PTSD, OCD, panic disorder, generalized anxiety disorder, major depressive disorder, and clinical level paranoia. Dr. Skarbek diagnosed Petitioner with adjustment disorder with depressed mood. He believes that Petitioner is having a reaction to his injury. He opined, "[Petitioner's] strong belief that he is unable to return to work despite medical findings and his thoughts that he cannot be helped, has a raw deal from life and that life is a strain is out of proportion to the event." *Id.* The doctor recommended eight more weeks of psychotherapy with a specific focus on helping Petitioner's adjustment with returning to work. Dr. Skarbek opined that Petitioner would likely then reach MMI.

Dr. Skarbek authored an addendum report at Respondent's request on February 24, 2017. (RX 1 at Ex. 3). He reviewed additional medical records as well as Dr. Shoshana's November 21, 2016, narrative. Dr. Skarbek noted that Dr. Shoshana did not identify any specific cognitive behavioral interventions he employed. Dr. Skarbek opined that after six months of high-level treatment, cognitive behavioral treatment should include behavioral interventions that encourage and enable a return to work. The doctor noted that most of Petitioner's job duties are generally not high-risk and are unrelated to the work activity that led to his injury. He opined that nothing in his assessment or in the medical records suggests that Petitioner could not transition back to work. He further noted that Dr. Shoshana did not provide any support for his opinion that Petitioner exhibited cognitive deficits consistent with his symptoms. Dr. Skarbek opined that Petitioner exhibited no overt problems related to cognitive deficits such as memory, concentration, judgment, planning, problem solving, or attention. As Petitioner's identity is closely tied to his ability to work and be productive, the doctor opined that "a treatment that doesn't move him closer to his ideal perception is only perpetuating the problem." Dr. Skarbek opined that returning to work should be an essential component of Petitioner's treatment.

Dr. Skarbek testified via evidence deposition on May 17, 2017. (RX 1). He is a licensed clinical psychologist and frequently encounters PTSD cases in his practice. He testified that cognitive therapy is "based on the assumption that a person's behavior is being directed by kind of their thoughts, beliefs, or perceptions, and that dysfunction is the result of either maladaptive, problematic, dysfunctional beliefs." *Id.* at 9-10. Treatment would include identifying and correcting those beliefs through belief modification. *Id.* at 10. He testified that behavioral interventions are targeted to several types of problems, such as exposure to treat trauma. *Id.* He testified that because avoidance is a very common symptom of anxiety and PTSD, part of the appropriate behavioral intervention is avoidance prevention. *Id.* Dr. Skarbek opined that a combination of behavioral observation, a structured clinical interview, and the use of objective assessment instruments was the best approach to assess Petitioner. *Id.* at 14.

Dr. Skarbek testified that it is important for a psychologist to document his work and to have progress notes of each therapy session. *Id.* at 18. The intake evaluation should include the doctor's impression and possible diagnosis, and a general treatment plan. *Id.* Dr. Skarbek spent four or five hours with Petitioner and concluded that Petitioner did not have PTSD after considering all the information such as his personal history, his medical and psychological history, and the results of the objective tests. *Id.* at 20-21, 26. Dr. Skarbek also considered Petitioner's long history of working with and around electricity and the fact that he was conscious of the potential danger. *Id.* at 25-26. He opined that Petitioner's work accident did not generally meet the criteria that the accident was "horror-inducing, something unusual, completely atypical of experience." *Id.*

at 28.

Dr. Skarbek testified that nothing in Dr. Shoshana's records provided a reason why the doctor thought Petitioner would be unable to return to work. *Id.* at 33. He testified that Petitioner's primary concern was that he was physically unable to return to work due to the need for a second shoulder surgery. *Id.* at 34. Petitioner also reported that the thought of returning to work made him feel anxious; thus, Dr. Skarbek concluded Petitioner was trying to minimize the stress he felt by avoiding work. *Id.* Dr. Skarbek found the frequency and amount of Petitioner's sessions with Dr. Shoshana unusual. *Id.* at 38, 40. He found it unusual that someone participating in cognitive behavioral therapy had never visited the scene of the accident. *Id.* at 41. He also found it odd that "avoidance of the situation would be not only suggested but maintained." *Id.* Dr. Skarbek testified that while Petitioner reported he believed he had a near-death experience, he was not demonstrating or displaying any characteristics the doctor felt prevented Petitioner from returning to work regardless of his subjective opinion about the severity of the work accident. *Id.* at 66.

Conclusions of Law

Petitioner bears the burden of proving each element of his case by a preponderance of the evidence. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). After carefully considering the totality of the evidence, the Commission modifies the Arbitrator's denial of the causal relation of Petitioner's current condition of ill-being. The Commission also reverses the Arbitrator's denial of prospective medical treatment. Finally, the Commission modifies the Arbitrator's award of temporary total disability benefits. The Commission affirms and adopts the remainder of the Arbitrator's Decision.

The Commission finds Dr. Skarbek, Respondent's IME doctor, provided the most credible testimony regarding Petitioner's current psychological condition and need for additional treatment. Dr. Skarbek thoroughly explained each test he administered as well as the implications of Petitioner's test results. After reviewing Dr. Shoshana's records, Dr. Skarbek concluded there was no evidence that Dr. Shoshana engaged in any behavioral therapy with Petitioner. The Commission finds Dr. Skarbek credibly testified that Petitioner's therapy should include visits to the injury location to help desensitize Petitioner and address any of Petitioner's associated anxiety or fear. He concluded that Petitioner did not suffer from PTSD and instead suffered from adjustment disorder. Dr. Skarbek opined that Petitioner was capable of a full duty return to work as of November 27, 2016; however, he recognized that Petitioner would likely have some difficulty transitioning back to work. Thus, Dr. Skarbek recommended Petitioner attend approximately eight additional weeks of psychotherapy to provide support for Petitioner during the transition to work.

In contrast, Dr. Shoshana's treatment notes are so sparse that they do not contain the information necessary for this Commission to find most of Petitioner's sessions are causally related to the work accident. His records certainly do not provide any semblance of a treatment plan designed with the goal of successfully returning Petitioner to work. After reviewing the medical records as well as Dr. Shoshana's testimony, the Commission is hard-pressed to ascertain any real benefit Petitioner gained from his ongoing counseling sessions. In fact, Dr. Shoshana's records fail to exhibit any specific steps the doctor has taken to address Petitioner's work-related psychological injury. The Commission is unable to delineate an identified treatment plan geared towards

ultimately facilitating Petitioner's return to work. Unfortunately, Dr. Shoshana's testimony did not shed the necessary light on the causal relationship between the doctor's numerous ongoing sessions and the work accident. Notably, the doctor failed to even identify any of the alleged cognitive deficits referenced in his narrative report. This is particularly concerning given Dr. Shoshana's continued treatment following Dr. Skarbek's November 2016 IME report.

Based on the foregoing, it is clear Petitioner met his burden of proving his current condition of ill-being is causally related to his work injury. Respondent's IME doctor, Dr. Skarbek, agreed that Petitioner did exhibit some lingering effects from the work accident. While he disagreed with Dr. Shoshana's diagnosis of PTSD and opined that Petitioner could return to work full duty, Dr. Skarbek readily acknowledged Petitioner was not yet at MMI and required at least eight additional weeks of psychotherapy to support Petitioner during his transition back to work.

While the Commission finds the opinions of Dr. Skarbek most credible, the Commission does not agree with all of the doctor's conclusions. After considering the totality of the evidence, the Commission finds a neuropsychological evaluation is necessary to fully assess Petitioner's current condition and allow the medical provider to prepare an appropriate treatment plan targeted towards facilitating Petitioner's full duty return to work. Given the significant deficiencies in the treatment provided by Dr. Shoshana, the Commission is not convinced that Petitioner is currently able to return to work full duty. As Dr. Skarbek pointed out, there is no evidence that Petitioner has received appropriate behavioral therapy to address the residual effects of his work injury.

As the Commission reverses the Arbitrator's causal connection denial, the Commission must also reverse the Arbitrator's denial of prospective medical treatment. Even Dr. Skarbek believes Petitioner requires a limited amount of additional psychotherapy to support his transition back to work. The Commission finds Petitioner is entitled to reasonable and necessary prospective medical treatment in the form of a neuropsychological evaluation and targeted treatment necessary to facilitate Petitioner's return to work. The Commission specifically affirms the Arbitrator's denial of certain medical expenses as detailed in the Arbitrator's Decision.

Finally, the Commission must reverse the Arbitrator's denial of TTD. The Commission agrees that Dr. Shoshana's records and testimony do not necessarily support a finding that Petitioner is not yet at MMI and is unable to currently return to work. However, given the Commission's conclusions regarding causal connection and prospective medical treatment, the Commission finds Respondent is liable for additional TTD benefits in the amount of $1,060.63 for the period of November 28, 2016, through the date of hearing, June 16, 2017.

The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 11, 2017, is modified as stated herein.

IT IS FURTHER ORDERED that Petitioner's current condition of ill-being relating to his psychological condition is causally related to the March 9, 2016, work accident.

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IT IS FURTHER ORDERED that Respondent shall pay for reasonable and necessary prospective medical treatment in the form of a neurological evaluation and additional treatment as needed to facilitated Petitioner's to work.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner temporary total disability benefits of $**1,060.63**/week for **66-2/7** weeks, commencing **March 10, 2016** through **June 16, 2017**, as provided in Section 8(b) of the Act. Respondent shall be given a credit in the amount of $40,167.16 for temporary total disability benefits previously paid to Petitioner.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $70,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 2 6 2018

o: 8/28/2018
TJT/jds
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Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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

CONTRERAS, DAVID
Employee/Petitioner

Case# **16WC009349**

FORDHAM CONDO ASSOCIATION
Employer/Respondent

18IWCC0639

On 7/11/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.12% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4128 RUBENS AND KRESS
FRANK D KRESS
134 N LASALLE ST SUITE 444
CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
MITZI WESTERHOFF
140 S DEARBORN ST 7TH FL
CHICAGO, IL 60603

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STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

DAVID CONTRERAS
Employee/Petitioner

v.

FORDHAM CONDO ASSOCIATION
Employer/Respondent

Case # **16** WC **09349**

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 **Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago**, on **June 16, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **March 9, 2016**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$82,729.40**; the average weekly wage was **$1,590.95**.

On the date of accident, Petitioner was **58** 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 **$40,167.16** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of **$40,167.16**.

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 $1,060.63/week for 37 and 3/7 weeks, commencing 3/10/2016 through 11/27/2016, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $40,167.16 for temporary total disability benefits paid to Petitioner.

Respondent shall pay reasonable and necessary medical services, of $3,523.15 to Dr. Shoshana, as provided in Sections 8(a) and 8.2 of the Act. This is the fee schedule figure for expenses incurred up to November 27, 2016.

Petitioner's treatment with Dr. Shoshana up to November 27, 2016, is considered reasonable and necessary. After November 27, 2016, the treatment ceased to be reasonably and necessarily related to the March 9, 2016 accident. Respondent is not liable for those medical expenses.

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.

FINDINGS OF FACT

The disputed issues in this matter are: 1) causal connection; 2) medical bills; 3) temporary total disability; 4) overpayment of temporary total disability; and 5) entitlement to prospective medical treatment. The parties agree that an accident took place on March 9, 2016. *See,* AX1.

Mr. David Contreras (the "Petitioner") testified that on March 9, 2016, he was employed by the Fordham Condominium Association ("Respondent"). The petitioner's job title was chief engineer and his job duties required him to perform a variety of maintenance activities to support the high-rise residence located in the city of Chicago. Petitioner reported that 30-50% of his activities required him to work with electricity. Petitioner was terminated by the respondent.

On March 9, 2016, the petitioner was assisting a co-worker, Mr. Joe Bankowski, with replacing light fixtures on the 10th floor of the parking garage that is attached to the building. Mr. Bankowski wanted help stabilizing his ladder while installing new light fixtures. Petitioner testified that he asked Mr. Bankowski to confirm that he had turned off the electricity to the light sockets. Mr. Bankowski advised him that he had turned off the electricity. Petitioner climbed up on a ladder to assist Mr. Bankowski with the installation of the new lights. Petitioner had one hand gripping a sprinkler pipe and one hand touching a copper wire, which was live. The petitioner's right index finger was the point of the electrical shock. The petitioner experienced pain in the right shoulder and testified that his colleague caught him as he fell back off the ladder.

Petitioner received emergency medical treatment at Northwestern's emergency room on March 9, 2016. Petitioner treated with Dr. Saltzman on March 15, 2016 and had surgery to repair his right shoulder on March 21, 2016.

Petitioner was referred to Dr. Shoshana, a clinical psychologist, by his primary care physician, Dr. Charman. On May 23, 2016, Petitioner had his first evaluation with Dr. Shoshana, who then began seeing the petitioner 2-3 times per week.

Following right shoulder surgery, Petitioner participated in physical therapy and work-conditioning. In October 2016 Petitioner performed a functional capacity evaluation ("FCE"), which identified additional physical deficits. Petitioner had additional work-conditioning and then completed a second FCE on November 1, 2016. Dr. Saltzman declared Petitioner to be at maximum medical improvement ("MMI") and released him from orthopedic treatment on November 15, 2016, to return to work in a full duty capacity.

Petitioner had a second surgery to his right shoulder in January 2017. The parties agree that this surgery is not related to his work injury of March 9, 2016. Petitioner testified that his physical strength came back and he felt better after having the second right shoulder surgery. Concerning petitioner's psychiatric treatment Petitioner testified that Dr. Shoshana has recommended neuro-

psych testing. Currently, Petitioner continues to see Dr. Shoshana on a weekly basis and Petitioner testified that he has also begun treating with another psychiatrist solely to receive medication. No information was provided about the identity of this psychiatrist; nor were any treatment records from this doctor offered into evidence.

On November 18, 2016, Petitioner had an independent medical evaluation ("IME") with Dr. Matthew Skarbek, a clinical psychiatrist. The purpose of this evaluation was to assess Petitioner's psychiatric condition. Dr. Skarbek found that Petitioner had an adjustment disorder and recommended a return to work plan that included eight (8) weeks of supportive therapy to assist him in re-acclimating to the work environment.

Deposition of Dr. Joseph Shoshana dated February 24, 2017

Dr. Shoshana testified as to his definition of post-traumatic stress syndrome, ("PTSD"). He began treating the petitioner on May 23, 2016 and testified that he is a cognitive behavioral psychologist. As treatment, he helps people process what happened to them and deal with the symptoms of PTSD to overcome the trauma.

Dr. Shoshana further testified that the petitioner had symptoms of PTSD and that he is currently on three different medications. The medications are to help him sleep, act as an antidepressant and to address anxiety. He suspects that the petitioner has cognitive deficits that would impact his capacity to be focused and concentrate however, the condition is not permanent. Dr. Shoshana testified that he reviewed Dr. Skarbek's report and felt that the testing Dr. Skarbek performed did not obtain all the information needed to make a reasonable decision as to whether the petitioner could return to work.

Deposition of Dr. Matthew Skarbek

On May 17, 2017 Dr. Matthew Skarbek testified that he is a clinical psychologist licensed in the state of Illinois. Dr. Skarbek testified as to the definition of PTSD and how he utilizes a cognitive behavioral approach to therapy for cases of PTSD. He testified that he is primarily a treating psychologist and only completes about four (4) workers' compensation evaluations per year. His evaluation of the petitioner that took place on November 18, 2016.

Dr. Skarbek completed an initial interview with the petitioner and he administered the MMPI-2 and the Symptom checklist-90. The MMPI and the symptom checklist were chosen because they both have validity indices. The tests are designed to show if someone is under reporting or over reporting symptoms. Per Dr. Skarbek's opinions, the petitioner did not meet the DSM-V criteria for PTSD. Criteria A of the DSM-V is that the individual must be exposed to a truly unexpected horrific event. Petitioner reported to Dr. Skarbek that he had been working with electricity for most of his career and that he had specialized training in electrical work. He also reported to Dr. Skarbek that this was not the first time he had been shocked by electricity. Per Dr. Skarbek, this information demonstrated the petitioner's familiarity with electrical work and Dr. Skarbek felt that the appropriate diagnosis for him was "adjustment disorder".

According to Dr. Skarbek, an adjustment disorder occurs when an individual has a reaction that is out of proportion with the circumstances of an event. In his opinion, the petitioner should be treated with a two-part cognitive behavioral approach. Part 1 would be to get the individual to identify his fears/issues; part 2 would require the individual to participate in activities to help them overcome said fears/issues. Dr. Skarbek testified that he did not see any reason why psychiatrically, the petitioner should be out of work. He stated that the petitioner was very clear that being out of work had a detrimental impact on his mental health and he had the appropriate support to make the transition back to work. He had a very supportive family and he and his wife were attending appointments as needed. Dr. Skarbek also testified regarding the treatment the petitioner was receiving. He felt that the frequency of the treatment was unusually high.

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 causal connection between work and the alleged condition of ill-being, compensation is to be denied. *Id.* The facts of each case must be closely analyzed to be fair to the employee, the employer, and to the employer's workers' compensation carrier. *Three "D" Discount Store v. Industrial Commission*, 198 Ill.App. 3d 43, 556 N.E.2d 261, 144 Ill.Dec. 794 (4th Dist. 1989).

The parties agree that the petitioner's orthopedic treatment pertaining to the right shoulder open reduction internal fixation glenoid fracture is related and that Petitioner was determined to have reached maximum medical improvement on November 15, 2016. The parties are disputing whether the Petitioner's ongoing psychiatric treatment is related to the date of accident of March 9, 2016. The Arbitrator finds that no medical evidence was presented to support an assessment that the petitioner's current mental condition is causally related and that he should receive additional benefits under section 8(a) of the Act.

Below is a list of the content of the medical notes associated with the petitioner's psychiatric treatment post November 27, 2016. Not one note mentions the March 9, 2016 accident. Not one note has a corresponding work status note indicating that the petitioner needs to remain off work. Not one note discusses any plan of treatment to return the petitioner to employment or provides insight into why the issues discussed are related to the March 9, 2016 accident.

November 28, 2016: Discussed with patient his communication with family and ways to seek support.
December 5, 2016: Met with patient and wife to discuss ways to provide support for patient.
December 8, 2016: Patient discussed his financial concerns and its impact on his emotional wellbeing.

December 13, 2016: Discussed use of distress tolerance skills.
December 19, 2016: Patient discusses impact of his finances on his ability to enjoy the holidays.
December 26, 2016: Discussed with patient different activities to keep him engaged.
January 3, 2017: Discussed with patient different coping skills to address anxiety.
January 9, 2017: Patient discusses anxiety about his surgery and expressed concerns about his future.
February 10, 2017: discussed with patient financial stresses due to lack of income
February 17, 2017: discussed with patient ways to reduce stress and use relaxation
February 24, 2017: discussed with patient the importance of proper sleep and self-care
March 2, 2017: discussed with patient ways to engage his family and get support
March 6, 2017: discussed with patient and his wife ways to better monitor changes and provide support.
March 13, 2017: discussed with patient expectations for recovery.
March 20, 2017: discussed with patient use of emotion regulation skills
March 27, 2017: discussed with patient better ways to organize his day
April 3, 2017: discussed with patient his struggles to be organized and motivated.
April 10, 2017: discussed with patient his concerns about his future and cognitive difficulties.
April 17, 2017: discussed with patient his interpersonal effectiveness skills
April 24, 2017: discussed with patient use of coping skills and support from family while the therapist is away.
May 23, 2017: discussed with patient his adjustment to meds and therapy absence.
May 31, 2017: discussed with patient and his wife ways to support patient.
June 5, 2017: Discussed with patient ways to compensate for memory loss.
The notes above are the only documentation produced by Dr. Shoshana following each evaluation.

Over the course of 23 sessions we know what was talked about concerning Petitioner's finances, his relationship with his wife, his therapist going away; and the surgery he had in January 2017. There is no indication that the petitioner was addressing the March 9, 2016 accident or any plan to return him to work. We have no record of what complaints the petitioner had or why any of the above-mentioned issues were the topic of the day.

The Arbitrator finds that the opinions of Dr. Skarbek are persuasive and that his recommendation that the petitioner return to work with supportive therapy for eight weeks was reasonable. To support this opinion the Arbitrator looks to the background of Dr. Skarbek. His testimony and CV demonstrate that treating PTSD is a regular part of his work activities and as part of his DCFS- related evaluations. He deals with patients who manifest this diagnosis, on a daily basis. There was no evidence presented demonstrating the frequency that Dr. Shoshana confronts this diagnosis.

Dr. Shoshana's treating records outside of the initial May 23, 2016, evaluation do not contain any mention of a treatment plan or projection towards how he plans to return the petitioner to work. Dr. Shoshana's deposition is vague in how it addresses this issue and doesn't provide the parties involved

with any understanding of how he plans to return the petitioner to work; or why keeping the petitioner out of the work environment, is helping him recover from the March 9, 2016 accident.

Dr. Skarbek's November 27, 2016 report proposes that the petitioner return to work with supportive therapy. The report outlines the pros and cons of returning the petitioner back to work and is supported by Dr. Skarbek's opinions which relied on his interview of the petitioner and review of the objective testing he performed during his IME. Dr. Shoshana provides testimony that neuropsychic testing was his recommendation. But he doesn't explain why the neuropsychic testing Dr. Skarbek performed was inappropriate or offer any suggestions for what would be more appropriate. The Arbitrator finds that we learn more about the Petitioner's condition, background and issues from the assessment Dr. Skarbek provided then from the 12 months of records produced by Dr. Shoshana.

Dr. Shoshana, while testifying that the opinions of Dr. Skarbek were based on incomplete information, does not provide any alternative conclusions for how he proposes getting the petitioner back to work, after having provided ten (10) months of psychotherapy sessions. It is also reasonable to question whether Dr. Shoshana had all the information pertaining to the petitioner's pre-accident psychiatric history. During Petitioner's direct examination he testified to never having had prior psychiatric treatment. However, he was presented with a prescription report during cross-examination, indicating that he had been prescribed drugs for a psychiatric condition by Dr. Charman, prior to the date of accident. The Arbitrator questions the petitioner's credibility associated with his denial of pre-accident, mental health treatment.

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

The Arbitrator finds that the treatment provided by Dr. Shoshana ceased being reasonable once the recommendations of Dr. Skarbek were issued on November 27, 2016. The Arbitrator looks to the depositions of Drs. Shoshana and Skarbek and the treating records from Dr. Shoshana as evidence to support this decision.

Dr. Shoshana deposition demonstrates that the treatment he provided was not related to the March 9, 2016 accident and that he was addressing other issues outside of his alleged PTSD diagnosis. The notes listed in the causation section of Dr. Shoshana's treating records demonstrate that the March 9, 2016 accident was not discussed and/or addressed as part of the Petitioner's ongoing therapy sessions after November 27, 2016.

The Arbitrator finds that the plan for returning the Petitioner to work identified in Dr. Skarbek's report acknowledges the difficulties he might face in returning to work and provides a method of addressing those difficulties through additional psychotherapy. Dr. Shoshana has made minimal effort to assist the petitioner in returning to work and dealing with any mental issues that could be

lingering from the accident of March 9, 2016. It appears that Dr. Shoshana is fostering the petitioner's avoidance issues by addressing non-work related issues in his treatment.

The Arbitrator finds that the expenses issued by Dr. Shoshana up to November 27, 2016, when Dr. Skarbek issued his report are reasonable and should be paid by the respondent. The Arbitrator awards $3,523.15 in medical expenses to the petitioner. This is the fee schedule value of the expenses incurred prior to November 27, 2016. The parties have not presented any dispute to the treatment rendered prior to November 27, 2016.

The Arbitrator finds that the out of pocket expenses the Petitioner presented are not supported by medical records. The petitioner presented a 32-page exhibit addressing out of pocket expenses the following list addresses each page. *See,* Petitioner's Exhibit #6 for corresponding documents.

Page 1: the script predates the petitioner's accident date – not awarded
Page 2: Script was issued 12/4/2016 by Dr. Charman, no records were presented into evidence to support causation of treatment or medication– not awarded
Page 3: Script was issued 12/4/2016 by Dr. Charman, no records were presented into evidence to support causation of treatment or medication – not awarded
Page 4: Script was issued 12/4/2016 by Dr. Charman, no records were presented into evidence to support causation of treatment or medication – not awarded
Page 5: Script was issued 12/4/2016 by Dr. Charman, no records were presented into evidence to support causation of treatment or medication – not awarded
Page 6: Script was issued 9/28/2016 by Dr. Charman, no records were presented into evidence to support causation of treatment or medication – not awarded
Page 7: Script was issued 9/27/2016 by Dr. Saltzman, causation in medical records established – awarded $0.00.
Page 8: Script was issued 9/6/2016 by Dr. Charman, no records were presented into evidence to support causation of treatment or medication – not awarded
Page 9: Script was issued 8/2/2016 by Dr. Charman, no records were presented into evidence to support causation of treatment or medication – not awarded
Page 10: Refund issued to petitioner no expenses incurred – not awarded
Page 11: Script was issued 6/28/2016 by Dr. Guthman, no records were presented into evidence to support causation of treatment or medication – not awarded
Page 12: Script was issued 6/28/2016 by Dr. Charman, no records were presented into evidence to support causation of treatment or medication – not awarded
Page 13: Script was issued 6/28/2016 by Dr. Guthman, no records were presented into evidence to support causation of treatment or medication – not awarded
Page 14: Script was issued 5/25/2016 by Heather McKinley, no records were presented into evidence to support causation of treatment or medication – not awarded

Page 15: Script was issued 5/25/2016 by Heather McKinley, no records were presented into evidence to support causation of treatment or medication – not awarded
Page 16: Script was issued 5/23/2016 by Dr. Guthman, no records were presented into evidence to support causation of treatment or medication – not awarded
Page 17: Script was issued 4/14/2016 by Heather McKinley, no records were presented into evidence to support causation of treatment or medication – not awarded
Page 18: Script was issued 3/18/2016 by Heather McKinley, no records were presented into evidence to support causation of treatment or medication – not awarded
Page 19: Script was issued 3/18/2016 by Heather McKinley, no records were presented into evidence to support causation of treatment or medication – not awarded
Page 20: Script was issued 3/14/2016 by Dr. Adney, no records were presented in to evidence to support causation of treatment or medication – not awarded
Page 21: Script was issued 12/31/2016 by Dr. Charman, no records were presented into evidence to support causation of treatment or medication – not awarded
Page 22: Script was issued 1/10/2017 by Heather McKinley, no records were presented into evidence to support causation of treatment or medication – not awarded
Page 23: Script was issued 1/31/2017 by Heather McKinley, no records were presented into evidence to support causation of treatment or medication – not awarded
Page 24: Script was issued 2/9/2017 by Dr. Beckemeeyer, no records were presented into evidence to support causation of treatment or medication – not awarded
Page 25: Script was issued 3/3/2017 by E. Shim, DDS, no records were presented in to evidence to support causation of treatment or medication – not awarded
Page 26: Script was issued 3/3/2017 by E. Shim, DDS, no records were presented into evidence to support causation of treatment or medication – not awarded
Page 27: Script was issued 3/13/2017 by Dr. Charman, no records were presented into evidence to support causation of treatment or medication – not awarded
Page 28: Script was issued 3/13/2017 by Dr. Charman, no records were presented into evidence to support causation of treatment or medication – not awarded
Page 29: Script was issued 3/23/2017 by H. Iodice, APN, no records were presented into evidence to support causation of treatment or medication – not awarded
Page 30: Script was issued 3/23/2017 by H. Iodice, APN, no records were presented in to evidence to support causation of treatment or medication – not awarded
Page 31: Target receipts – no supporting scripts or explanation for the expenses provided – not awarded
Page 32: Walgreens receipts – no supporting scripts or explanation for the expenses provided – not awarded

K. Is Petitioner entitled to prospective medical care?

The petitioner has not proven, by a preponderance of the evidence, that he is entitled to additional medical treatment under section 8(a) of the Act. The Arbitrator finds that the recommendations and

opinions of Dr. Skarbek were reasonable and persuasive although. The Arbitrator finds and concludes that Petitioner's current condition of ill-being is not causally related to the March 9, 2016 accident and the petitioner has not proven, by a preponderance of the evidence, that he is entitled to additional medical treatment under the Worker's Compensation Act. Petitioner MMI as to his right shoulder as of November 15, 2016.

L. What temporary benefits are in dispute?

The parties agree that the Petitioner was paid $40,167.16 in TTD benefits. The Petitioner is due $39,697.86 in TTD benefits. This represents the period of March 10, 2016 through November 27, 2016. The Respondent is due a credit of $469.30.

18IWCC0639

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
16WC9349
SIGNATURE PAGE

Signature of Arbitrator

July 11, 2017
Date of Decision

JUL 11 2017

STATE OF ILLINOIS)
) SS.
COUNTY OF LA SALLE)

☒ 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

Liudmila Antonenko,

Petitioner,

vs.

NO: 14 WC 30962

HCC, Inc.,

18IWCC0640

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 7, 2017, is hereby affirmed and adopted.

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

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

18IWCC0640

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 6 2018
TJT:yl
o 10/23/18
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ANTONENKO, LIUDMILA
Employee/Petitioner

Case# **14WC030962**

HCC INC
Employer/Respondent

18IWCC0640

On 9/7/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.11% 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:

4642 O'CONNOR & NAKOS PC
MATT WALKER
120 N LASALLE ST 35TH FL
CHICAGO, IL 60602

0481 MACIOROWSKI SACKMANN & ULRICH
ROBERT ULRICH
105 W ADAMS ST SUITE 2200
CHICAGO, IL 60603

18IWCC0640

STATE OF ILLINOIS)
)SS.
COUNTY OF LA SALLE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Liudmila Antonenko
Employee/Petitioner
v.
HCC, Inc.
Employer/Respondent

Case # **14** WC **30962**

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

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. 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 **January 3, 2014,** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$16,237.01**; the average weekly wage was **$523.77**.

On the date of accident, Petitioner was **57** years of age, ***married*** with **0** dependent children.

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

Respondent paid appropriate charges for all reasonable and necessary medical services (none owed).

To date, Respondent has paid $ **0** in TTD and/or for maintenance benefits, and is entitled to a credit for any and all amounts paid.

Respondent shall be given a credit of **$2,832.00** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of $ **2,832.00**.

Respondent is entitled to a credit of **$14,977.07** under Section 8(j) of the Act.

ORDER

Petitioner failed to prove that she sustained accidental injuries that arose out of and in the course of her employment with respondent on January 3, 2014, or at any time.

Respondent shall be given credit for the $2,832.00 TTD benefits paid.

Petitioner's claim is hereby denied and case is dismissed.

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

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

Christine Moy

Signature of Arbitrator

09/06/2017

Date

SEP - 7 2017

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Liudmila Antonenko	)
Petitioner,	)
vs.	) **No. 14 WC 30962**
HCC, Inc.	)
Respondent.	)
	)

ADDENDUM TO ARBITRATOR'S DECISION

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This matter proceeded to hearing in Ottawa on December 22, 2016. The parties agree that on January 3, 2014, the Petitioner and the Respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer. They agree petitioner gave respondent notice of the claimed accident within the time limits stated in the Act. They further agree that in the year preceding the injuries, the Petitioner earned $16,237.01, and that her average weekly wage, as calculated pursuant to §10, was $523.77.

At issue in this hearing is as follows:

1. Whether the petitioner sustained accidental injuries that arose out of and in the course of her employment;
2. Whether petitioner's current condition of ill-being is causally connected to the claimed injury.
3. Whether respondent is liable for the unpaid medical bills.
4. Whether temporary total disability is due petitioner
5. The nature and extent of petitioner's injury.

FINDING OF FACTS

The Petitioner does not speak English; her native language is Russian. She testified with the assistance of Lydia Wechsler, a certified interpreter, qualified to translate Russian to English and English to Russian. After being duly qualified and accepted by both parties, Ms. Wechsler served as an interpreter for the petitioner.

Petitioner began working for respondent on May 28, 2010 as an assembler. This job did not require pushing, it required lifting up to approximately thirty pounds. Petitioner was periodically laid off. She confirmed she had been laid off from July 26, 2013 until January 2, 2014. She did not work any other place while she was laid off.

On January 2, 2014, petitioner was assigned to the sieves department. In the sieves department petitioner assembled large farming equipment. This job called for lifting of metal frames onto an assembly table; which was usually done with a hoist. However, there were two assembly tables and only one hoist. Petitioner testified that the people she worked with preferred to lift the frame

onto the assembly table and not wait for the hoist. If it was a large frame, four people were needed to lift it. A smaller frame only required two people to lift the frame.

Petitioner was not certain how many frames she lifted on January 2, 2014; estimating it was twenty. She then clamped clips on the wires of the frame. In doing so, she had to reach further and further forward on the frame. She clamped approximately 3000 clips per day. At the end of the shift on January 2, 2014, she noticed pain in her back and achiness in her arms.

She worked the following day, January 3, 2014, at her usual shift. She had a harder time lifting, as the frames were larger. At the end of her shift, she was experiencing excruciating pain in her left shoulder. She testified that the pain was so bad she had to stop at a gas station to get pain killers. She was having problems dressing. She could not sleep. She spent the night in the chair. She claimed did not come to work on Monday due to pain; but also due to snow.

She returned to work on Tuesday [January 7, 2014] doing her regular job carefully. She did not use her left shoulder. She continued to work until January 14, 2014 when she saw Dr. Ritz.

She was referred to orthopedic surgeon, Dr. Mitchell; whom she saw on January 22, 2014 (sic). An MRI was ordered. She received a shoulder injection on February 4, 2014. She started physical therapy on February 10, 2014. She followed up with Dr. Mitchell.

On April 2, 2014, petitioner had carpal tunnel surgery (which was unrelated to this accident). She had another shoulder injection by Dr. Mitchell on May 14, 2014. She returned to Dr. Mitchell on May 29, 2014 with continued problems. She started physical therapy on June 3, 2014. On June 27, 2014 petitioner underwent surgery to her right knee.

On July 31, 2014, Dr. Mitchell recommended shoulder surgery, which was done on August 22, 2014. She had physical therapy at City Center starting on September 9, 2014. On January 21, 2015, petitioner was released to return to work without restrictions and was laid off by respondent. She went to work at Cookies Kingdom packing cookies. She worked eight months for Cookies Kingdom; four hours a day.

She returned to work for respondent working in the reel department, which was a physical job However, she did not have problems with shoulder.

She testified she was off work [due to the shoulder injury] as of January 15, 2014 and received short term disability.

She can't reach overhead. When she drives, she feels pulsing in her arm. She is capable of doing daily activities, but needs help. Her husband goes shopping with her. Moving her arms while walking causes a burning sensation.

When she was put back in the sieves department, she experienced the same problems she had before. She has not seen Dr. Mitchell since January, 2015. She was examined by Dr. Bush Joseph and Dr. Karlsson.

On cross examination she confirmed she had prior cases under a different name. She had weak hands. She had problems lifting. She was not sure what percentage of the day she attached clips and what percentage of the day she lifted frames.

Petitioner's Exhibit List (PX.1)

Petitioner introduced nine exhibits, including the exhibit list.

IVCH Medical Group Records (PX.2)

Petitioner presented to Dr. Ritz on January 15, 2014 with complaints of left shoulder pain. Petitioner provided a history of sudden onset of left shoulder pain after returning to work on

January 2, 2014 and being put on a new job. She stated she worked on January 2nd and 3rd. She was off work on January 6, 2014, and worked from January 7, through January 13; however, when she arrives home she was in horrible pain. Her left arm range of motion was painful. She was taken off work and referred to Dr. Mitchell.

On March 10, 2014, petitioner was seen by Dr. Ritz for sudden onset of neck pain, which had lasted for four days. She reported she was in physical therapy for her left shoulder. The diagnosis was neck strain.

On July 29, 2014, petitioner was seen for back pain which had been occurring intermittently for years, but developed over past two weeks and was seeing chiropractor for it. (Unfortunately, the last two pages of this visit were not included with these records.)

Morris Healthcare Center Records (PX.3)

Petitioner was seen by Dr. Deena Raval on June 19, 2014 as a referral from Dr. Ritz, for degenerative joint disease with polyarthralgia in various body parts; including bilateral ankles, knees; right greater than left, hips wrists and shoulders.

She related the left shoulder pain had been present for five months; cortisone injections helped, physical therapy helped only a little. She could not externally rotate with left shoulder and abduction. Diagnosis was polyarthralgia, tendonitis of the left rotator cuff, right knee meniscal tear, history of left carpal tunnel surgery, wrist pain and fatigue.

Petitioner returned to Dr. Raval on October 1, 2014 as a referral by Dr. Mitchell; her complaints remained the same. The primary diagnosed with inflammatory arthritis. An MRI confirmed tendinoplasty and partial thickness tear of superior labrum of the left shoulder.

Illinois Valley Orthopedics Records (PX.4)

Contained in these records was a form which was completed by Dr. Mitchell, for Principal Financial Group, indicating petitioner was first seen by Dr. Mitchell on January 23, 2014 for left shoulder pain and limited mobility that was not related to employment (94).

The records indicate petitioner was first seen by Dr. Robert Mitchell on January 23, 2014. The history contained in the records was: "the patient is a 57-year-old female with chief complaint of shoulder pain. Left shoulder. Patient is right hand dominant. Patient describes her shoulder pain today at 4 out of 10 and has had left shoulder pain for the past few weeks, which has worsened gradually. The pain is located on the superior aspect of the shoulder, and not the result of a fall or injury." Dr. Mitchells' impression was type II acromion with AC joint arthritis.

She was seen again on February 4, 2014. She received an injection. She was in physical therapy. She followed up on March 18, 2014 for impingement syndrome of the left shoulder. Dr. Mitchell recommended home exercises.

She was seen on May 13, 2014 for follow up to her right carpal tunnel release. She also had complaints of left shoulder pain.

On May 16, 2014, Dr. Mitchell completed a form for Principal Financial Group, indicating petitioner was under treatment at that time for ongoing impingement syndrome, bilateral CTS and left cubital tunnel syndrome.

On May 29, 2014, Dr. Mitchell recommended petitioner receive physical therapy to her left shoulder to improve range of motion and strength.

On June 17, 2014, petitioner followed up with Dr. Mitchell for treatment of her right knee and left shoulder. Dr. Mitchell recommended right knee meniscectomy, which was done on June 27, 2014. She followed upon July 8, 2014 and July 31, 2014.

At the July 31, 2014 follow-up visit for her meniscectomy, she had complaints of the left shoulder. On August 14, 2014, left shoulder surgery was discussed.

Petitioner underwent left shoulder arthroscopy on August 22, 2014. Petitioner followed up with Dr. Mitchell on September 2, 2014, September 30, 2014, October 14, 2014, October 28, 2014 and December 4, 2014 for status post left shoulder arthroscopy with debridement of labral tear and partial rotator cuff tear, SAD, and mini-open distal clavicle excision. (At the October 14, 2014, petitioner also had complaints relative to her left elbow.)

On January 20, 2015, Dr. Mitchell released petitioner to return to full-duty work as of January 21, 2015.

Illinois Valley Community Hospital Records (PX.5)

Petitioner's left shoulder January 28, 2014 MRI showed supraspinatus tendinopathy without evidence of a rotator cuff tear; moderate acromioclavicular arthrosis/arthritis. And possible small partial-thickness nondisplaced tear of the superior labrum, but no full-thickness tear or labral fragment/displacement.

At petitioner's June 3, 2014 physical therapy initial evaluation, petitioner reported a left shoulder injury of January 2, 2014 for "occupational overuse".

Dr. Mitchell performed left shoulder arthroscopy on August 22, 2014 which consisted of debridement of labral tear and partial rotator cuff tear, subacromial decompression and mini open distal clavicle excision for left shoulder impingement syndrome with acromioclavicular joint arthritis, degenerative anterior labral rea with partial thickness rotator cuff tear.

City Center Rehabilitation Records (PX.6)

Petitioner received physical therapy from September 9, 2014 through February 5, 2015. The history in the records was petitioner had been laid off for six months, returned to work on a different line and developed pain after two days.

Unity Point Clinic Records (PX.7)

Petitioner underwent an EMG on March 6, 2014 because of left shoulder and elbow complaints. The EMG was positive for ulnar canal and cubital tunnel and persistent bilateral carpal tunnel syndrome.

Dr. Charles Bush-Joseph May 4, 2016 Evidence Deposition (PX.8)

Dr. Charles Bush-Joseph, board-certified orthopaedic surgeon with a secondary board certification in orthopaedic sports medicine, which includes evaluation and treatment of knee and shoulder injuries and conditions, testified in behalf of petitioner via deposition (6).

Dr. Bush-Joseph examined petitioner, in her behalf, on November 4, 2015. He also reviewed records from IVCH and Illinois Valley Orthopedics. According to Dr. Bush-Joseph, petitioner related prior problems with her upper left extremity in 2011. (11)

Petitioner related an acute onset of shoulder pain that occurred on January 2, 2014 (11). She reportedly changed positions and the pain became tolerable; however, on the second day, her symptoms became more noticeable (11). Petitioner advised Dr. Bush-Joseph that the activities she was performing [on January 2, 2014 and January 3, 2014] were more stressful than her previous activities (12).

Dr. Bush-Joseph reviewed the MRI [of January 28, 2014] and agreed the findings were consistent with rotator cuff tendinitis and moderate arthritis of the AC joint (14). As for the surgery

performed by Dr. Mitchell on August 22, 2014, Dr. Bush-Joseph indicated petitioner had two problems; inflamed tissue around the rotator cuff and, as Dr. Bush Joseph stated: "it was clear that the patient had eroded all the articular cartilage there, and that bone-on-bone contact becomes quite painful to patients" (14-15). Dr. Bush-Joseph found the surgery was successful (16).

Based upon his examination of petitioner, review of the medical records and diagnostic studies, Dr. Bush-Joseph believed petitioner developed an aggravation of her AC joint arthritis in the development of rotator cuff impingement (18). Based upon the information provided to Dr. Bush-Joseph, he believed petitioner developed rotator cuff tendinosis with aggravation or acceleration of her arthritic AC joint due to the assembly activities petitioner described as providing significant pain and repetitive activities (18-19). Dr. Bush-Joseph reiterated that, based upon the information provided to him of no other precipitating activities, petitioner's work activities accelerated or aggravated the pre-existing left shoulder condition (19-20).

Dr. Bush-Joseph believed petitioner was capable of returning to unrestricted work and did not require any further treatment (21-22).

On cross-examination, Dr. Bush-Joseph confirmed the two-day work activities coupled with the pre-existing condition caused petitioner' left shoulder problem (25). Dr. Bush-Joseph agreed that he would rule-out causation if [the work activity] was of short duration (26). Dr. Bush-Joseph could not quantify what level of repetitive activity would rule in or out causation (27-28). However, Dr. Bush-Joseph agreed that if [petitioner] had told him she occasionally did the activities it would rule out causation (29).

Dr. Bush-Joseph could not point to any objective findings on the MRI that supported his opinion that petitioner's moderate arthritis had been aggravated (33).

Medical Bills (PX.9)

Petitioner claims the following bills:
$21,902.00 City Center Rehabilitation
$394.00 Hospital Radiology Service
$28,944.30 Illinois Valley Community Hospital
$16,959.00 Illinois Valley Orthopedics
$683.00 Morris Medical Specialists/Morris Healthcare Center

Dr. Troy Karlsson June 13, 2106 Evidence Deposition (RX.1)

Dr. Troy Karlsson, board-certified orthopaedic surgeon, who is also certified by the American Academy of Disability Evaluating Physicians, testified in behalf of respondent. Dr. Karlsson examined petitioner on August 20, 2015. After the examination and reviewing medical records, Dr. Karlsson authored a report, which was admitted into evidence.

Petitioner related to Dr. Karlsson that she was working for respondent assembling farming equipment on January 3, 2014 and injured her left (non-dominant) shoulder. She didn't recall any specific incident; only related that lifting caused shoulder pain that worsened throughout the day. (8-9)

Petitioner related she had surgery and therapy that helped, but she continued to have pain in her shoulder (9-10) Dr. Karlsson's review of the January 29, 2014 MRI showed petitioner had significant acromioclavicular joint arthritis, with some bone spurs, and tendonitis without tears or thinning of the rotator cuff; the glenoid labrum was intact (11). Dr. Karlsson also reviewed the August 22, 2014 operative report (12-13). Dr. Karlsson's examination found no loss of motion, strength or instability; only some tenderness of petitioner's left shoulder (13).

Based upon his review of the records and studies, as well as his examination of the petitioner, Dr. Karlsson concluded petitioner's condition was unrelated to her employment; it was all degenerative (14). Dr. Karlsson believed this condition was present prior to the claimed work incident (17). Dr. Karlsson agreed that petitioner's claimed work activity could cause petitioner's pre-existing to become temporarily symptomatic (17).

CONCLUSIONS OF LAW

The Arbitrator adopts the Finding of Facts in support of the Conclusions of Law.

C. In support of the Arbitrator's decision with regard to whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator makes the following conclusions of law:

The Arbitrator finds petitioner failed to prove she sustained an accidental injury to her left shoulder that arose out of and in the course of her employment on January 3, 2014, or any other date. In reaching this conclusion, the Arbitrator took into consideration the fact that petitioner claimed she injured her left shoulder due to repetitive activities at work on January 3, 2014, which was the second day she returned to work after a six-month layoff. She claimed it was not any specific incident that occurred on January 2, 2014 or January 3, 2014, that caused the pain in her arm. Despite the fact that petitioner claimed the injury occurred on January 2, 2014, and the pain increased on January 3, 2014, she purportedly continued to work in the same job before receiving medical treatment on January 15, 2014.

At the time of petitioner's examination with Dr. Ritz on January 15, 2014, petitioner related the history of a sudden onset of pain on January 2, 2014 while working at a new job. There was no such history contained in Dr. Mitchell's records when she first saw him on January 23, 2014 for her left shoulder complaints. Specifically, the history continued in Dr. Mitchell's January 23, 2014 records was: "The pain is located on the superior aspect of the shoulder, and not the result of a fall or injury." In addition, Dr. Mitchell's records included a Principal Financial Group form indicating petitioner was first seen on January 23, 2014 for left shoulder pain and limited mobility that was not related to employment.

In fact, the records of Dr. Mitchell, who provided care and treatment to petitioner for her left shoulder condition, including surgery, are completely void of any mention of petitioner's work causing or contributing to her left shoulder condition.

Instead of relying upon the opinion of the treating physician, Dr. Mitchell, petitioner utilized the expertise of Dr. Bush-Joseph, who opined petitioner's pre-existing arthritic condition was accelerated or aggravated by petitioner's work activity on January 2, 2014 and January 3, 2014. However, Dr. Bush-Joseph agreed that if the work activity was of a short duration than it would rule out causation. Dr. Bush-Joseph also found no objective evidence on the MRI of an aggravation or acceleration of the pre-existing arthritis.

To the contrary, Dr. Karlsson, respondent's §12 examining physician, determined petitioner's left shoulder problem was only degenerative in nature and not due to any work activity. Support of Dr. Karlsson's opinion is found in the records of Dr. Deena Raval, of Morris Healthcare Center, who determined petitioner was suffering from polyarthralgia of various body parts; including the left shoulder.

Taken as a whole, the Arbitrator finds petitioner's two-day work activity on January 2, and January 3, 2014, did not raise to the level of a repetitive accident that arose out of and in the course of her employment with respondent.

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

Petitioner failed to prove she sustained accidental injuries to her left shoulder that arose out of and in the course of her employment on January 3, 2014, or any other day, but rather pain from the pre-existing arthritis. Furthermore, the Arbitrator finds petitioner failed to prove that her pre-existing shoulder condition was accelerated or aggravated by her work activity of January 3, 2014, or any other date.

As petitioner failed to prove she sustained injuries to her left shoulder in an accident that arose out of and in the course of her employment with respondent on January 3, 2014, or any other day, all remaining issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Poulter,

Petitioner,

vs. NO: 11 WC 24341

18IWCC0641

Cassens Transport,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 6, 2017, is hereby affirmed and adopted.

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

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

18IWCC0641

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 6 2018
TJT:yl
o 10/16/18
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

POULTER, JOHN
Employee/Petitioner

Case# **11WC024341**

CASSENS TRANSPORT
Employer/Respondent

18IWCC0641

On 4/6/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

4888 KEITH SHORT LAW OFFICE
1355 N BLUFF RD
COLLINSVILLE, IL 62234

2396 KNAPP OHL & GREEN
L DAVID GREEN
6100 CENTER GROVE RD
EDWARDSVILLE, IL 62025

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

JOHN POULTER
Employee/Petitioner

v.

CASSENS TRANSPORT
Employer/Respondent

Case # 11 WC 24341

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Cellini**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **August 10, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **January 31, 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 **$93,600.00**; the average weekly wage was **$1,752.15**.

On the date of accident, Petitioner was **55** years of age, ***married*** with **1** dependent child.

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

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

Respondent shall be given a credit of **$43,362.35** for TTD, **$0** for TPD, **$0** for maintenance, and **$6,700.20** for non-occupational disability benefits, for a total credit of **$50,062.55**.

Respondent is entitled to a credit of **$66,395.02** under Section 8(j) of the Act. Respondent is also entitled to credit for all medical expenses paid via group health coverage which qualifies under Section 8(j) of the Act.

ORDER

The parties have stipulated that the Petitioner's right shoulder condition is causally related to the January 31, 2011 accident. The Arbitrator finds that the Petitioner's lumbar condition is also causally related to the January 31, 2011 accident.

Respondent shall pay Petitioner temporary total disability benefits of **$1,168.10 per week** for **42-17 weeks**, commencing **February 1, 2011 through June 17, 2011** and from **December 2, 2015 through May 7, 2016**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from February 1, 2011 through August 10, 2016, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of **$43,362.35** for temporary total disability benefits that have been paid, as well as a credit of **$6,700.20** for non-occupational disability benefits paid pursuant to Section 8(j) of the Act, and Respondent shall hold Petitioner safe and harmless from any and all claims by any providers of the non-occupational disability benefits for which Respondent is receiving this credit, as provided in Section 8(j) of the Act. .

Respondent shall pay the reasonable and necessary medical charges contained in Petitioner's Exhibits 18 through 29, totaling $351,802.74, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given credit for medical benefits that have been paid prior to hearing, pursuant to Section 8(a) and/or Section 8(j) of the Act, and Respondent shall hold Petitioner safe and harmless from any and all

claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$669.64 per week**, the maximum allowable PPD rate, for **50 weeks**, because the injuries sustained caused the **10% loss of the person as a whole**, with regard to the Petitioner's right shoulder condition, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$669.64** per week, the maximum allowable PPD rate, for **112.5 weeks**, because the injuries sustained caused the **22.5% loss of the person as a whole**, with regard to the Petitioner's lumbar condition, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner PPD compensation that has accrued from **June 17, 2011** through **August 10, 2016**, with regard to the right shoulder, and shall pay Petitioner PPD compensation that has accrued from **May 7, 2016** through **August 10, 2016**, with regard to the lumbar spine, 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

March 28, 2017
Date

APR 6 – 2017

ICArbDec p 2

STATEMENT OF FACTS

Petitioner, 55 years old at the time of the accident, testified that he began working for Respondent in 1993 driving a semi-truck car hauler. The job involved being dispatched to various terminals, and he would load and unload vehicles both at his departure and arrival destinations. Petitioner testified that he would load between 8 and 10 vehicles per trip. He would drive them onto the carrier and strap them down with four ratcheted straps per car. He was under no active work restrictions prior to the accident, and he testified that he had no prior right shoulder or low back injuries or treatment. He testified that he is right hand dominant. At the time of the accident Petitioner testified he would get routes based on seniority, but he had a dedicated route when he came back to work following this accident.

On 1/31/11, while working out of Princeton, IN, he picked a load up in Chicago to take to Louisville. He was loading cars to bring back to Princeton, and it was cold and rainy. He had driven a vehicle up to the spot above the tractor cab. As he was exiting the vehicle, approximately 10 feet off the ground, he was attempting to descend the truck and slipped. He was holding onto the driver's door of the loaded vehicle and tried to hold on, causing him to yank his right shoulder. His testified he heard a pop, his right arm gave out and he fell to the ground onto his left side.

Someone at the auto facility saw him on the ground and called 911, and Petitioner was taken by ambulance to Norton Hospital. He called his supervisor, Princeton terminal manager Dennis Kniser, who then came out to the hospital the next day. The EMT report from Louisville Metro EMS indicated the Petitioner was found lying down in a grassy field, he reported that he fell more than 10 feet from the top rack of a semi car transporter, and that he had right shoulder pain radiating to the upper arm. Nothing was indicated regarding the low back. (Px8).

Petitioner testified he reported excruciating right shoulder pain at the ER, as well as left hip and back pain into the left leg, and was diagnosed with a dislocated shoulder. The 1/31/11 ER report from Norton Hospital indicates Petitioner fell from 10 or more feet off the ground, and had right shoulder and left hip pain. A pain diagram supports the written notes of pain in these areas. Multiple x-rays were performed (right elbow, right shoulder, right arm, chest and pelvis), noting Petitioner was complaining of the elbow, arm, pelvis, shoulder and chest. All were negative. CT scans were performed on the head (no acute intracranial abnormalities), cervical spine (no acute abnormalities), chest (consistent with right shoulder dislocation and right lower lung lobe findings) and abdomen/pelvis (mild, non-acute sigmoid diverticulitis and nonspecific prostate enlargement). No lumbar films were taken. He was diagnosed with a right shoulder dislocation, which was reduced under anesthesia, and held off work pending follow up with workers' comp for orthopedic approval. He was prescribed Hydrocodone and a sling. (Px5).

Petitioner first visited Concentra (Dr. Lopez) on 2/4/11, reporting that he fell from the top truck deck when the truck door he was holding opened, which pulled on his right shoulder. The prior ER visit was noted as well as the dislocation diagnosis and closed reduction. Petitioner complained of severe pain, stiffness, popping, swelling and loss of motion. He was referred to orthopedic physician Dr. Garelick. There was no indication of hip or back complaints. (Rx7).

Petitioner saw Dr. Garelick (Concentra) on 2/11/11, reporting the right shoulder dislocation of 1/31/11 and that he underwent closed reduction at the ER. Petitioner reported he was taking Ibuprofen. He testified he had been using Vicodin for pain and did not know why the record did not state this. The record does not indicate hip or low back complaints, or anything about prescribed medications. Given persistent pain, right shoulder MRI was ordered. (Px9; Rx7).

The 2/16/11 right shoulder MRI revealed a complex tear of the glenoid labrum with probable sleeve retraction, subacute Hill-Sachs deformity of the humeral head, contusion of the inferior glenoid process of the scapula and small inferior partial thickness supraspinatus tear. (Px7). Dr. Garelick reviewed the MRI on 2/25/11, and given no rotator cuff tear was seen, he saw no surgical indication. He prescribed ibuprofen, continued Petitioner off work and referred him for therapy. (Px9; Rx7).

On 3/18/11, Dr. Garelick prescribed Tramadol. When Petitioner did not subjectively improve with therapy, on 4/8/11 Dr. Garelick prescribed arthroscopic surgery, noting a re-review of the MRI showed a large loose body, and that he hoped this was the problem versus a labral tear. (Px9). Petitioner underwent surgery on 4/14/11, which involved manipulation under anesthesia, removal of the loose body, synovectomy and debridement of a

partial thickness rotator cuff tear, as well as anterior and inferior labral tearing. The report noted a fair amount of synovitis, an essentially pristine glenohumeral joint except for the large Hill-Sachs lesion on the posterior humeral head, and that a large loose body was found in the subscapularis recess. It appears that Vicodin (hydrocodone) was again given, with one note appearing to indicate "2 tablets (as needed) for pain", as well as Ibuprofen (600 mg). (Px11; Px13).

On 4/29/11, Dr. Garelick noted Petitioner was doing well and aggressive therapy was continued. On 5/27/11, he had ongoing stiffness but was making progress in therapy, and he was continued off work. On 6/17/11, while he had some remaining stiffness, Petitioner was released to unrestricted work, noting if he was unable to perform his job, work hardening would be recommended. (Px9; Rx7).

The Petitioner testified that he "mentioned" low back pain to Dr. Garelick, and that he also reported left side/hip pain to the insurer during an initial investigative interview. He also testified that the left hip was bruised and, noting he was mainly concerned about his shoulder, that he thought it would get better. Asked to pinpoint where the primary pain location was, Petitioner pointed to the area of his left rear pants pocket area. This is consistent with the pain drawing at the ER on the accident date. Petitioner testified that from the accident date until his June 2011 return to work, his back/hip pain never improved, noting that he was on pain medications during that time. He testified he had no subsequent injuries or accidents that would have made the back/hip pain worse. After returning to work, Petitioner testified he followed up with Dr. Garelick the following Friday, indicating the shoulder was stiff but he could work with it. He testified that at work he would walk to various facility locations to pick up vehicles for loading, noticed worsening left hip and lower back pain and developed a limp. He testified he had no similar problems before the accident.

The medical records indicate no visits to Dr. Garelick between 6/17 and 6/30/11. By the 6/30/11 visit to Dr. Garelick, he testified his pain would be severe by the end of the workday, and he was unable to take narcotic medication while driving his truck due to DOT restrictions. Petitioner reported he had been working and able to climb up and down the stairs on the truck, but had pain radiating into the right hand when he turned his head left (which Garelick believed was from the neck), as well as some pain in is left hip that radiated down his leg, with some occasional knee instability. Dr. Garelick stated: "At this time I took another look at his pelvis x-ray and this was unremarkable. I think that most of his pain he is having in his left side is secondary to some deconditioning and primarily, more of the pain, I do believe is coming from his back." Dr. Garelick reassured Petitioner that he was hopeful the neck and back issues would improve over time. He indicated he did not believe Petitioner had yet reached maximum medical improvement (MMI) and thus was not yet released from care. He was to follow up the next month for the left hip and right arm numbness. (Px9).

Petitioner testified that Dr. Garelick ordered a lumbar MRI, but that Respondent would not authorize the MRI. He also testified that Garelick indicated the lumbar spine was not his area of expertise. There is no indication of a lumbar MRI prescription in the records of Dr. Garelick.

Petitioner's physical therapy was performed at Athletico, starting on 3/1/11, and he had 46 sessions between that date and 6/15/11. (Px6). This consisted of only shoulder treatment, and Petitioner testified that the exercises were mainly performed while seated. Petitioner testified that throughout this time he continued to have hip/low back symptoms, but primarily right shoulder pain. The Athletico record of 3/18/11 notes the shoulder pain was affecting Petitioner's sleep. Petitioner also underwent post-surgical (right shoulder) therapy at Athletico. He testified that he would rest or otherwise be inactive during the period he was recovering from shoulder surgery and that he remained on pain medications during his post-surgical recovery. The Arbitrator noted no references to the Petitioner's left hip/low back in these records. (Px6). Respondent submitted selected records from Athletico into evidence. (Rx5). These appear to have been submitted to show that the 3/1/11 "Outpatient

Screening Form", i.e. the intake form, only indicates a right shoulder condition. There is a box that could have been checked for "Low back, hip, leg pain." Additionally, the initial 3/1/11 report was submitted and also reflects no low back/left hip complaints. Also included in this exhibit are Athletico reports from 4/6, 4/22, 6/14/11 reports which do not have any low back or left hip references. (Rx5). Petitioner began physical therapy at Athletico on March 1, 2011, and the patient information sheet did not indicate any pain in his low back, hip or leg. (Rx5).

Petitioner returned to Dr. Garelick on 9/2/11, noting right hand complaints in an ulnar distribution as well as some right elbow ulnar pain. He was diagnosed with new subjective complaints of cubital tunnel syndrome, and right shoulder adhesive capsulitis. There was no reference to the low back or left hip in this report. At 9/30/11 follow up, Petitioner noted left hip pain and give-way in the left knee. He was continuing to work full duty. Dr. Garelick noted the Petitioner's shoulder was much better than it was pre-surgically, and stated: "It does not appear to me that any other conditions are compensable at this juncture. Therefore, just focusing on his shoulder, I have released the patient from care. We will declare today as the date of MMI. He will follow up on an as-needed basis." (Rx7).

Petitioner saw his primary provider, Dr. Krad, on 2/12/11, and the report did not record any complaints of the shoulder or back/hip, but the visit was for a cold and medication refills. The Arbitrator notes that Dr. Krad's records are handwritten and difficult to read. On 4/21/11, Petitioner reported right shoulder pain to Dr. Krad. On 7/1/11 Dr. Krad noted Petitioner had undergone right shoulder surgery. Both of these visits were noted to be for check ups and/or medication refills. (Px10).

On 10/20/11, Petitioner underwent a Commercial Driver Fitness Determination in Indiana, which indicated, after examination, that Petitioner met the required Federal standards to qualify for a two year certificate. Petitioner, with regard to whether he had a history of spinal injury or disease, or chronic low back pain, checked boxes on a form indicating no history of same. (Rx8).

On 12/1/11, Petitioner returned to Dr. Krad with complaints of left hip and/or back pain, which appears to be the initial indication by Dr. Krad of back/hip complaints. (Px10; Rx6). Petitioner testified he went to Dr. Krad because Dr. Garelick "cut him loose". Dr. Krad prescribed x-rays, including 12/5/11 lumbar films which showed L5 spondylosis with minimal L5 over S1 spondylolisthesis. 12/5/11 left hip x-rays revealed mild degenerative changes with no acute pathology. (Px10; Px14). He also ordered a lumbar MRI, and those 12/19/11 films revealed a bilateral pars defect and grade 1 anteriolisthesis L5-S1 with no definitive evidence of post-traumatic changes. (Px14). On 1/2/12, the MRI was read and Petitioner was referred for a second opinion with an orthopedic surgeon. (Px10). The Arbitrator notes that Petitioner testified that after therapy failed to provide improvement, Dr. Krad referred him to Dr. Yapor.

Petitioner initially saw Dr. Yapor on 1/31/12. Petitioner reported falling 15 feet into his back on the ground with low back pain ever since, which increased with prolonged sitting or standing. Neurological exam indicated patchy areas of decreased sensation that appeared to be in an S1 pattern of the left leg, but was otherwise normal. Dr. Yapor reviewed the 12/19/11 MRI, which indicated bilateral L5 pars defects with slight grade 1 anterolisthesis of L5 on S1 with moderate disc degeneration. (Px14). Dr. Yapor recommended discogram to try to confirm that L5/S1 was a pain generator, and if so recommended lumbar fusion at that level. (Px4).

The 4/25/12 discogram was performed by Dr. Ciemens at L4/5 and L5/S1, which was concordant at L5/S1 with findings of Grade 4 annular tear. (Px12). Post-discogram lumbar CT scan reportedly showed the L5/S1 annular tear as well as bilateral spondylolisthesis at L5 with mild Grade 1 anterolisthesis of L5 on S1, with no evidence of herniation and normal findings at all other lumbar levels. (Px12).

On 5/22/12, Dr. Yapor noted the discogram findings and recommended L5/S1 posterior interbody fusion. (Px4). On 8/9/12, Dr. Yapor issued a letter in response to questions from Petitioner's attorney. Noting Petitioner's report of back pain since the accident, that he had been working with no problems prior to the accident, and that he had no prior work up or time off for back problems, Dr. Yapor opined that Petitioner's lumbar condition was consistent with this history and the Petitioner's prior medical records. More specifically, he opined that the pars defects and anterolisthesis were likely preexisting, but that it was stable with no symptoms until the 1/31/11 fall destabilized and exacerbated the condition. (Px4).

On 10/15/12, the Petitioner was examined at the Respondent's request by Dr. Zelby, pursuant to Section 12 of the Act. Dr. Zelby opined that Petitioner's lumbar condition was not related to the work accident, noting there were no lumbar complaints at the time of the accident or at any time for months after the accident. His opinions are outlined further below. (Rx4).

In supplemental reports on 3/14/13 and 8/16/13, Dr. Yapor noted that Dr. Zelby's report did not change his opinion, stating: "From a historical standpoint, it is quite obvious that the event that changed Mr. Poulter's employability and medical necessity is the injury that occurred on 1/31/11, after his fall." He noted that the initial ER records mentioned complaints of back pain on arrival, i.e. left hip/back pain, noting this supported his sustaining a traumatic injury on the accident date. He also noted that Petitioner had initially received pain medications for his right shoulder pain, and was taking Ibuprofen following shoulder surgery. Dr. Yapor also stated that, in his experience, Petitioner's objective pars/anterolisthesis condition involves no pain or symptoms, and that a traumatic event such as Petitioner experienced can injure the surrounding ligaments and destabilize the condition and create symptoms. In further support of his opinions, Dr. Yapor noted Petitioner's shoulder problem was receiving primary attention, and that Petitioner had not been active since the accident until returning to work after the shoulder surgery, which is when his pain then worsened. (Px4).

Petitioner testified he continued to work but continued to worsen, to the point that he was unable to do his job. The pain eventually went down to his knee and foot, and he sought further treatment with Dr. Raskas, who was recommended by his attorney.

Petitioner initially saw orthopedic surgeon Dr. Raskas on 5/12/14. The Petitioner provided a history of falling from the top of his car hauler, complaining of left low back pain at the hospital, and that he had been on pain medication while his right shoulder was being treated, noticing more back pain after he stopped the medication and returned to work. Dr. Raskas noted the ER report indicated left groin pain per a pain diagram. X-rays and MRI reflected mild Grade I spondylolisthesis, some instability on flexion and extension films, and bilateral L5 pars defects, and facet arthropathy throughout the lumbar spine. He also noted Dr. Yapor's discography indicated positive findings at L5/S1, with CT films indicating a grade 4 annular tear at that level. Examination was normal except for pain reproduction with extension much more than flexion. Dr. Raskas opined that Petitioner was asymptomatic prior to the fall, and the fall caused his preexisting spondylolisthesis to become symptomatic. He recommended anterior L5/S1 fusion, noting surgeons could differ on the approach, but that anterior fusion would likely allow him to return to his full duty job. (Px3).

Petitioner returned to Dr. Raskas on 8/17/15, indicating continued back pain with symptoms radiating down his left leg. He was continuing to work regular duty. He recommended physical therapy for conditioning (Px6) and repeat MRI due to new radicular symptoms. On 9/22/15 Dr. Raskas noted the new MRI showed the L5/S1 spondylolisthesis with instability and bilateral foraminal stenosis, left greater than right. (Px3). On 12/2/15, Petitioner underwent an anterior lumbar interbody fusion with caging and internal fixation at L5/S1 with Dr.

Raskas. This included L5/S1 discectomy and decompression of the L5 nerve root, as well as laminotomy and foraminotomy. (Px16).

Dr. Raskas issued a 1/25/16 report, noting Petitioner noticed some soreness in his low back after his fall, and that it became more problematic and significant after he returned to work, which became disabling when he was unable to rest and take pain medication. Petitioner reported no prior back injuries or pain. After reviewing Petitioner's post-accident medical records, Dr. Raskas opined that Petitioner's spondylolisthesis was preexisting but asymptomatic, and that the fall caused an L5/S1 annular tear and caused the spondylolisthesis to become symptomatic. This was based on Petitioner's report of no prior back pain; left groin pain complaints at the ER which were consistent with L5 nerve root injury; positive discogram at L5/S1 (with grade 4 annular tear); and that Petitioner's delay in low back complaints was due to masking from his use of pain medication for his shoulder injury, followed by severe worsening when he weaned off of them. (Px3).

On 2/22/16, Dr. Raskas reevaluated Petitioner and noted he was doing very well, but he was to remain off work. On 5/2/16, Dr. Raskas again noted that Petitioner was doing well, and x-rays showed a healing fusion. He wanted Petitioner to follow up in five months for a CT scan of his lumbar spine, which is to take place in October 2016. (Px3). Petitioner was kept off work by Dr. Raskas from 12/2/15 through 5/7/16 at which time he was released to return to work without restrictions. Petitioner testified that he was doing well enough in his recovery that Dr. Raskas believed Petitioner could forgo post-surgical physical therapy.

Orthopedic surgeon Dr. Raskas' deposition was taken on 10/8/14. He initially performed an evaluation of the Petitioner on 5/12/14 at his attorney's request. Petitioner reported to him that he fell about 10 feet off a car hauler and had dislocated his right shoulder, and had some left low back pain, while most of his treatment was focused on the shoulder. The back pain had become more problematic when he returned to work. He was still performing his regular job at that time (including driving a truck, strapping cars down, climbing, bending, twisting, lifting, and exerting force), but was miserable and stated that it was hard for him just to get through the day. He reported no back problems prior to the 1/31/11 accident. (Px1).

Dr. Raskas believed that it was a normal state of events for Petitioner to begin to notice his low back pain once he became more active upon his return to work and once he was no longer taking pain medications for his shoulder.(Px1).

Dr. Raskas noted a 12/19/11 lumbar MRI showed bilateral L5 pars defects with grade 1 anterolisthesis of L5 on S1. He testified that the pars defects indicated he had a fracture that never healed, and that there was no way to state with certainty how long the defect had existed, but that such a condition usually develops before age 13. He noted that such pars defects are frequently stable, and a trauma can cause destabilization. Dr. Raskas also reviewed the discogram and post-discogram CT scan, noting it was concordant at L5/S1 with a grade 4 annular tear. Examination did not indicate any neurological deficits or evidence of true radiculopathy. Dr. Raskas opined that the 1/31/11 fall caused Petitioner's spondylolisthesis to become symptomatic, creating the need for surgery. He noted the initial ER report noted complaints of left groin pain, testifying: "I think frequently the L5 nerve root's going to refer pain into your groin in that area. It's pretty well established." He further testified that with significant trauma like the Petitioner had, once a predominantly symptomatic condition begins to heal, other problems are found. He recommended an anterior L5/S1 fusion surgery with posterior percutaneous stabilization, noting this would minimize disruption of the back muscles and would allow a greater likelihood that Petitioner could return to his regular work duties. (Px1).

On cross-examination, Dr. Raskas could not recall how Petitioner landed when he fell on 1/31/11. He agreed that while Petitioner told him he complained of left low back pain at the ER, the records indicated left groin

complaints. He also agreed that there was no indication of a low back injury or complaints of low back pain in the 1/31/11 ambulance or ER records, and the ER noted no vertebral tenderness on exam. He agreed no low back or left hip diagnostic testing was performed at the ER, while such tests were performed on multiple other body parts, but that the pelvic x-ray "would really evaluate his hip". (Px1).

Dr. Raskas also agreed he did not review the Petitioner's medical records between the initial ER visit and the 12/19/11 lumbar MRI, and thus didn't see any of Petitioner's records from Concentra/Dr. Garelick or Athletico. He also did not review the 10/20/11 DOT fitness for duty exam report. Thus, he agreed he did not know if these records noted low back complaints: "I don't know other than what he told me." He testified that his causation opinion would not change even if Petitioner had up to 10 months of medical records which did not reflect low back complaints. Petitioner reported to him that when he returned to work and when he began to stop taking pain medications, he started to notice his back was bothering him. Dr. Raskas testified Petitioner reported he began noticing problems with his back towards the end of his conservative shoulder treatment, prior to surgery, and that he then was put on medication again and didn't notice the back as much until he returned to work after surgery. Dr. Raskas testified that ibuprofen and/or narcotics could mask the back pain, but agreed he had no knowledge of when Petitioner took these medications other than what Petitioner told him. He testified that the pars defect was likely present prior to the accident but that there were no symptoms because he had a strong L5/S1 disc without an annular tear, and that the accident caused that tear, resulting in symptoms. Dr. Raskas believed Petitioner would likely have had some symptoms in his low back when he wasn't taking medications, but that the symptoms could have been masked by his right shoulder injury ("The shoulder injury just producing enough pain that he's not noticing his back as much"). (Px1). On redirect exam, Dr. Raskas testified that a dislocated shoulder is very painful, and could be so predominant that the lack of an initial medical history of a back injury rules it out. (Px1).

Neurosurgeon Dr. Yapor's deposition was obtained on 3/26/15. (Px2). His reports were reviewed, and he indicated Petitioner reported falling approximately 15 feet to the ground with low back pain since that time. He testified that he was unable to tell by reviewing the Petitioner's lumbar MRI how long the pars defects and spondylolisthesis had been present. He testified that Petitioner's subjective symptoms correlated "exactly" with the discogram results and Grade 4 annular tear with bilateral spondylolysis at L5/S1. As to causation, Dr. Yapor testified to the following: "[t]he patient prior to his injury had an asymptomatic bilateral pars defect which was stable due to ligamental anatomy and the force generated by the 15-foot fall landing on his back destabilized the L5-S1 spondylolisthesis and produced a painful condition which required an operation." He also testified that the accident involved the proper mechanics to produce such symptoms with an L5/S1 spondylolisthesis. He agreed that his opinion relied on the Petitioner not having lumbar symptoms prior to the 1/31/11 accident. Dr. Yapor recommended a posterior L5/S1 fusion. (Px2).

With regard to his review of the opinions of Dr. Zelby, Dr. Yapor testified that they agreed that Petitioner's spondylolisthesis predated the accident, but he disagreed with Dr. Zelby's opinion disputing causation, noting that Zelby would be aware that Petitioner fell from a significant height, and yet opined that the fall didn't have anything to do with Petitioner's back pain, and that after such a fall, he would have been loaded up on medication and would have had "sky high" hormones in reaction to the fall, which could mask other problems. Additionally, the ER triage report indicating left hip/back pain, with no evidence of any such prior complaints. (Px2).

On cross examination, Dr. Yapor testified that his causation opinion was based on the Petitioner's fall from a height, his indication that his symptoms began at that time, as well as the MRI findings. He testified that how the petitioner landed did not matter with regard to his opinion, and that the petitioner had no evidence of prior back problems, treatment or imaging. He testified that the triage nurse noted complaints of back pain at the

emergency room, and testified: "I believe there are other notes including the physician that stated that he was complaining of back pain". He agreed that the EMT and emergency physician record from Brownsboro Hospital did not reflect low back complaints. He agreed that the ER report noted no vertebral tenderness, and that one would think an ER would note it if there were low back tenderness. However, he noted that the petitioners pain diagram circled the back of the neck, and questioned why a report would also indicate no vertebral tenderness. However, he agreed that the same pain diagram did not circle anything at the low back. He agreed that no lumbar spine imaging was done at the ER, but questioned how such testing was not performed given the fall the petitioner had. Dr. Yapor agreed that, just based on the radiographic studies performed in the ER on 1/31/11, he could not confirm that Petitioner suffered a low back injury. Dr. Yapor testified he would have expected Petitioner's low back symptoms to have started right away if the injury destabilized his spondylolisthesis, and to then continue when the pain medication is discontinued. Dr. Yapor did not know when Petitioner's first documented low back complaint was recorded after the initial ER visit. While its possible it wasn't documented, Dr. Yapor found it hard to believe that Petitioner would have had no low back pain for five months after 1/31/11. Dr. Yapor presumed that Petitioner was taking narcotic pain medications until his right shoulder injury healed, but also testified that ibuprofen could also mask the back pain. He testified that pars defect and anterolisthesis conditions can have waxing and waning symptoms – "back problems almost always wax and wane". In terms of surgery, his preference was a posterior approach, in order to avoid potential anterior complications. He agreed he has treated patients with spondylolisthesis where there is no obvious cause of the onset of symptoms. (Px2).

On redirect examination, Dr. Yapor testified that a shoulder dislocation is extremely painful, noting he has had cases where patients have ruptured viscera, fractured ribs and/or a deflated lung, and they didn't mention anything other than the shoulder dislocation. (Px2).

Neurosurgeon Dr. Zelby's deposition was taken on 10/13/14. (Rx4). He examined the Petitioner pursuant to Section 12 at the Respondent's request on 10/15/12, and prepared a report and two addendums. Dr. Zelby reviewed all of Petitioner's medical records, including those from Concentra and Athletico, as well as radiographic studies. Dr. Zelby diagnosed Petitioner with degenerative spondylolysis, which likely began due to an injury in Petitioner's teens, and acquired spondylolisthesis. He testified that the bilateral L5 pars defects involved detachment of the spinal bones, and that while initially a healthy disc will still support the spine, over time it degenerates and can lead to the slippage of the spine, i.e. spondylolisthesis. Dr. Zelby opined that there is no medical causal relationship between Petitioner's 1/31/11 work injury and his lumbar spine condition, and no aggravation of a preexisting condition. The basis of his opinion was the lack of any low back complaints after the accident until approximately December 2011, many months after the 1/31/11 accident, and he would have had them within days of the accident had there been such a causal relationship. He also testified that there was no evidence that pain medications masked Petitioner's low back pain, given that the medication did not mask his right shoulder pain. Dr. Zelby pointed out that Petitioner did not take Vicodin for very long after the accident, and he was only prescribed small amounts of Vicodin in the emergency room on 1/31/11 and after his 4/14/11 right shoulder surgery. Dr. Zelby also opined that any 1/31/11 aggravation of Petitioner's preexisting L5 pars defects and associated spondylolisthesis would have had to include complaints of back pain, not solely groin and/or hip complaints. Dr. Zelby did testify that a fall from a height like Petitioner did would be a competent cause of an aggravation of the lumbar condition if Petitioner had contemporaneous back symptoms. He also testified that he agreed that L5/S1 fusion was a more than reasonable surgery based on the Petitioner's lumbar spondylolisthesis, and that his preference would be an anterior fusion approach. (Px5; Rx4).

Petitioner testified that following the lumbar fusion surgery: "It was overnight that I had no pain", and his leg and hip pain resolved completely. Petitioner testified he was off work from 12/2/15 to 5/7/16, and has worked full duty since that time. He now works 46 to 48 hours per week, but noted he could work up to 70 hours per

week. He testified that he lift differently now than he used to, trying to avoid bending and to use his legs more than his back. With regard to the right shoulder, the Petitioner has no work restrictions. He testified that at the end of the workday, due to gear shifting, it clicks, and has pain, it goes away with Advil. As to his low back, its fine in the morning, but by the end of the day he has pain from 2/10 to 4/10. Again, an over the counter pain medication calms it down by the end of the night. He continues to do all aspects of his job, including climbing and loading. He testified that he does feel that both the shoulder and back surgeries were successful.

Mr. Kniser testified on behalf of the Respondent. His testimony essentially was that the Petitioner never complained at any point in time about his right shoulder of his back at work. He also explained how to read the Petitioner's attendance sheets and driving logs. (Rx9 & 10)

Respondent submitted Petitioner's attendance records and driver logs from 2011 to 2015, including the attendance records through July 2016. (Rx9 & 10).

Petitioner received TTD benefits from 2/1/11 to 6/18/11 totaling $22,862.56. (Rx2). By agreement of the parties, Petitioner received the difference in what he would have received in TTD benefits and what he actually received in short-term disability benefits from 12/2/15 to 5/8/16 totaling $24,499.79. The parties agreed this second period of benefits from 12/2/15 to 5/8/16 would be credited towards PPD if the low back injury were to be found unrelated to the work accident.

CONCLUSIONS OF LAW

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

The parties indicated prior to hearing that the Respondent did not dispute the causal relationship of the Petitioner's right shoulder condition to the 1/31/11 accident, but did dispute the causal relationship of the lumbar spine to the accident. The Arbitrator finds that the Petitioner has shown by a preponderance of the evidence that the disputed low back condition at L5/S1 is causally related to the 1/31/11 accident.

First, it is important to note that, while it is true that there are no specific references to low back pain in the ER records, they do reference left hip complaints, which is what the Petitioner reported to Dr. Garelick in June 2011 after returning to work. The Arbitrator notes that it is reasonable to conclude that the Petitioner was not focused on a back or hip condition at the ER, given the fact that he arrived with a dislocated shoulder that had to be reduced back into place under anesthesia. The Petitioner fell from what appears to be at least a 10 foot height which, regardless of the "softness" of the earth he landed on, is a significant trauma. The Arbitrator further notes that the severity of the fall in terms of the Petitioner falling from a significant height, jerking his right shoulder and body trying to catch himself, and then landing on the ground, is a factor that carries weight in this decision. As Drs. Yapor, Raskas and Zelby all agreed, such a fall was a competent cause of the destabilization of the Petitioner's preexisting spondylolysis and spondylolisthesis and the high grade annular tear at L5/S1. No evidence was presented which indicates the Petitioner had preexisting back or hip symptoms.

In hearing and viewing his testimony, the Arbitrator specifically notes that the Petitioner appeared to be a credible witness. It is believable that the Petitioner was focused on his right shoulder and his back may not have initially been of great concern. Clearly, there are discrepancies between the Petitioner's testimony with regard to when he initially complained of back pain to Dr. Garelick and whether he was prescribed Vicodin during his treatment with Garelick. It should be noted, however, that the testimony of the Petitioner took place over four

years after the date of accident. The Petitioner was initially prescribed Vicodin at the ER, as well as being provided with what appears to be a couple of pills at the time of right shoulder surgery. There are also references, albeit inconsistently, to prescriptions for Tramadol and for 600 mg of Ibuprofen. Medical testimony was elicited indicating that pain medications other than narcotics could have essentially reduced whatever level of back pain the Petitioner had after the accident to a level that paled in comparison to what he was experiencing with his shoulder.

The records in evidence do not reflect low back or left hip complaints in these records after the initial ER visit until Dr. Garelick's 6/30/11 report. As noted above with the ER records, the Arbitrator believes that the Petitioner's references to left hip and buttocks area pain are consistent with the Petitioner's instability at L5/S1, as it matches what he reported in June 2011. Dr. Garelick indicated that the left hip symptoms Petitioner reported were likely emanating from the lumbar spine. Petitioner's complaints to Dr. Yapor in 1/12 were very similar. All appear to be complaints about mainly the left hip/buttocks area as opposed to specifically the middle of the low back. Thus, it looks like the pain Petitioner mainly felt in the hip/buttocks area was referred pain from the back as opposed to the hip itself. Additionally, he appears to have had significant symptomatic relief in the hip/buttock area with lumbar surgery.

Respondent questioned Petitioner about the fact that Dr. Krad's records throughout most of 2011 contain no references to back pain. However, it is noted that even after the 12/1/11 visit Dr. Krad only referenced Petitioner's low back pain if the doctor received some correspondence from Dr. Yapor or a testing facility. The bulk of Dr. Krad's examinations dealt with Petitioner's general health issues. Plus, as noted, these handwritten records were very hard to read and thus not every detail mentioned in them is clear to the Arbitrator.

It is also important to note that the Petitioner's activities were limited between the accident date and his 6/17/11 release to return to work, when he returned directly to regular duty. Petitioner's testimony regarding the physical nature of his job duties in loading and unloading, which logically would include bending/squatting and twisting activities, as well as attendance records which reflect significant periods of being seated while driving, supports that he likely had a significant change in his activity level after being off work for several months. In the Arbitrator's view, this supports the likelihood that the Petitioner injured his back on the accident date and the time off work for the right shoulder condition allowed him rest and deconditioned him to some degree prior to going back to doing his regular work, after which the symptoms increased.

This also is a case where all of the testifying physicians agreed that the evidence of pathology at the L5/S1 level was consistent with Petitioner's symptoms and that fusion surgery at that level was the proper treatment procedure. This is not the case where there may be objective findings that don't support the subjective complaints of a patient. Here, there is a provable competent cause of the Petitioner's low back pain, and his willingness to continue to work despite this, in the Arbitrator's view, adds to the Petitioner's credibility. Further, the Petitioner testified that the surgery significantly resolved his symptoms.

There was a lengthy gap in treatment between the Petitioner seeing Dr. Yapor and Dr. Raskas. However, the evidence also makes clear that the Respondent was disputing the case, which likely made obtaining treatment more difficult for Petitioner, and Dr. Yapor had already prescribed the lumbar fusion surgery.

While Respondent points to a report from an October 2011 DOT physical indicating Petitioner noted no back complaints, it also notes no hip complaints despite the June 2011 and 9/30/11 medical records of Dr. Garelick prior to that time indicating he did, in fact, have such complaints. The Arbitrator believes it is more likely that the Petitioner's back claim was being denied, he wanted to return to work and did not indicate ongoing

problems that could inhibit his ability to do so. He did testify, however, that he was honest about what he reported at this physical.

The lack of recorded left hip or low back complaints over a significant period of time provides the Respondent with a fair defense in this case, and there was evidence presented that arguably pokes holes in Petitioner's story, but at the same time the Petitioner appeared to be a hard worker who wanted to get back to his job and made effort to do so despite a severe shoulder dislocation with surgery and an L5/S1 fusion. The Arbitrator finds that the greater weight of the evidence supports the Petitioner's position with regard to the causal relationship of lumbar condition, that being an aggravation and destabilization of a preexisting pars defect/anterolisthesis condition at L5/S1, resulting in the need for fusion surgery.

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

The Arbitrator finds that the Respondent is liable for the medical expenses contained in Petitioner's Exhibits 17 through 29, totaling $351,802.74. This is based on the Arbitrator's finding that both the Petitioner's right shoulder and low back conditions are causally related to the 1/31/11 accident. The Arbitrator finds that the treatment rendered for these conditions was reasonable and necessary pursuant to Sections 8(a) and 8.2 of the Act.

The Respondent is entitled to credit for any of the awarded medical charges that were paid via workers compensation prior to the hearing. The Respondent is also entitled to credit for any of the awarded medical charges that were paid prior to the hearing via group health coverage pursuant to Section 8(j) of the Act, so long as the Respondent holds the Petitioner safe and harmless with regard to any claims for reimbursement from the group health provider for such credited charges. The parties stipulated that this credit totals $66,395.02.

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

The Arbitrator finds that the Petitioner is entitled to temporary total disability benefits from 2/1/11 through 6/17/11, and again from 12/2/15 through 5/7/16, a total of 42-1/7 weeks. The initial period is from the day after the accident through the date Petitioner was released by Dr. Garelick to return to his regular job following right shoulder surgery. The second period of TTD runs from the date of lumbar surgery through the date Petitioner was released by Dr. Raskas to return to work following post-surgical recovery. The Arbitrator notes that the medical records in evidence support the Petitioner's off work status during the awarded TTD periods, as do the attendance sheets in Rx10.

Prior to the hearing, the parties indicated that Petitioner received non-occupational benefits during the second period of awarded TTD, pursuant to Section 8(j), and that the Respondent also paid benefits during that time which covered any deficiency between what the Petitioner received in non-occupational benefits and what he would have normally received as TTD during that period. The parties also stipulated that if the Respondent's total credit exceeded the TTD awarded, the overpayment would be credited to Respondent against any award of permanency.

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

As the date of accident in this case predated 9/1/11, Section 8.1b is not applicable to this case.

The Petitioner sustained a right shoulder dislocation that had to be reduced at the ER. He underwent surgery involving manipulation under anesthesia, removal of the loose body, synovectomy and debridement of a partial thickness rotator cuff tear, as well as anterior and inferior labral tearing. He also sustained an aggravation/exacerbation of his preexisting L5/S1 pars defect/anterolisthesis, resulting in the onset of symptoms and the need for surgery. The surgery involved anterior lumbar interbody fusion with caging and internal fixation at L5/S1, including discectomy and decompression of the L5 nerve root, as well as laminotomy and foraminotomy.

The Petitioner was employed as a semi-truck car carrier driver at the time of the accident, and he returned to that regular duty job that subsequent to right shoulder and lumbar surgeries. He testified that he felt the surgeries were successful in resolving his symptoms, but indicated that he still has symptoms after the workday. He testified that over the counter medications would help this pain increase and allow him to be more active in the evenings than he was prior to lumbar surgery. The Petitioner did testify that he has had to modify how he performs some of his duties, such as using his legs more to avoid bending, and that he does still have increased symptoms following the workday. There was no evidence presented indicating that his earnings have been impacted negatively.

Based on the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 10% loss of use of the person as a whole pursuant to §8(d)2 of the Act, referable to the right shoulder. The Arbitrator further finds that Petitioner sustained permanent partial disability to the extent of 22.5% loss of use of the person as a whole pursuant to §8(d)2 of the Act, referable to the lumbar spine.

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

As noted above, the parties have stipulated that Respondent is entitled to a $43,362.35 TTD credit, as well as a credit of $6,700.20 for non-occupational indemnity disability benefits. The parties stipulated that if it turns out that Respondent has overpaid TTD based on the Arbitrator's award of TTD and awarded credit, the Respondent would be entitled to a credit for same against any permanency awarded.

Respondent is also entitled to a credit of $66,395.02 under Section 8(j) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JASON DALLEFELD,

Petitioner,

vs.

NO: 12 WC 25504
14 WC 09863
14 WC 09895
14 WC 10019
14 WC 10068 (cons.)

FIVE STAR FITNESS,

Respondent.

18IWCC0642

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

Initially, the Commission observes there is a typographical error in the Decision. Five Star Fitness' witness is identified throughout the Decision as "Robert Rizell"; we correct the decision to reflect the individual's name is Robert Reszel, Jr.

12 WC 25504 – Jason Dallefeld v. Five Star Fitness

The Commission affirms the Arbitrator's analysis with respect to accident and notice. The Commission emphasizes the Physicians Immediate Care records document Petitioner's report of a right knee injury while moving exercise equipment as well as objective findings consistent with acute trauma, and are replete with references to this being a work-related injury: repeated notations of "WC Five Star Fitness" and "W/C New"; Five Star Fitness is listed as the Guarantor; on the

Work Form, Five Star Fitness is listed as the Employer and Brian Kelly is listed as the contact under "WC Notes"; and on the Return to Work Form, Dr. Metrou identified Brian Kelly as the contact and in the space for "Co. Contacted" the doctor initialed she had done so. We do not find Mr. Reszel's testimony on this issue persuasive. Mr. Reszel testified he was not made aware of Petitioner's work injury until 10 to 14 days prior to the March 16, 2017 hearing, this despite the fact Petitioner's Application for Adjustment of Claim was filed five years prior, in 2012. Given this lack of awareness, Mr. Reszel's assertion that he knew the accident was not reported to Herb or George because the three owners converse regularly and a work injury was never mentioned is not credible. The Commission affirms and adopts the Arbitrator's findings regarding accident and notice.

In finding Petitioner's current right knee condition is causally related to the August 29, 2009 work injury, the Arbitrator acknowledged the 2 year, 11 month gap in treatment was troublesome but ultimately found it did not defeat Petitioner's claim given the totality of the circumstances. The Commission views the evidence differently.

On August 29, 2009, Petitioner presented to Physicians Immediate Care where he was evaluated by Dr. Metrou. Dr. Metrou's physical examination findings included effusion, very significant antalgic gait, increased warmth to touch, diffuse tenderness over anterior knee and laterally along the lateral collateral ligament, and decreased range of motion. Diagnosing a right knee strain, Dr. Metrou dispensed crutches and a knee support, prescribed an anti-inflammatory, and restricted Petitioner to sit-down work only until a re-evaluation in three days. PX12. Petitioner testified Dr. Metrou advised he needed an MRI (T. 59), but the Commission notes there is no mention of an MRI nor an order for such in the record. Petitioner further testified he did not attend the scheduled follow-up appointment because he was told not to. T. 58.

Petitioner remained employed at Five Star for a few months following the incident. T. 26. Petitioner testified for the first few weeks he worked at the desk, but he thereafter resumed his regular duties. T. 59-60. He stated there were no job duties he was unable to perform. T. 60. Petitioner testified his knee improved to the point he was living with it, although some symptoms persisted. T. 27-28. He explained, within a few weeks of the accident, he stopped using the crutches and started working out again. T. 90. Germane to the issues here, Petitioner described a strenuous lower body regimen: "I did a lot of hamstring movements, cable, pin loading machines first of all to get the strength back in my knee. The stronger my hamstrings were, the better my knee felt. I would work on that quite a bit. I was able to do light squats at some point later on." T. 62-63. Petitioner continued this routine through the end of his employment with Five Star. T. 62. When Petitioner thereafter commenced employment with The Clubs at River City, one of his job requirements was to perform a physical workout at the facility at least once a week. Petitioner confirmed he fulfilled that requirement. T. 73.

The pertinent diagnostic imaging is the July 18, 2012 MRI. The radiologist's impression is bucket-handle tear of the lateral meniscus, thickened medial plica, small knee joint effusion, and popliteal cyst. PX11. In his July 25, 2012 office note, Dr. Rhode described this is a significant lateral meniscus tear (PX14), and during his deposition, labeled it an obvious tear. PX17, p. 7.

With these facts in mind, we turn to the conflicting causation opinions provided by Dr. Rhode and Dr. Lieber. Dr. Rhode opined Petitioner's knee condition is causally related to the August 2009 incident:

> Based upon the patient's stated mechanism of injury, specifically that he was - - he was moving a piece of heavy equipment, which specifically was a treadmill, stepped on a water bottle and twisted and fell into a deep squatting position with subsequent lateral knee pain, based upon the fact that the patient clinically demonstrated lateral joint line pain with a positive lateral McMurray with an MRI that demonstrated an obvious lateral meniscus tear, I believe that the described mechanism was causative to the patient's symptomatology. The patient did not relate an intervening accident that may have been a causative factor to his pathology. PX17, p. 9.

In addressing the gap in treatment, Dr. Rhode stated nondisplaced tears can be tolerated: "...a reduced meniscus be it bucket handle or be it horizontal cleavage or any other tear pattern as long as it's reduced people can live with them. They'll have symptoms, but they're not debilitating especially on the lateral side. Only when the meniscus displaces does it cause significant symptomatology." PX17, p. 10.

Dr. Lieber reached the contrary conclusion. Dr. Lieber, who reviewed the July 20, 2012 MRI as well as records from Dr. Hoffman, Dr. Rhode, and Physicians Immediate Care, opined there was no direct relationship between the August 2009 event and Petitioner's condition of ill-being. RXC, p. 9. Dr. Lieber explained the basis of his opinion was the severity of the tear coupled with the absence of documented ongoing pain complaints:

> I felt that the mechanism of injury as explained to me by the petitioner was not significant enough to cause a bucket-handle tear of the medial [*sic*] meniscus. I felt that the lack of medical care for a period of three years, almost three years, was significant in that if there had been a significant meniscal tear as indicated in the MRI, the petitioner would have been unable to carry on activities of daily living or any normal functions without significant pain and would have required and sought treatment prior to three years. RXC, p. 9-10.

While Dr. Lieber acknowledged pain is subjective, he rejected the notion a high pain tolerance would explain the failure to seek treatment given the expected functional deficits such an injury engenders: "If he had a bucket-handle tear of his lateral meniscus, in my opinion, there is no way he would not have sought medical treatment for three years. His knee would not - - he would have had lack of motion. He would have had swelling. He would have had significant functional disabilities associated with that abnormality, and he would not - - they would not have waited three years to seek treatment...." RXC, p. 16.

The Commission finds the nearly three-year gap in treatment is incompatible with Petitioner having sustained a meniscal tear during the August 2009 accident. We emphasize

Petitioner did not simply return to performing activities of daily living. Rather, within a few weeks of his injury, Petitioner resumed working out and his usual routine involved rigorous lower body exercises. Petitioner was able to perform such exercises for several years, up to and including during his employment at Clubs at River City. The Commission finds Petitioner's level of function following the August 29, 2009 injury is not consistent with the accident having caused a cartilage injury which the physicians alternately described as "significant," "obvious," and "large." The Commission finds Dr. Lieber's opinion is most consistent with the evidence on this issue. The Commission finds Petitioner sustained a right knee strain as a result of his August 29, 2009 accident. Given Petitioner's testimony he resumed his full duties within a few weeks of his accident, we find Petitioner reached maximum medical improvement as of September 15, 2009.

Our causation finding necessarily implicates the award of benefits. As to medical expenses, we find the treatment rendered at Physicians Immediate Care on August 29, 2009 was reasonable, necessary, and related to the work accident. Respondent Five Star Fitness is ordered to pay those expenses pursuant to Section 8(a).

Regarding permanent disability, as the accidental injury at issue occurred prior to September 1, 2011, Section 8.1b is inapplicable. Consistent with our conclusion Petitioner sustained a knee strain and shortly thereafter resumed his usual activities, the Commission finds Petitioner sustained the 5% loss of use of the right leg under Section 8(e)12.

14 WC 9863; 14 WC 9895; 14 WC 10019; 14 WC 10068 – Jason Dallefeld v. Clubs at River City, Inc.

The Commission affirms the Arbitrator's denial of accident and causation. In addition to the salient facts detailed by the Arbitrator, we highlight Dr. Verma reviewed the MRI films from both the 2012 and 2014 scans, and Dr. Verma persuasively testified there was no interval change. RXD, p. 12, 27. We note the Arbitrator's Decision states, "The Arbitrator specifically finds that Petitioner's current condition of ill-being is solely causally related to his accident on 8/29/09." Based on our causation determination in consolidated matter 12 WC 25504, the Commission strikes that language.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on May 8, 2017, as modified above, is affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of temporary total disability benefits is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent Five Star Fitness pay to Petitioner the sum of $420.65 per week for a period of 10.75 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused 5% loss of use of the right leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent Five Star Fitness

pay the reasonable and necessary medical expenses incurred by Petitioner on August 29, 2009, pursuant to §8(a) and §8.2 of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $6,000.00. 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 9 2018

L. Elizabeth Coppoletti

Charles J. DeVriendt

Joshua D. Luskin

LEC/mck

O: 8/29/18

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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DALLEFELD, JASON
Employee/Petitioner

Case# **12WC025504**

14WC010068
14WC010019
14WC009863
14WC009895

FIVE STAR FITNESS
Employer/Respondent

18IWCC0642

On 5/8/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.97% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1824 STRONG LAW OFFICES
HANIA SOHAIL
3100 N KNOXVILLE AVE
PEORIA, IL 61603

2837 LAW OFFICES JOSEPH MARCINIAK
MICHELLE R POWELL
TWO N LASALLE ST SUITE 2510
CHICAGO, IL 60602

18IWCC0642

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

Jason Dallefeld
Employee/Petitioner

v.

Five Star Fitness
Employer/Respondent

Case # **12**WC **25504**

cons/ 14wc10068 14wc10019 14wc9863
and 14 wc 9895 under separate decisions

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed out to each party. The matter was heard by the Honorable **Carolyn Doherty** Arbitrator of the Commission, in the city of **New Lenox** on **March 16, 2017.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **8/29/09**, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner *did* sustain an accident that arose out of and in the course of her 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 stipulated average weekly wage was $701.09.

On the date of accident, Petitioner was **29** years of age, *single* with **0** dependent children.

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

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

Respondent shall be given a credit of **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance. and $0.00 for other benefits, for a total credit of $0.

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

ORDER

Respondent shall pay Petitioner the reasonable, necessary and causally related medical expenses incurred in connection with the care and treatment of his causally related injury pursuant to Sections 8 and 8.2 of the Act.

Respondent shall pay TTD benefits for a period of 48-1/7 weeks in the amount of $467.79/week commencing 3/26/14 through 2/25/15.

Respondent shall pay Petitioner PPD benefits for a period totaling up to 32.25 weeks in the amount of $420.65 per week representing 15% loss of Petitioner's right leg Pursuant to Section 8e of the Illinois Workers' Compensation 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.

Jacquelyn M. Arvesky

Signature of Arbitrator

5/5/17

Date

ICArbDec p. 2

MAY 8 – 2017

FINDINGS OF FACT

Petitioner presented five consolidated matters at trial. 12 WC 25504 was filed against the Respondent Five Star Fitness alleging an accident date of 8/29/09. ARB Ex 1. 14 WC 10068 was filed against Respondent The Clubs at River City alleging an accident date of 9/13/13. ARB Ex 2. 14 WC 10019 was filed against Respondent The Clubs at River City alleging an accident date of 1/31/14. ARB Ex 3. 14 WC 9863 was filed against Respondent The Clubs at River City alleging an accident date of 2/17/14. ARB Ex 4. 14 WC 9895 was filed against Respondent The Clubs at River City alleging an accident date of 3/5/14. ARB Ex 5. Respondents Five Star and The Clubs were represented at trial by separate counsel.

Petitioner testified that he was 29 years old when he began working for Five Star in July 2009 as a fitness consultant. Petitioner testified that Five Star was owned by three men – Herb, Bob and George. Petitioner's duties included selling gym memberships. Brian Kelly was his manager at the time. Petitioner sold memberships working from a desk. Petitioner alleges that on 8/29/09 there was renovation occurring at the club. Petitioner testified that he was moving a treadmill with Brian when while awkwardly lifting a treadmill he slipped on a water bottle and fell into a deep squat position while still holding the treadmill. He felt a pop in his right knee while still in the squat position. Petitioner testified that he heard a popping sound in his right knee which immediately swelled. Petitioner testified that he had pain down his calf and needed help to walk. Petitioner testified that he sat at his desk rest of day.

Petitioner testified that the next day Brian picked him up from home and they went to work. Brian then took Petitioner to Physicians Immediate Care where an MRI was recommended. Petitioner testified that he returned to work trying to keep weight off his leg using crutches. Petitioner testified that he continued to work at Five Star with crutches and that Brian said he would have to get permission for the MRI. Petitioner testified that no treatment was ever approved, including the follow up appointment and the MRI, and that he did not ask again for treatment after having been denied.

The Physicians Immediate Care records are dated 8/29/09, which is the same day of the alleged accident. PX 11. The records indicate a chief complaint of right knee pain. The records list Five Star Fitness as the guarantor and are also listed under the "insurance" section of the paperwork. The status is also referred to on the paper work as "W/C new." Brian Kelly's name is listed as the employer contact on the Return to Work Form on 8/29/09. A note on the bottom of the 8/29/09 doctor's notes reads "This case would be considered OSHA recordable unless deemed not to be compensable under workers compensation." The recorded history reads, "Jason is an employee of Five Star Fitness. At the time of the injury which started yesterday 8/28/09, he was squatting, lifting and moving equipment. He felt soreness in his right knee, mostly anteriorly. He said he tried to walk it off and he was limping on it, but it was not until today, on 8/29/09, when he stepped over an object, came down hard on his right knee, he developed a sharp burning pain along the lateral aspect of the knee. He has not been able to put full weight on it since. The pain was so severe it brought him to tears. He rates his pain at a constant 10/10 which is sharp in quality." PX 12.

Upon physical exam of the right knee, the doctor noted abnormal results including "... knee effusion. He is walking with a very significant antalgic gait, barely putting weight on that right leg. He has increased warmth to touch. There is no redness, abrasions or bruises. There is diffuse tenderness over the anterior knee and laterally along the lateral collateral ligament. He is able to extend to -10 degrees and flex to 90 degrees. There is also tenderness and swelling of the quadriceps muscle, particularly to the vastus medialis. There is no tenderness posteriorly." X-rays were normal. Following the exam, Petitioner was diagnosed with a right knee strain. He was told to ice and elevate the knee, use crutches and a hinged patellar knee brace along with

Naproxen. Petitioner was given work restrictions of "sit down work only until recheck" which was scheduled for 9/1/09. PX 12. No MRI order is present in these records.

Petitioner testified that he continued to work at Five Star and his knee slowly improved to the point where he was living with the improved but continued pain. He testified that he was not active but could function with minimal pain when standing. Petitioner testified that he left Five Star a few months after the accident.

On cross-exam, Petitioner testified that the initial medical records reflect accurate accident histories but disagreed with the records to the extent they reflect no MRI order. He further testified that he reported his injury to Brian Kelly as the "HR" person and that Brian told him no treatment would be available. Petitioner did not contract the owners directly about his accident or condition. Petitioner was not given an accident form to complete by Mr. Kelly. Petitioner further testified that he had no further treatment to his knee in 2009 and that he was told not to attend the follow up visit at Physician's Immediate Care.

Petitioner testified that he continued to work his desk duties through February 2010 and that he did notice improvement in his knee. He further agreed that he could still work out between August 2009 and February 2010 after his knee improved but only worked on ham string strength and light squats along with low impact cardio. He testified that elliptical use was fine in that he was gliding his legs back and forth without impact. Petitioner did not have health insurance while working at Five Star.

Respondent Five Star called Robert Rizell to testify in his capacity as one of the owners of Five Star. He testified that he hired Petitioner as a sales consultant in 2009 and that Brian Kelly was a manager at Five Star at the time. Mr. Kelly no longer works for Five Star. Mr. Rizell testified that Petitioner never reported an injury to him. He testified that Mr. Kelly never reported an injury to Petitioner at any time. Mr. Rizell testified that Petitioner continued to work for Five Star through February 2010 full duty and then just didn't show up one day for work. Mr. Rizell also testified that he never saw a report of injury at any time concerning Petitioner.

On cross-exam, Mr. Rizell testified that he co-owned Five Star with George Barr and Herb Landey and that Brian Kelly managed all employees at Five Star and reported directly to the witness and to Mr. Herb Landey. Mr. Rizell testified that he went to Five Star every day for a few hours in 2009. George never went and Herb Landey went occasionally. Mr. Rizell testified that he had a lot of interaction with Petitioner during his employment tenure at Five Star and that Petitioner never made any complaints of pain.

Mr. Rizell testified that injuries at Five Star are to be reported to the manager followed by completed paper work which was to be turned over by the manager. He has no personal knowledge if Petitioner completed an accident report but has never seen or heard of one for Petitioner. Mr. Rizell testified that his first knowledge of Petitioner's claimed accident was 10 days prior to trial. When he was notified he asked George and Herb if they ever heard of the alleged accident or injury to Petitioner they responded that they had not. Mr. Rizell testified that an accident or injury to Petitioner was never discussed over the ensuing years by the three owners as they had no knowledge. Finally, he testified that he did not personally look for a resignation given to Five Star by Petitioner.

After leaving Five Star Petitioner worked next at SC2 as a safety coordinator. He ordered supplies and performed safety investigations and write ups to present to management. He testified this was a desk job which he worked 40 hours per week at $11 per hour. Petitioner testified that he worked at this job through some time in 2013 and had health insurance for one year toward the end of 2013.

On cross-exam by Respondent Five Star, Petitioner testified that while working at SC2 as a safety coordinator, he gained knowledge of the accident reporting process for work related accidents. He also gave presentations on how to decrease the number of work place accidents.

While working for SC2 in 2012, Petitioner obtained an attorney and in 2012 filed his claim against Five Star. On cross-exam, Petitioner testified that because of his position at SC2, he discovered that he could proceed against Five Star for his knee related injury in 2009. At that point, Petitioner filed his claim against Five Star and sought medical care for his knee.

On re-direct, Petitioner testified that his knee improve enough after the 2009 accident such that he was able to return to daily activities but that his knee never returned to 100%. Petitioner testified that he simply lived with the knee problems until July 2012 when he realized he could pursue a workers' compensation claim against Five Star and sought medical care from Dr. Hoffman. Petitioner testified that he sought no treatment between 2009 and 2012 because he could not pay for it.

Petitioner testified that although he did not have health insurance in 2012 he saw Dr. Hoffman, a primary care doctor, on July 18, 2012. PX 13. At that visit, Dr. Hoffman noted, "This 32 year old male was employed by Five Star Fitness in Joliet as a Fitness Consultant. While at work on 8/29/09, he was moving a treadmill, tripped on a water jug landing on his right knee. The patient had x-rays taken at that time, however, he did not have an MRI. Since the injury he has had intermittent pain and swelling in the right knee." Exam of the right knee revealed "...pain with flexion to 90 degrees. Full extension. Stability normal. No spasm or atrophy." The diagnosis was "probable torn cartilage" and an MRI was ordered. PX 13. The MRI was done on July 19, 2012 and indicated a bucket handle tear of the lateral meniscus with thickened medial plica, small knee joint effusion and popliteal cyst. All other meniscus, ligament and tendon findings were normal. Dr Hoffman diagnosed Petitioner on 7/23/12 with "torn lateral cartilage" and made an "orthopedic referral." PX 13.

On July 25, 2012, Petitioner saw Dr. Rhode on the referral of Dr. Hoffman. Petitioner was solely working at SC2 at this time and did not have health insurance. Dr. Rhode's records indicate a consistent history of accident "2 years and 11 months" earlier while Petitioner was moving a treadmill, stepped on a water bottle and fell into a squatting position developing a sudden onset of lateral knee pain. Dr. Rhode then writes, "He states that he went to get evaluated for his work relate injury. He states that his employer never submitted his injury form to workers' compensation. He has continued to deal with his symptomatology of lateral joint line pain with locking and catching. He states that her recently realized his workers' compensation right and , therefore, has sought to gain access to medial treatment for which he has been denied over the last 2 years 11 months by his employer due to the fact that his employer never submitted his work injury to the insurance carrier. When asked why he has taken so long to seek treatment, Jason states that he did not realize his rights until recently."

At the July 25, 2012 exam, Dr. Hoffman noted a positive McMurray along the lateral joint line. He reviewed the MRI and noted "evidence of a lateral meniscus tear." Dr. Rhode noted, "Secondary to the fact that the patient has been living with this significant lateral meniscus tear for 2 years 11 months, I recommend proceeding with surgical intervention." He allowed Petitioner to continue to work full duty until surgery. Dr. Rhode continued to make the same surgical recommendation at the visits which occurred every 2 to 3 weeks in 2012 through 2014.

Petitioner attended a Section 12 exam with Dr. Lieber on January 28, 2013. Dr. Lieber testified that Petitioner reported moving the treadmill, kicking a small water bottle and falling into a full squat with immediate pain in his right knee. He reviewed the MRI of July 2012, and the records from Physician's Immediate Care, Dr.

Hoffman, and Dr. Rhode. He noted that the MRI showed a bucket handle tear of the lateral meniscus and that Drs. Hoffman and Rhode confirmed the need for surgery for the lateral meniscal tear. He also noted the Physician's Immediate records noting a work injury of August 28, 2009 and August 29, 2009 as noted above. Following an exam Dr. Lieber agreed there was internal knee derangement and a possible meniscal tear. However, he testified there was no direct relationship between the alleged accident and the condition stating, " I felt that the mechanism of injury as explained to me by Petitioner was not significant enough to cause a buckle-handle tear of the medial meniscus. I felt that the lack of medical care for a period of three years, ... was significant in that if there had been a significant meniscal tear as indicated in the MRI the Petitioner would have been unable to carry on activities of daily living or any normal functions without significant pain and would have required and sought treatment prior to three years." He placed Petitioner at MMI. RX C, p. 9-10.

On cross, Dr. Lieber testified that if Petitioner were holding the treadmill and fell into a squat position, such an incident is not a sufficient mechanism of injury to cause a bucket handle tear of the lateral meniscus. He opined that such a tear would be associated with a high contact, twisting injury with forces much greater than squatting and holding up the end of the treadmill. RX C, p. 14. He agreed with surgical repair. P . 15. He further testified that even in a person with a high pain tolerance, a person with a bucket handle tear of the lateral meniscus would have sought medical attention within the three years following the accident. P. 16.

On October 23, 2013, Dr. Rhode gave his deposition. In it, he again reiterated his diagnosis of lateral meniscal tear which he opined was causally related to Petitioner's treadmill lifting in 2009. He disagreed with Dr. Lieber's opinion that Petitioner would have sought medical treatment sooner if he sustained a meniscal tear in that the symptoms would have been acute. Dr. Rhode testified, "I disagree with Dr. Leiber that a bucket handle tear would have resulted in consistent and persistent significant symptomatology, and my specific point was that a reduced meniscus be it bucket handle or be it horizontal cleavage or any other tear pattern as long as it's reduced people can live with them. They'll have symptoms but they're not debilitating especially on the lateral side. Only when the meniscus displaces does it cause significant symptomatology." PX 17, p. 9-11. Dr. Rhode further testified that the MRI revealed a large tear but the meniscus was not displaced. He testified that Dr. Lieber did not discuss symptom likelihood in the context of a reduced vs. displaced meniscus. PX 17, p. 12. Lastly, Dr. Rhode reiterated his record notes citing that Petitioner did not seek medical care between 2010 and 2012 because he did not have health insurance and did not understand his rights as an injured worker. PX 17, p. 18-19.

While working at SC2 in 2013 Petitioner also worked part time for Respondent The Clubs at River City. Petitioner was already under the care of treating physicians for his right knee while still working for SC2 and while working part time for The Clubs in 2012-2013. Eventually he left SC2 in 2013 and began working full time for The Clubs at River City. Petitioner alleges in case 14 WC 10068 that while working solely for The Clubs he sustained an accident on 9/13/13. Petitioner testified that while walking to the back end of the club near the pool while wearing dress shoes he slipped on a wet mat in the locker room and fell down onto his right knee. He immediately felt pain in his right knee and reported his accident to "Lizzy" his manager. This time, Petitioner completed accident reports listing an accident date of 9/13/13. PX 6.

Petitioner testified to three more accidents which are the subject of the three remaining cases. On 1/31/14, Petitioner hopped over the front desk wall landing on his right leg. The impact caused pain in his right knee so he completed another accident report. PX 7. Petitioner alleges that on 2/27/14 he was moving a box of paper turned the corner and his right knee twisted and popped causing another pain flare up and worsening his limp. PX 8. Lastly, Petitioner alleges that on 3/5/14 he was carrying boxes down some stairs when he could not see

the last step. He testified that he over stepped with too much weight on his right knee and fell on his right knee. PX 9. Petitioner testified that he worked full duty for each of his employers from 2009 through 2014.

On cross-exam by The Clubs, Petitioner testified that his job at The Clubs was a desk job in membership sales. He was also required to give tours of the facility. He received a free club membership as part of his job description. He testified that after the 9/13/13 accident at The Clubs he continued to exercise performing seated work outs of the upper body and lower body leg extensions and curls on a machine.

Petitioner further testified that he began seeing Dr. Rhode in July 2012 and saw him every two to three weeks through the date of his September 2013 accident. Petitioner continued to work full duty during his treatment. Petitioner further testified that Dr. Rhode allowed him to work full duty and continue his work-outs after the first 3 alleged accidents at The Clubs. Petitioner further testified that he first asked The Clubs for medical treatment after the March 5, 2014 accident. He further admitted that the January 31, 2014 alleged accident while jumping over the front desk was not an accident in that such activity was not part of his job duties.

Petitioner testified that he continued to see Dr. Rhode who continued to recommend the same surgery to his knee as was recommended in 2012 prior to Petitioner working part time or full time with The Clubs. Petitioner further testified that Dr. Rhode's surgical recommendation remained the same after each alleged accident at The Clubs. Petitioner testified that the March 2014 accident exacerbated his right knee condition to the point where his need for surgery was accelerated.

Dr. Rhode took Petitioner off work on March 26, 2014. Petitioner testified that he asked for light duty restrictions pending his surgery and that he gave those restrictions to Respondent. Petitioner testified that Respondent would not accommodate the light duty prior to Petitioner having the surgery. Petitioner then testified that his employment was terminated on June 1, 2014.

Petitioner underwent the right knee surgery on June 17, 2014 with Dr. Rhode. He was given a modified duty release in August 2014 but had already been let go by Respondent prior to his surgery.

Respondent The Clubs called Lisbeth Robinson to testify in her capacity as Vice President of Operations and Accounting at The Clubs for the previous 8 years. As such, she oversaw HR and payroll. Ms. Robinson was Petitioner's supervisor in 2013. She further testified that she was made aware of each of Petitioner's claimed accidents at The Clubs and that a form 45 was completed for each of the accidents. However, she testified that she never received any completed accident reports from Petitioner and does not know what happened to those reports or who prepared the form 45s. She further testified that she received notice of these accidents from Petitioner's attorney.

Ms. Robinson further testified that she was made aware that Petitioner was under treatment for his right knee prior to his first accident at The Clubs in September 2013. She further testified that Petitioner did not request medical attention for his right knee from The Clubs at any time after any accident. Rather, Petitioner continued to work after all four accidents and was only taken off work for the surgery in March 2014. She testified that Petitioner gave her an off work slip from Dr. Rhode on March 26, 2014. Lastly, she testified that Petitioner had group health insurance at the time of his alleged accidents in 2013 and 2014 while working at The Clubs.

On cross-exam, Ms. Robinson testified that Petitioner's employment with The Clubs was terminated on June 1, 2014. She testified that his employment was terminated because his position needed to be filled. She testified

that Petitioner was still off work at the time and that she did not receive any request for modified duty at any time from Petitioner prior to his termination.

Petitioner testified that he has not sought any care for his right knee since his full duty release in February 2015. Petitioner found employment with a tree service company where he continues to work cutting down trees. He testified that his pain has improved but that he has a limp in his right leg. Petitioner no longer runs, plays softball or rides a bike. He can no longer perform a normal work out. He testified that his biggest problems arise when he stands for a period of time.

Petitioner attended a Section 12 exam with Dr. Verma on December 18, 2014 at the request of Respondent The Clubs. The exam was after Petitioner's right knee surgery. Dr. Verma gave his deposition on 9/21/16. RX 1. Petitioner reported a consistent history of accident slipping while holding the treadmill in 2009. Petitioner advised that he was told by his supervisor that he should wait to see if his knee improved and that no care was authorized. Petitioner did not seek care until 2012 with an MRI and surgical recommendation. Dr. Verma noted Petitioner's subsequent employment with The Clubs and his slip by the pool in September 2013 along with the other claimed incidents. He reviewed the records of Dr. Hoffman and Dr. Rhode from 2012-2014. He reviewed the MRI from July 19 2012 and from March 21, 2014 prior to surgery. He agreed the July 2012 MRI showed a bucket handle tear of a lateral meniscus. The MRI of 2014 was unchanged. Dr. Verma examined Petitioner and diagnosed status post partial lateral meniscectomy with mild subjective discomfort.

Dr. Verma opined that Petitioner's condition was not related to any of his accidents claimed while he worked for The Clubs based on the fact that his condition was "clearly preexisting based on the objective findings on an MRI scan. I did not find any change in the objective findings on the MRI scan between 2012 and 2014. And the symptoms that the patient was describing during work activities during that time are consistent with the normal symptoms associated with his underlying prexisting knee condition." RX 1. P. 12. Dr. Verma testified that he was referencing Petitioner's job activities with The Clubs only. RX 1, p. 14. He opined that Petitioner's existing symptomatic knee condition was consistent with the diagnosis received prior to his employment with The Clubs in 2013 and Dr. Verma opined that those symptoms "would come about" with any type of activity whether work related or not. RX 1, p. 15.

Dr. Verma further agreed that the bucket handle tear diagnosed by Dr. Rhode in 2012 was traumatic in nature as they are consistent with traumatic events. RX 1, p. 19. However, Dr. Verma testified that he does not know what caused the bucket handle tear. RX 1, p. 25.

Dr. Lieber testified again via deposition on 10/19/16. RX D. He testified using the same Section 12 exam from 1/28/13. RX D, p. 7. He testified that Petitioner had no treatment to the knee between the 2009 Physician's Immediate care visit and the 2012 treatment with Dr. Hoffman. RX D, p. 7. Upon exam, Petitioner demonstrated positive McMurray and Steinman's test and tenderness upon extremes of motion, tenderness at the medial and lateral joint lines and bout the patellofemoral joint. RX D, p. 8. Dr. Lieber testified that the MRI of July 20, 2012 indicated a bucket handle tear of the lateral meniscus as read by the radiologist. He opined that Petitioner's right knee condition was not related to the event of August 2009 at Five Star fitness stating that if Petitioner had sustained a bucket handle tear at that time he would have been "quite symptomatic" in the following three years and would have sought treatment. RX D, p. 10. He also felt the mechanism of injury wasn't significant enough to cause a bucket handle tear of the lateral meniscus, which is a full tear of the mensical tissue and is associated with significant functional impairment. RX D, p. 11.

In his addendum report authored 2/12/13, Dr. Lieber opined that Petitioner was at MMI for the alleged 2009 work accident and that he needed no further treatment. Acknowledging his prior deposition, Dr. Lieber stated that he was not given any subsequent information to review and that his opinions had not changed.

On cross, Dr. Lieber testified that he was not convinced in reviewing the July 2012 MRI that Petitioner had a bucket handle tear. RX D, p. 13. He further agreed that his findings at the Section 12 exam of positive McMurray and Steinman's testing would indicate a bucket handle tear. He disagreed that bucket handle tears are only traumatic in nature. RX D, p. 15. However, if they are traumatically induced, the involved mechanism would be twisting injury to the knee. RX D, pp 16-17.

CONCLUSIONS OF LAW

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

The following conclusions of law apply to all five of Petitioner's consolidated matters. However, a separate Decision is rendered in each case under separate cover and individual case number.

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

12 WC 25504- Jason Dallefeld v. Five Star Fitness

Based upon a preponderance of the credible evidence at trial, the Arbitrator finds that Petitioner sustained a work related accident while employed by Respondent Five Star Fitness on August 29, 2009. In so finding, the Arbitrator notes Petitioner's credible testimony as bolstered by that of Mr. Rizell and the Physician's Immediate Care records that he worked for Five Star at the membership desk at the time of the accident. Petitioner's unrebutted and credible testimony is that he was moving a treadmill with Brian Kelly when he awkwardly tripped on a water bottle causing him to fall into a squat while still holding the treadmill resulting in immediate popping, pain and swelling in his right knee. This history of injury to the right knee is clearly supported by the initial treatment records at Physician's Immediate Care. The Arbitrator is not persuaded to find otherwise on the issues of accident or date of accident based on any minor discrepancy regarding the date or manor of accident presented by the Physician's Immediate Care records.

The Arbitrator further finds that timely notice of the accident was given to Respondent Five Star through the immediate involvement of Respondent's supervisor Brian Kelly. Petitioner's unrebutted testimony is that Mr. Kelly witnessed the accident and took him to Physician's Immediate Care. Those records clearly indicate that the injury was treated as a work injury at Five Star listing Brian Kelly as the corporate contact. In finding proper notice, the Arbitrator places greater weight on Petitioner's testimony and the records of Physician's Immediate Care than on the testimony offered by Mr. Rizell at trial.

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

The Arbitrator finds that Petitioner's condition of right knee torn meniscus is causally related to the injury and accident on 8/29/09. Petitioner sought immediate care on 8/29/09 for which he was given crutches, medication, work restrictions and a follow up visit date. Petitioner credibly testified that no further care was authorized by Respondent. The 2 year 11 month delay in treatment to Petitioner's right knee is not lost on the Arbitrator. However, under the specific facts and testimony presented in this matter, the Arbitrator is not persuaded to find

a severance of causal relationship based on the lack of treatment. Petitioner credibly testified that he was told no treatment would be forthcoming and that he continued to work for Respondent while his symptoms subsided to a point where he could perform his daily activities. The Arbitrator notes Dr. Rhode's opinion that Petitioner's meniscal tear was reduced vs. displaced and that as such it was feasible Petitioner could perform his daily activities and live with the denial of treatment for a period. The Arbitrator further notes that once Petitioner educated himself on his rights as an injured worker, he pursued medical care for his knee injury in a timely manner first with Dr. Hoffman and then Dr. Rhode, despite not having insurance coverage. Based on the record in its entirety, the Arbitrator finds Petitioner's right knee condition is causally related to the accident of August 29, 2009.

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

Based on the Arbitrator's findings on the issues of accident, notice and causal connection, the Arbitrator further finds that Respondent Five Star shall pay Petitioner's reasonable, necessary and causally related medical expenses incurred in the care and treatment of his right knee condition pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid, if any.

K. What temporary benefits are in dispute? TTD

The Petitioner testified and medical records reveal that Dr. Rhode kept the Petitioner off of work from March 26, 2014 to August 13, 2014. Petitioner's employment with his then current employer was terminated on June 1, 2014 during the period of time of instability in Petitioner's condition pending surgery. Petitioner testified and the medical records also reveal that from August 14, 2014 to February 25, 2015 the Petitioner was on modified duty restrictions. Petitioner was released full duty on February 25, 2015. The Arbitrator finds that the Petitioner is entitled to TTD benefits from March 26, 2014 to February 25, 2015, a period of 48-1/7 weeks to be paid by Respondent Five Star Fitness.

L. What is the nature and extent of injury?

Pursuant to 820 ILCS 305/8.1(b) the Arbitrator utilized the following factors in considering the Petitioner's nature and extent of the injury in this case:

1. The reported level of impairment pursuant to an AMA assessment.

The Arbitrator notes that there has been no AMA assessment performed in this case by either party. Therefore, the Arbitrator does not have any facts to consider as it relates to an AMA assessment and no weight is given to this factor.

2. The occupation of the injured employee.

The Arbitrator notes that the Petitioner at the time of the accident was a membership/sales coordinator. The Arbitrator notes that after being injured the Petitioner maintained this job and thereafter worked other jobs including a similar job at The Clubs at River City. The Arbitrator notes that the Petitioner testified his job to be a sit down job. The Arbitrator notes that the Petitioner's current restrictions would allow him to return back to this job or a similar job. Great weight is given to this factor.

3. The age of the employee at the time of the injury was 29 years old.

The Arbitrator notes that Petitioner was young on the date of injury and that no evidence in the record indicates that his age is a factor to be given great weight.

4. The employee's future earning capacity.

The Arbitrator notes that Dr. Rhode released the Petitioner with permanent duty restrictions. However, the Arbitrator also notes that Petitioner works currently as a tree cutter which is strenuous work. The Arbitrator finds no evidence of impaired future earnings capacity and given this factor little weight.

5. The evidence of disability corroborated with the treating physicians' medical records.

The Arbitrator notes that when the Petitioner last saw Dr. Rhode on January 28, 2015 Dr. Rhode did document that the Petitioner continued to experience lateral knee pain. The physical examination revealed lateral joint line tenderness and pain with patella femoral compression. Dr. Rhode at that time did provide the Petitioner with permanent work restrictions with medium heavy work and opined that the Petitioner could perform occasional ladders, squatting, kneeling, crawling, bending and stooping. Petitioner testified that he currently works as a tree cutter, a physically demanding job. At Petitioner's last visit with Dr. Rhode's office of February 26, 2015 Dr. Rhode's physicians' assistant once again noted that the Petitioner continued to experience lateral knee pain and the Petitioner will require future oral medications. Petitioner testified that he continued to experience pain with his right knee and specifically that he had difficulty when standing for a long period of time. Based on the foregoing, the Arbitrator finds that Petitioner sustained 15% loss of use of his right leg pursuant to Section 8(e) of the Act.

14 WC 9863; 14 WC 10068; 14 WC 10019; 14 WC 9895 – Jason Dallefeld v. The Clubs at River City, Inc

The following conclusions of the Arbitrator apply to all four of Petitioner's matters against Respondent The Clubs at River City.

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

Based on the Arbitrator's decision in consolidated matter 12 WC 25504 finding accident on 8/29/09 as well as on the record in its entirety, the Arbitrator further finds that Petitioner did not sustain accidental injuries on September 13, 2013, January 31, 2014, February 27, 2014 or March 5, 2014 while working for Respondent The Clubs at River City. The Arbitrator specifically finds that Petitioner's current condition of ill-being is solely causally related to his accident on 8/29/09. In making these findings in the cases related to Respondent The Clubs, the Arbitrator further notes that well in advance of working for The Clubs in 2013, Petitioner sought treatment for his right knee in July 2012 from Dr. Rhode and obtained a surgical recommendation at that time. That surgical recommendation never changed during his period of employment with The Clubs. The objective test and exam results did not change. The record is devoid of any persuasive evidence to show that Petitioner's ultimate surgery while working for The Clubs was performed on an accelerated basis due to any of his alleged incidents with The Clubs. Accordingly, the Arbitrator finds that Petitioner's alleged incidents while working for The Clubs caused only minor or temporary exacerbations of Petitioner's long standing preexisting right knee

condition insufficient to result in a finding of new accidental injury or sufficient aggravation of the preexisting injury.

Based on the foregoing findings on the issues of accident and causal connection in cases 14 WC 9863; 14 WC 10068; 14 WC 10019; 14 WC 9895, all remaining issues in each of these cases is rendered moot and no further findings are made. No benefits are awarded Petitioner in these matters.

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 DALLEFELD,

Petitioner,

vs.

NO: 14 WC 09863
14 WC 09895
14 WC 10019
14 WC 10068
12 WC 25504 (cons.)

CLUBS AT RIVER CITY, INC.,

Respondent.

18IWCC0643

DECISION AND OPINION ON REVIEW

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

Initially, the Commission observes there is a typographical error in the Decision. Five Star Fitness' witness is identified throughout the Decision as "Robert Rizell"; we correct the decision to reflect the individual's name is Robert Reszel, Jr.

12 WC 25504 – Jason Dallefeld v. Five Star Fitness

The Commission affirms the Arbitrator's analysis with respect to accident and notice. The Commission emphasizes the Physicians Immediate Care records document Petitioner's report of a right knee injury while moving exercise equipment as well as objective findings consistent with acute trauma, and are replete with references to this being a work-related injury: repeated notations of "WC Five Star Fitness" and "W/C New"; Five Star Fitness is listed as the Guarantor; on the

Work Form, Five Star Fitness is listed as the Employer and Brian Kelly is listed as the contact under "WC Notes"; and on the Return to Work Form, Dr. Metrou identified Brian Kelly as the contact and in the space for "Co. Contacted" the doctor initialed she had done so. We do not find Mr. Reszel's testimony on this issue persuasive. Mr. Reszel testified he was not made aware of Petitioner's work injury until 10 to 14 days prior to the March 16, 2017 hearing, this despite the fact Petitioner's Application for Adjustment of Claim was filed five years prior, in 2012. Given this lack of awareness, Mr. Reszel's assertion that he knew the accident was not reported to Herb or George because the three owners converse regularly and a work injury was never mentioned is not credible. The Commission affirms and adopts the Arbitrator's findings regarding accident and notice.

In finding Petitioner's current right knee condition is causally related to the August 29, 2009 work injury, the Arbitrator acknowledged the 2 year, 11 month gap in treatment was troublesome but ultimately found it did not defeat Petitioner's claim given the totality of the circumstances. The Commission views the evidence differently.

On August 29, 2009, Petitioner presented to Physicians Immediate Care where he was evaluated by Dr. Metrou. Dr. Metrou's physical examination findings included effusion, very significant antalgic gait, increased warmth to touch, diffuse tenderness over anterior knee and laterally along the lateral collateral ligament, and decreased range of motion. Diagnosing a right knee strain, Dr. Metrou dispensed crutches and a knee support, prescribed an anti-inflammatory, and restricted Petitioner to sit-down work only until a re-evaluation in three days. PX12. Petitioner testified Dr. Metrou advised he needed an MRI (T. 59), but the Commission notes there is no mention of an MRI nor an order for such in the record. Petitioner further testified he did not attend the scheduled follow-up appointment because he was told not to. T. 58.

Petitioner remained employed at Five Star for a few months following the incident. T. 26. Petitioner testified for the first few weeks he worked at the desk, but he thereafter resumed his regular duties. T. 59-60. He stated there were no job duties he was unable to perform. T. 60. Petitioner testified his knee improved to the point he was living with it, although some symptoms persisted. T. 27-28. He explained, within a few weeks of the accident, he stopped using the crutches and started working out again. T. 90. Germane to the issues here, Petitioner described a strenuous lower body regimen: "I did a lot of hamstring movements, cable, pin loading machines first of all to get the strength back in my knee. The stronger my hamstrings were, the better my knee felt. I would work on that quite a bit. I was able to do light squats at some point later on." T. 62-63. Petitioner continued this routine through the end of his employment with Five Star. T. 62. When Petitioner thereafter commenced employment with The Clubs at River City, one of his job requirements was to perform a physical workout at the facility at least once a week. Petitioner confirmed he fulfilled that requirement. T. 73.

The pertinent diagnostic imaging is the July 18, 2012 MRI. The radiologist's impression is bucket-handle tear of the lateral meniscus, thickened medial plica, small knee joint effusion, and popliteal cyst. PX11. In his July 25, 2012 office note, Dr. Rhode described this is a significant lateral meniscus tear (PX14), and during his deposition, labeled it an obvious tear. PX17, p. 7.

With these facts in mind, we turn to the conflicting causation opinions provided by Dr. Rhode and Dr. Lieber. Dr. Rhode opined Petitioner's knee condition is causally related to the August 2009 incident:

> Based upon the patient's stated mechanism of injury, specifically that he was - - he was moving a piece of heavy equipment, which specifically was a treadmill, stepped on a water bottle and twisted and fell into a deep squatting position with subsequent lateral knee pain, based upon the fact that the patient clinically demonstrated lateral joint line pain with a positive lateral McMurray with an MRI that demonstrated an obvious lateral meniscus tear, I believe that the described mechanism was causative to the patient's symptomatology. The patient did not relate an intervening accident that may have been a causative factor to his pathology. PX17, p. 9.

In addressing the gap in treatment, Dr. Rhode stated nondisplaced tears can be tolerated: "...a reduced meniscus be it bucket handle or be it horizontal cleavage or any other tear pattern as long as it's reduced people can live with them. They'll have symptoms, but they're not debilitating especially on the lateral side. Only when the meniscus displaces does it cause significant symptomatology." PX17, p. 10.

Dr. Lieber reached the contrary conclusion. Dr. Lieber, who reviewed the July 20, 2012 MRI as well as records from Dr. Hoffman, Dr. Rhode, and Physicians Immediate Care, opined there was no direct relationship between the August 2009 event and Petitioner's condition of ill-being. RXC, p. 9. Dr. Lieber explained the basis of his opinion was the severity of the tear coupled with the absence of documented ongoing pain complaints:

> I felt that the mechanism of injury as explained to me by the petitioner was not significant enough to cause a bucket-handle tear of the medial [*sic*] meniscus. I felt that the lack of medical care for a period of three years, almost three years, was significant in that if there had been a significant meniscal tear as indicated in the MRI, the petitioner would have been unable to carry on activities of daily living or any normal functions without significant pain and would have required and sought treatment prior to three years. RXC, p. 9-10.

While Dr. Lieber acknowledged pain is subjective, he rejected the notion a high pain tolerance would explain the failure to seek treatment given the expected functional deficits such an injury engenders: "If he had a bucket-handle tear of his lateral meniscus, in my opinion, there is no way he would not have sought medical treatment for three years. His knee would not - - he would have had lack of motion. He would have had swelling. He would have had significant functional disabilities associated with that abnormality, and he would not - - they would not have waited three years to seek treatment...." RXC, p. 16.

The Commission finds the nearly three-year gap in treatment is incompatible with Petitioner having sustained a meniscal tear during the August 2009 accident. We emphasize

Petitioner did not simply return to performing activities of daily living. Rather, within a few weeks of his injury, Petitioner resumed working out and his usual routine involved rigorous lower body exercises. Petitioner was able to perform such exercises for several years, up to and including during his employment at Clubs at River City. The Commission finds Petitioner's level of function following the August 29, 2009 injury is not consistent with the accident having caused a cartilage injury which the physicians alternately described as "significant," "obvious," and "large." The Commission finds Dr. Lieber's opinion is most consistent with the evidence on this issue. The Commission finds Petitioner sustained a right knee strain as a result of his August 29, 2009 accident. Given Petitioner's testimony he resumed his full duties within a few weeks of his accident, we find Petitioner reached maximum medical improvement as of September 15, 2009.

Our causation finding necessarily implicates the award of benefits. As to medical expenses, we find the treatment rendered at Physicians Immediate Care on August 29, 2009 was reasonable, necessary, and related to the work accident. Respondent Five Star Fitness is ordered to pay those expenses pursuant to Section 8(a).

Regarding permanent disability, as the accidental injury at issue occurred prior to September 1, 2011, Section 8.1b is inapplicable. Consistent with our conclusion Petitioner sustained a knee strain and shortly thereafter resumed his usual activities, the Commission finds Petitioner sustained the 5% loss of use of the right leg under Section 8(e)12.

14 WC 9863; 14 WC 9895; 14 WC 10019; 14 WC 10068 – Jason Dallefeld v. Clubs at River City, Inc.

The Commission affirms the Arbitrator's denial of accident and causation. In addition to the salient facts detailed by the Arbitrator, we highlight Dr. Verma reviewed the MRI films from both the 2012 and 2014 scans, and Dr. Verma persuasively testified there was no interval change. RXD, p. 12, 27. We note the Arbitrator's Decision states, "The Arbitrator specifically finds that Petitioner's current condition of ill-being is solely causally related to his accident on 8/29/09." Based on our causation determination in consolidated matter 12 WC 25504, the Commission strikes that language.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on May 8, 2017, as modified above, is affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of temporary total disability benefits is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent Five Star Fitness pay to Petitioner the sum of $420.65 per week for a period of 10.75 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused 5% loss of use of the right leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent Five Star Fitness

pay the reasonable and necessary medical expenses incurred by Petitioner on August 29, 2009, pursuant to §8(a) and §8.2 of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $6,000.00. 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:

LEC/mck

O: 8/29/18

43

L. Elizabeth Coppoletti

Charles J. DeVriendt

Joshua D. Luskin

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DALLEFELD, JASON
Employee/Petitioner

Case# **14WC009863**

14WC010068
14WC010019
14WC009895
12WC025504

CLUBS AT RIVER CITY INC
Employer/Respondent

18IWCC0643

On 5/8/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.97% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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3100 N KNOXVILLE AVE
PEORIA, IL 61603

0507 RUSIN & MACIOROWSKI LTD
THOMAS P CROWLEY
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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

Jason Dallefeld
Employee/Petitioner

v.

Clubs at River City, Inc.
Employer/Respondent

Case # 14 WC 9863

Consolidated cases: 14 WC 10068; 14 WC 10019; 14 WC 9895; 12 WC 25504

18IWCC0643

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Doherty**, Arbitrator of the Commission, in the city of **New Lenox, IL** , on **March 16, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **February 27, 2014**, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner *did 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 **$40,224.60**; the average weekly wage was **$773.55**.

On the date of accident, Petitioner was **34** years of age, ***single*** with **0** dependent children.

No further findings are made. SEE DECISION

ORDER

Because the Petitioner did not sustain an accident that arose out of and in the course of his employment, benefits are denied.

Because the Petitioner's current condition of ill-being is not causally related to the accident, benefits are denied.

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

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

Signature of Arbitrator

5/5/17
Date

ICArbDec p. 2

MAY 8 - 2017

FINDINGS OF FACT

Petitioner presented five consolidated matters at trial. 12 WC 25504 was filed against the Respondent Five Star Fitness alleging an accident date of 8/29/09. ARB Ex 1. 14 WC 10068 was filed against Respondent The Clubs at River City alleging an accident date of 9/13/13. ARB Ex 2. 14 WC 10019 was filed against Respondent The Clubs at River City alleging an accident date of 1/31/14. ARB Ex 3. 14 WC 9863 was filed against Respondent The Clubs at River City alleging an accident date of 2/17/14. ARB Ex 4. 14 WC 9895 was filed against Respondent The Clubs at River City alleging an accident date of 3/5/14. ARB Ex 5. Respondents Five Star and The Clubs were represented at trial by separate counsel.

Petitioner testified that he was 29 years old when he began working for Five Star in July 2009 as a fitness consultant. Petitioner testified that Five Star was owned by three men – Herb, Bob and George. Petitioner's duties included selling gym memberships. Brian Kelly was his manager at the time. Petitioner sold memberships working from a desk. Petitioner alleges that on 8/29/09 there was renovation occurring at the club. Petitioner testified that he was moving a treadmill with Brian when while awkwardly lifting a treadmill he slipped on a water bottle and fell into a deep squat position while still holding the treadmill. He felt a pop in his right knee while still in the squat position. Petitioner testified that he heard a popping sound in his right knee which immediately swelled. Petitioner testified that he had pain down his calf and needed help to walk. Petitioner testified that he sat at his desk rest of day.

Petitioner testified that the next day Brian picked him up from home and they went to work. Brian then took Petitioner to Physicians Immediate Care where an MRI was recommended. Petitioner testified that he returned to work trying to keep weight off his leg using crutches. Petitioner testified that he continued to work at Five Star with crutches and that Brian said he would have to get permission for the MRI. Petitioner testified that no treatment was ever approved, including the follow up appointment and the MRI, and that he did not ask again for treatment after having been denied.

The Physicians Immediate Care records are dated 8/29/09, which is the same day of the alleged accident. PX 11. The records indicate a chief complaint of right knee pain. The records list Five Star Fitness as the guarantor and are also listed under the "insurance" section of the paperwork. The status is also referred to on the paper work as "W/C new." Brian Kelly's name is listed as the employer contact on the Return to Work Form on 8/29/09. A note on the bottom of the 8/29/09 doctor's notes reads "This case would be considered OSHA recordable unless deemed not to be compensable under workers compensation." The recorded history reads, "Jason is an employee of Five Star Fitness. At the time of the injury which started yesterday 8/28/09, he was squatting, lifting and moving equipment. He felt soreness in his right knee, mostly anteriorly. He said he tried to walk it off and he was limping on it, but it was not until today, on 8/29/09, when he stepped over an object, came down hard on his right knee, he developed a sharp burning pain along the lateral aspect of the knee. He has not been able to put full weight on it since. The pain was so severe it brought him to tears. He rates his pain at a constant 10/10 which is sharp in quality." PX 12.

Upon physical exam of the right knee, the doctor noted abnormal results including "... knee effusion. He is walking with a very significant antalgic gait, barely putting weight on that right leg. He has increased warmth to touch. There is no redness, abrasions or bruises. There is diffuse tenderness over the anterior knee and laterally along the lateral collateral ligament. He is able to extend to -10 degrees and flex to 90 degrees. There is also tenderness and swelling of the quadriceps muscle, particularly to the vastus medialis. There is no tenderness posteriorly." X-rays were normal. Following the exam, Petitioner was diagnosed with a right knee strain. He

was told to ice and elevate the knee, use crutches and a hinged patellar knee brace along with Naproxen. Petitioner was given work restrictions of "sit down work only until recheck" which was scheduled for 9/1/09. PX 12. No MRI order is present in these records.

Petitioner testified that he continued to work at Five Star and his knee slowly improved to the point where he was living with the improved but continued pain. He testified that he was not active but could function with minimal pain when standing. Petitioner testified that he left Five Star a few months after the accident.

On cross-exam, Petitioner testified that the initial medical records reflect accurate accident histories but disagreed with the records to the extent they reflect no MRI order. He further testified that he reported his injury to Brian Kelly as the "HR" person and that Brian told him no treatment would be available. Petitioner did not contract the owners directly about his accident or condition. Petitioner was not given an accident form to complete by Mr. Kelly. Petitioner further testified that he had no further treatment to his knee in 2009 and that he was told not to attend the follow up visit at Physician's Immediate Care.

Petitioner testified that he continued to work his desk duties through February 2010 and that he did notice improvement in his knee. He further agreed that he could still work out between August 2009 and February 2010 after his knee improved but only worked on ham string strength and light squats along with low impact cardio. He testified that elliptical use was fine in that he was gliding his legs back and forth without impact. Petitioner did not have health insurance while working at Five Star.

Respondent Five Star called Robert Rizell to testify in his capacity as one of the owners of Five Star. He testified that he hired Petitioner as a sales consultant in 2009 and that Brian Kelly was a manager at Five Star at the time. Mr. Kelly no longer works for Five Star. Mr. Rizell testified that Petitioner never reported an injury to him. He testified that Mr. Kelly never reported an injury to Petitioner at any time. Mr. Rizell testified that Petitioner continued to work for Five Star through February 2010 full duty and then just didn't show up one day for work. Mr. Rizell also testified that he never saw a report of injury at any time concerning Petitioner.

On cross-exam, Mr. Rizell testified that he co-owned Five Star with George Barr and Herb Landey and that Brian Kelly managed all employees at Five Star and reported directly to the witness and to Mr. Herb Landey. Mr. Rizell testified that he went to Five Star every day for a few hours in 2009. George never went and Herb Landey went occasionally. Mr. Rizell testified that he had a lot of interaction with Petitioner during his employment tenure at Five Star and that Petitioner never made any complaints of pain.

Mr. Rizell testified that injuries at Five Star are to be reported to the manager followed by completed paper work which was to be turned over by the manager. He has no personal knowledge if Petitioner completed an accident report but has never seen or heard of one for Petitioner. Mr. Rizell testified that his first knowledge of Petitioner's claimed accident was 10 days prior to trial. When he was notified he asked George and Herb if they ever heard of the alleged accident or injury to Petitioner they responded that they had not. Mr. Rizell testified that an accident or injury to Petitioner was never discussed over the ensuing years by the three owners as they had no knowledge. Finally, he testified that he did not personally look for a resignation given to Five Star by Petitioner.

After leaving Five Star Petitioner worked next at SC2 as a safety coordinator. He ordered supplies and performed safety investigations and write ups to present to management. He testified this was a desk job which he worked 40 hours per week at $11 per hour. Petitioner testified that he worked at this job through some time in 2013 and had health insurance for one year toward the end of 2013.

On cross-exam by Respondent Five Star. Petitioner testified that while working at SC2 as a safety coordinator, he gained knowledge of the accident reporting process for work related accidents. He also gave presentations on how to decrease the number of work place accidents.

While working for SC2 in 2012, Petitioner obtained an attorney and in 2012 filed his claim against Five Star. On cross-exam, Petitioner testified that because of his position at SC2, he discovered that he could proceed against Five Star for his knee related injury in 2009. At that point, Petitioner filed his claim against Five Star and sought medical care for his knee.

On re-direct, Petitioner testified that his knee improve enough after the 2009 accident such that he was able to return to daily activities but that his knee never returned to 100%. Petitioner testified that he simply lived with the knee problems until July 2012 when he realized he could pursue a workers' compensation claim against Five Star and sought medical care from Dr. Hoffman. Petitioner testified that he sought no treatment between 2009 and 2012 because he could not pay for it.

Petitioner testified that although he did not have health insurance in 2012 he saw Dr. Hoffman, a primary care doctor, on July 18, 2012. PX 13. At that visit, Dr. Hoffman noted, "This 32 year old male was employed by Five Star Fitness in Joliet as a Fitness Consultant. While at work on 8/29/09, he was moving a treadmill, tripped on a water jug landing on his right knee. The patient had x-rays taken at that time, however, he did not have an MRI. Since the injury he has had intermittent pain and swelling in the right knee." Exam of the right knee revealed "...pain with flexion to 90 degrees. Full extension. Stability normal. No spasm or atrophy." The diagnosis was "probable torn cartilage" and an MRI was ordered. PX 13. The MRI was done on July 19, 2012 and indicated a bucket handle tear of the lateral meniscus with thickened medial plica, small knee joint effusion and popliteal cyst. All other meniscus, ligament and tendon findings were normal. Dr Hoffman diagnosed Petitioner on 7/23/12 with "torn lateral cartilage" and made an "orthopedic referral." PX 13.

On July 25, 2012, Petitioner saw Dr. Rhode on the referral of Dr. Hoffman. Petitioner was solely working at SC2 at this time and did not have health insurance. Dr. Rhode's records indicate a consistent history of accident "2 years and 11 months" earlier while Petitioner was moving a treadmill, stepped on a water bottle and fell into a squatting position developing a sudden onset of lateral knee pain. Dr. Rhode then writes, "He states that he went to get evaluated for his work relate injury. He states that his employer never submitted his injury form to workers' compensation. He has continued to deal with his symptomatology of lateral joint line pain with locking and catching. He states that her recently realized his workers' compensation right and , therefore, has sought to gain access to medial treatment for which he has been denied over the last 2 years 11 months by his employer due to the fact that his employer never submitted his work injury to the insurance carrier. When asked why he has taken so long to seek treatment, Jason states that he did not realize his rights until recently."

At the July 25, 2012 exam, Dr. Hoffman noted a positive McMurray along the lateral joint line. He reviewed the MRI and noted "evidence of a lateral meniscus tear." Dr. Rhode noted, "Secondary to the fact that the patient has been living with this significant lateral meniscus tear for 2 years 11 months, I recommend proceeding with surgical intervention." He allowed Petitioner to continue to work full duty until surgery. Dr. Rhode continued to make the same surgical recommendation at the visits which occurred every 2 to 3 weeks in 2012 through 2014.

Petitioner attended a Section 12 exam with Dr. Lieber on January 28, 2013. Dr. Lieber testified that Petitioner reported moving the treadmill, kicking a small water bottle and falling into a full squat with immediate pain in his right knee. He reviewed the MRI of July 2012, and the records from Physician's Immediate Care, Dr. Hoffman, and Dr. Rhode. He noted that the MRI showed a bucket handle tear of the lateral meniscus and that

Drs. Hoffman and Rhode confirmed the need for surgery for the lateral meniscal tear. He also noted the Physician's Immediate records noting a work injury of August 28, 2009 and August 29, 2009 as noted above. Following an exam Dr. Lieber agreed there was internal knee derangement and a possible meniscal tear. However, he testified there was no direct relationship between the alleged accident and the condition stating, " I felt that the mechanism of injury as explained to me by Petitioner was not significant enough to cause a buckle-handle tear of the medial meniscus. I felt that the lack of medical care for a period of three years, ... was significant in that if there had been a significant meniscal tear as indicated in the MRI the Petitioner would have been unable to carry on activities of daily living or any normal functions without significant pain and would have required and sought treatment prior to three years." He placed Petitioner at MMI. RX C, p. 9-10.

On cross, Dr. Lieber testified that if Petitioner were holding the treadmill and fell into a squat position, such an incident is not a sufficient mechanism of injury to cause a bucket handle tear of the lateral meniscus. He opined that such a tear would be associated with a high contact, twisting injury with forces much greater than squatting and holding up the end of the treadmill. RX C, p. 14. He agreed with surgical repair. P . 15. He further testified that even in a person with a high pain tolerance, a person with a bucket handle tear of the lateral meniscus would have sought medical attention within the three years following the accident. P. 16.

On October 23, 2013, Dr. Rhode gave his deposition. In it, he again reiterated his diagnosis of lateral meniscal tear which he opined was causally related to Petitioner's treadmill lifting in 2009. He disagreed with Dr. Lieber's opinion that Petitioner would have sought medical treatment sooner if he sustained a meniscal tear in that the symptoms would have been acute. Dr. Rhode testified, "I disagree with Dr. Leiber that a bucket handle tear would have resulted in consistent and persistent significant symptomatology, and my specific point was that a reduced meniscus be it bucket handle or be it horizontal cleavage or any other tear pattern as long as it's reduced people can live with them. They'll have symptoms but they're not debilitating especially on the lateral side. Only when the meniscus displaces does it cause significant symptomatology." PX 17, p. 9-11. Dr. Rhode further testified that the MRI revealed a large tear but the meniscus was not displaced. He testified that Dr. Lieber did not discuss symptom likelihood in the context of a reduced vs. displaced meniscus. PX 17, p. 12. Lastly, Dr. Rhode reiterated his record notes citing that Petitioner did not seek medical care between 2010 and 2012 because he did not have health insurance and did not understand his rights as an injured worker. PX 17, p. 18-19.

While working at SC2 in 2013 Petitioner also worked part time for Respondent The Clubs at River City. Petitioner was already under the care of treating physicians for his right knee while still working for SC2 and while working part time for The Clubs in 2012-2013. Eventually he left SC2 in 2013 and began working full time for The Clubs at River City. Petitioner alleges in case 14 WC 10068 that while working solely for The Clubs he sustained an accident on 9/13/13. Petitioner testified that while walking to the back end of the club near the pool while wearing dress shoes he slipped on a wet mat in the locker room and fell down onto his right knee. He immediately felt pain in his right knee and reported his accident to "Lizzy" his manager. This time, Petitioner completed accident reports listing an accident date of 9/13/13. PX 6.

Petitioner testified to three more accidents which are the subject of the three remaining cases. On 1/31/14, Petitioner hopped over the front desk wall landing on his right leg. The impact caused pain in his right knee so he completed another accident report. PX 7. Petitioner alleges that on 2/27/14 he was moving a box of paper turned the corner and his right knee twisted and popped causing another pain flare up and worsening his limp. PX 8. Lastly, Petitioner alleges that on 3/5/14 he was carrying boxes down some stairs when he could not see the last step. He testified that he over stepped with too much weight on his right knee and fell on his right knee. PX 9. Petitioner testified that he worked full duty for each of his employers from 2009 through 2014.

On cross-exam by The Clubs, Petitioner testified that his job at The Clubs was a desk job in membership sales. He was also required to give tours of the facility. He received a free club membership as part of his job description. He testified that after the 9/13/13 accident at The Clubs he continued to exercise performing seated work outs of the upper body and lower body leg extensions and curls on a machine.

Petitioner further testified that he began seeing Dr. Rhode in July 2012 and saw him every two to three weeks through the date of his September 2013 accident. Petitioner continued to work full duty during his treatment. Petitioner further testified that Dr. Rhode allowed him to work full duty and continue his work-outs after the first 3 alleged accidents at The Clubs. Petitioner further testified that he first asked The Clubs for medical treatment after the March 5, 2014 accident. He further admitted that the January 31, 2014 alleged accident while jumping over the front desk was not an accident in that such activity was not part of his job duties.

Petitioner testified that he continued to see Dr. Rhode who continued to recommend the same surgery to his knee as was recommended in 2012 prior to Petitioner working part time or full time with The Clubs. Petitioner further testified that Dr. Rhode's surgical recommendation remained the same after each alleged accident at The Clubs. Petitioner testified that the March 2014 accident exacerbated his right knee condition to the point where his need for surgery was accelerated.

Dr. Rhode took Petitioner off work on March 26, 2014. Petitioner testified that he asked for light duty restrictions pending his surgery and that he gave those restrictions to Respondent. Petitioner testified that Respondent would not accommodate the light duty prior to Petitioner having the surgery. Petitioner then testified that his employment was terminated on June 1, 2014.

Petitioner underwent the right knee surgery on June 17, 2014 with Dr. Rhode. He was given a modified duty release in August 2014 but had already been let go by Respondent prior to his surgery.

Respondent The Clubs called Lisbeth Robinson to testify in her capacity as Vice President of Operations and Accounting at The Clubs for the previous 8 years. As such, she oversaw HR and payroll. Ms. Robinson was Petitioner's supervisor in 2013. She further testified that she was made aware of each of Petitioner's claimed accidents at The Clubs and that a form 45 was completed for each of the accidents. However, she testified that she never received any completed accident reports from Petitioner and does not know what happened to those reports or who prepared the form 45s. She further testified that she received notice of these accidents from Petitioner's attorney.

Ms. Robinson further testified that she was made aware that Petitioner was under treatment for his right knee prior to his first accident at The Clubs in September 2013. She further testified that Petitioner did not request medical attention for his right knee from The Clubs at any time after any accident. Rather, Petitioner continued to work after all four accidents and was only taken off work for the surgery in March 2014. She testified that Petitioner gave her an off work slip from Dr. Rhode on March 26, 2014. Lastly, she testified that Petitioner had group health insurance at the time of his alleged accidents in 2013 and 2014 while working at The Clubs.

On cross-exam, Ms. Robinson testified that Petitioner's employment with The Clubs was terminated on June 1, 2014. She testified that his employment was terminated because his position needed to be filled. She testified that Petitioner was still off work at the time and that she did not receive any request for modified duty at any time from Petitioner prior to his termination.

Petitioner testified that he has not sought any care for his right knee since his full duty release in February 2015. Petitioner found employment with a tree service company where he continues to work cutting down trees. He

testified that his pain has improved but that he has a limp in his right leg. Petitioner no longer runs, plays softball or rides a bike. He can no longer perform a normal work out. He testified that his biggest problems arise when he stands for a period of time.

Petitioner attended a Section 12 exam with Dr. Verma on December 18, 2014 at the request of Respondent The Clubs. The exam was after Petitioner's right knee surgery. Dr. Verma gave his deposition on 9/21/16. RX 1. Petitioner reported a consistent history of accident slipping while holding the treadmill in 2009. Petitioner advised that he was told by his supervisor that he should wait to see if his knee improved and that no care was authorized. Petitioner did not seek care until 2012 with an MRI and surgical recommendation. Dr. Verma noted Petitioner's subsequent employment with The Clubs and his slip by the pool in September 2013 along with the other claimed incidents. He reviewed the records of Dr. Hoffman and Dr. Rhode from 2012-2014. He reviewed the MRI from July 19 2012 and from March 21, 2014 prior to surgery. He agreed the July 2012 MRI showed a bucket handle tear of a lateral meniscus. The MRI of 2014 was unchanged. Dr. Verma examined Petitioner and diagnosed status post partial lateral meniscectomy with mild subjective discomfort.

Dr. Verma opined that Petitioner's condition was not related to any of his accidents claimed while he worked for The Clubs based on the fact that his condition was "clearly preexisting based on the objective findings on an MRI scan. I did not find any change in the objective findings on the MRI scan between 2012 and 2014. And the symptoms that the patient was describing during work activities during that time are consistent with the normal symptoms associated with his underlying prexisting knee condition." RX 1. P. 12. Dr. Verma testified that he was referencing Petitioner's job activities with The Clubs only. RX 1, p. 14. He opined that Petitioner's existing symptomatic knee condition was consistent with the diagnosis received prior to his employment with The Clubs in 2013 and Dr. Verma opined that those symptoms "would come about" with any type of activity whether work related or not. RX 1, p. 15.

Dr. Verma further agreed that the bucket handle tear diagnosed by Dr. Rhode in 2012 was traumatic in nature as they are consistent with traumatic events. RX 1, p. 19. However, Dr. Verma testified that he does not know what caused the bucket handle tear. RX 1, p. 25.

Dr. Lieber testified again via deposition on 10/19/16. RX D. He testified using the same Section 12 exam from 1/28/13. RX D. p. 7. He testified that Petitioner had no treatment to the knee between the 2009 Physician's Immediate care visit and the 2012 treatment with Dr. Hoffman. RX D, p. 7. Upon exam, Petitioner demonstrated positive McMurray and Steinman's test and tenderness upon extremes of motion, tenderness at the medial and lateral joint lines and bout the patellofemoral joint. RX D, p. 8. Dr. Lieber testified that the MRI of July 20, 2012 indicated a bucket handle tear of the lateral meniscus as read by the radiologist. He opined that Petitioner's right knee condition was not related to the event of August 2009 at Five Star fitness stating that if Petitioner had sustained a bucket handle tear at that time he would have been "quite symptomatic" in the following three years and would have sought treatment. RX D, p. 10. He also felt the mechanism of injury wasn't significant enough to cause a bucket handle tear of the lateral meniscus, which is a full tear of the mensical tissue and is associated with significant functional impairment. RX D, p. 11.

In his addendum report authored 2/12/13, Dr. Lieber opined that Petitioner was at MMI for the alleged 2009 work accident and that he needed no further treatment. Acknowledging his prior deposition, Dr. Lieber stated that he was not given any subsequent information to review and that his opinions had not changed.

On cross, Dr. Lieber testified that he was not convinced in reviewing the July 2012 MRI that Petitioner had a bucket handle tear. RX D, p. 13. He further agreed that his findings at the Section 12 exam of positive McMurray and Steinman's testing would indicate a bucket handle tear. He disagreed that bucket handle tears

are only traumatic in nature. RX D, p. 15. However, if they are traumatically induced, the involved mechanism would be twisting injury to the knee. RX D, pp 16-17.

CONCLUSIONS OF LAW

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

The following conclusions of law apply to all five of Petitioner's consolidated matters. However, a separate Decision is rendered in each case under separate cover and individual case number.

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

12 WC 25504- Jason Dallefeld v. Five Star Fitness

Based upon a preponderance of the credible evidence at trial, the Arbitrator finds that Petitioner sustained a work related accident while employed by Respondent Five Star Fitness on August 29, 2009. In so finding, the Arbitrator notes Petitioner's credible testimony as bolstered by that of Mr. Rizell and the Physician's Immediate Care records that he worked for Five Star at the membership desk at the time of the accident. Petitioner's unrebutted and credible testimony is that he was moving a treadmill with Brian Kelly when he awkwardly tripped on a water bottle causing him to fall into a squat while still holding the treadmill resulting in immediate popping, pain and swelling in his right knee. This history of injury to the right knee is clearly supported by the initial treatment records at Physician's Immediate Care. The Arbitrator is not persuaded to find otherwise on the issues of accident or date of accident based on any minor discrepancy regarding the date or manor of accident presented by the Physician's Immediate Care records.

The Arbitrator further finds that timely notice of the accident was given to Respondent Five Star through the immediate involvement of Respondent's supervisor Brian Kelly. Petitioner's unrebutted testimony is that Mr. Kelly witnessed the accident and took him to Physician's Immediate Care. Those records clearly indicate that the injury was treated as a work injury at Five Star listing Brian Kelly as the corporate contact. In finding proper notice, the Arbitrator places greater weight on Petitioner's testimony and the records of Physician's Immediate Care than on the testimony offered by Mr. Rizell at trial.

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

The Arbitrator finds that Petitioner's condition of right knee torn meniscus is causally related to the injury and accident on 8/29/09. Petitioner sought immediate care on 8/29/09 for which he was given crutches, medication, work restrictions and a follow up visit date. Petitioner credibly testified that no further care was authorized by Respondent. The 2 year 11 month delay in treatment to Petitioner's right knee is not lost on the Arbitrator. However, under the specific facts and testimony presented in this matter, the Arbitrator is not persuaded to find a severance of causal relationship based on the lack of treatment. Petitioner credibly testified that he was told no treatment would be forthcoming and that he continued to work for Respondent while his symptoms subsided to a point where he could perform his daily activities. The Arbitrator notes Dr. Rhode's opinion that Petitioner's meniscal tear was reduced vs. displaced and that as such it was feasible Petitioner could perform his daily activities and live with the denial of treatment for a period. The Arbitrator further notes that once Petitioner educated himself on his rights as an injured worker, he pursued medical care for his knee injury in a timely manner first with Dr. Hoffman and then Dr. Rhode, despite not having insurance coverage. Based on the

record in its entirety, the Arbitrator finds Petitioner's right knee condition is causally related to the accident of August 29, 2009.

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

Based on the Arbitrator's findings on the issues of accident, notice and causal connection, the Arbitrator further finds that Respondent Five Star shall pay Petitioner's reasonable, necessary and causally related medical expenses incurred in the care and treatment of his right knee condition pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid, if any.

K. What temporary benefits are in dispute? TTD

The Petitioner testified and medical records reveal that Dr. Rhode kept the Petitioner off of work from March 26, 2014 to August 13, 2014. Petitioner's employment with his then current employer was terminated on June 1, 2014 during the period of time of instability in Petitioner's condition pending surgery. Petitioner testified and the medical records also reveal that from August 14, 2014 to February 25, 2015 the Petitioner was on modified duty restrictions. Petitioner was released full duty on February 25, 2015. The Arbitrator finds that the Petitioner is entitled to TTD benefits from March 26, 2014 to February 25, 2015, a period of 48-1/7 weeks to be paid by Respondent Five Star Fitness.

L. What is the nature and extent of injury?

Pursuant to 820 ILCS 305/8.1(b) the Arbitrator utilized the following factors in considering the Petitioner's nature and extent of the injury in this case:

1. The reported level of impairment pursuant to an AMA assessment.

The Arbitrator notes that there has been no AMA assessment performed in this case by either party. Therefore, the Arbitrator does not have any facts to consider as it relates to an AMA assessment and no weight is given to this factor.

2. The occupation of the injured employee.

The Arbitrator notes that the Petitioner at the time of the accident was a membership/sales coordinator. The Arbitrator notes that after being injured the Petitioner maintained this job and thereafter worked other jobs including a similar job at The Clubs at River City. The Arbitrator notes that the Petitioner testified his job to be a sit down job. The Arbitrator notes that the Petitioner's current restrictions would allow him to return back to this job or a similar job. Great weight is given to this factor.

3. The age of the employee at the time of the injury was 29 years old.

The Arbitrator notes that Petitioner was young on the date of injury and that no evidence in the record indicates that his age is a factor to be given great weight.

4. The employee's future earning capacity.

The Arbitrator notes that Dr. Rhode released the Petitioner with permanent duty restrictions. However, the Arbitrator also notes that Petitioner works currently as a tree cutter which is strenuous work. The Arbitrator finds no evidence of impaired future earnings capacity and given this factor little weight.

5. The evidence of disability corroborated with the treating physicians' medical records.

The Arbitrator notes that when the Petitioner last saw Dr. Rhode on January 28, 2015 Dr. Rhode did document that the Petitioner continued to experience lateral knee pain. The physical examination revealed lateral joint line tenderness and pain with patella femoral compression. Dr. Rhode at that time did provide the Petitioner with permanent work restrictions with medium heavy work and opined that the Petitioner could perform occasional ladders, squatting, kneeling, crawling, bending and stooping. Petitioner testified that he currently works as a tree cutter, a physically demanding job. At Petitioner's last visit with Dr. Rhode's office of February 26, 2015 Dr. Rhode's physicians' assistant once again noted that the Petitioner continued to experience lateral knee pain and the Petitioner will require future oral medications. Petitioner testified that he continued to experience pain with his right knee and specifically that he had difficulty when standing for a long period of time. Based on the foregoing, the Arbitrator finds that Petitioner sustained 15% loss of use of his right leg pursuant to Section 8(e) of the Act.

14 WC 9863; 14 WC 10068; 14 WC 10019; 14 WC 9895 – Jason Dallefeld v. The Clubs at River City, Inc

The following conclusions of the Arbitrator apply to all four of Petitioner's matters against Respondent The Clubs at River City.

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

Based on the Arbitrator's decision in consolidated matter 12 WC 25504 finding accident on 8/29/09 as well as on the record in its entirety, the Arbitrator further finds that Petitioner did not sustain accidental injuries on September 13, 2013, January 31, 2014, February 27, 2014 or March 5, 2014 while working for Respondent The Clubs at River City. The Arbitrator specifically finds that Petitioner's current condition of ill-being is solely causally related to his accident on 8/29/09. In making these findings in the cases related to Respondent The Clubs, the Arbitrator further notes that well in advance of working for The Clubs in 2013, Petitioner sought treatment for his right knee in July 2012 from Dr. Rhode and obtained a surgical recommendation at that time. That surgical recommendation never changed during his period of employment with The Clubs. The objective test and exam results did not change. The record is devoid of any persuasive evidence to show that Petitioner's ultimate surgery while working for The Clubs was performed on an accelerated basis due to any of his alleged incidents with The Clubs. Accordingly, the Arbitrator finds that Petitioner's alleged incidents while working for The Clubs caused only minor or temporary exacerbations of Petitioner's long standing preexisting right knee condition insufficient to result in a finding of new accidental injury or sufficient aggravation of the preexisting injury.

Based on the foregoing findings on the issues of accident and causal connection in cases 14 WC 9863; 14 WC 10068; 14 WC 10019; 14 WC 9895, all remaining issues in each of these cases is rendered moot and no further findings are made. No benefits are awarded Petitioner in these matters.

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 DALLEFELD,

Petitioner,

vs.

NO: 14 WC 10019
14 WC 09863
14 WC 09895
14 WC 10068
12 WC 25504 (cons.)

CLUBS AT RIVER CITY, INC.,

Respondent.

18IWCC0644

DECISION AND OPINION ON REVIEW

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

Initially, the Commission observes there is a typographical error in the Decision. Five Star Fitness' witness is identified throughout the Decision as "Robert Rizell"; we correct the decision to reflect the individual's name is Robert Reszel, Jr.

12 WC 25504 – Jason Dallefeld v. Five Star Fitness

The Commission affirms the Arbitrator's analysis with respect to accident and notice. The Commission emphasizes the Physicians Immediate Care records document Petitioner's report of a right knee injury while moving exercise equipment as well as objective findings consistent with acute trauma, and are replete with references to this being a work-related injury: repeated notations of "WC Five Star Fitness" and "W/C New"; Five Star Fitness is listed as the Guarantor; on the

Work Form, Five Star Fitness is listed as the Employer and Brian Kelly is listed as the contact under "WC Notes"; and on the Return to Work Form, Dr. Metrou identified Brian Kelly as the contact and in the space for "Co. Contacted" the doctor initialed she had done so. We do not find Mr. Reszel's testimony on this issue persuasive. Mr. Reszel testified he was not made aware of Petitioner's work injury until 10 to 14 days prior to the March 16, 2017 hearing, this despite the fact Petitioner's Application for Adjustment of Claim was filed five years prior, in 2012. Given this lack of awareness, Mr. Reszel's assertion that he knew the accident was not reported to Herb or George because the three owners converse regularly and a work injury was never mentioned is not credible. The Commission affirms and adopts the Arbitrator's findings regarding accident and notice.

In finding Petitioner's current right knee condition is causally related to the August 29, 2009 work injury, the Arbitrator acknowledged the 2 year, 11 month gap in treatment was troublesome but ultimately found it did not defeat Petitioner's claim given the totality of the circumstances. The Commission views the evidence differently.

On August 29, 2009, Petitioner presented to Physicians Immediate Care where he was evaluated by Dr. Metrou. Dr. Metrou's physical examination findings included effusion, very significant antalgic gait, increased warmth to touch, diffuse tenderness over anterior knee and laterally along the lateral collateral ligament, and decreased range of motion. Diagnosing a right knee strain, Dr. Metrou dispensed crutches and a knee support, prescribed an anti-inflammatory, and restricted Petitioner to sit-down work only until a re-evaluation in three days. PX12. Petitioner testified Dr. Metrou advised he needed an MRI (T. 59), but the Commission notes there is no mention of an MRI nor an order for such in the record. Petitioner further testified he did not attend the scheduled follow-up appointment because he was told not to. T. 58.

Petitioner remained employed at Five Star for a few months following the incident. T. 26. Petitioner testified for the first few weeks he worked at the desk, but he thereafter resumed his regular duties. T. 59-60. He stated there were no job duties he was unable to perform. T. 60. Petitioner testified his knee improved to the point he was living with it, although some symptoms persisted. T. 27-28. He explained, within a few weeks of the accident, he stopped using the crutches and started working out again. T. 90. Germane to the issues here, Petitioner described a strenuous lower body regimen: "I did a lot of hamstring movements, cable, pin loading machines first of all to get the strength back in my knee. The stronger my hamstrings were, the better my knee felt. I would work on that quite a bit. I was able to do light squats at some point later on." T. 62-63. Petitioner continued this routine through the end of his employment with Five Star. T. 62. When Petitioner thereafter commenced employment with The Clubs at River City, one of his job requirements was to perform a physical workout at the facility at least once a week. Petitioner confirmed he fulfilled that requirement. T. 73.

The pertinent diagnostic imaging is the July 18, 2012 MRI. The radiologist's impression is bucket-handle tear of the lateral meniscus, thickened medial plica, small knee joint effusion, and popliteal cyst. PX11. In his July 25, 2012 office note, Dr. Rhode described this is a significant lateral meniscus tear (PX14), and during his deposition, labeled it an obvious tear. PX17, p. 7.

With these facts in mind, we turn to the conflicting causation opinions provided by Dr. Rhode and Dr. Lieber. Dr. Rhode opined Petitioner's knee condition is causally related to the August 2009 incident:

> Based upon the patient's stated mechanism of injury, specifically that he was - - he was moving a piece of heavy equipment, which specifically was a treadmill, stepped on a water bottle and twisted and fell into a deep squatting position with subsequent lateral knee pain, based upon the fact that the patient clinically demonstrated lateral joint line pain with a positive lateral McMurray with an MRI that demonstrated an obvious lateral meniscus tear, I believe that the described mechanism was causative to the patient's symptomatology. The patient did not relate an intervening accident that may have been a causative factor to his pathology. PX17, p. 9.

In addressing the gap in treatment, Dr. Rhode stated nondisplaced tears can be tolerated: "...a reduced meniscus be it bucket handle or be it horizontal cleavage or any other tear pattern as long as it's reduced people can live with them. They'll have symptoms, but they're not debilitating especially on the lateral side. Only when the meniscus displaces does it cause significant symptomatology." PX17, p. 10.

Dr. Lieber reached the contrary conclusion. Dr. Lieber, who reviewed the July 20, 2012 MRI as well as records from Dr. Hoffman, Dr. Rhode, and Physicians Immediate Care, opined there was no direct relationship between the August 2009 event and Petitioner's condition of ill-being. RXC, p. 9. Dr. Lieber explained the basis of his opinion was the severity of the tear coupled with the absence of documented ongoing pain complaints:

> I felt that the mechanism of injury as explained to me by the petitioner was not significant enough to cause a bucket-handle tear of the medial [*sic*] meniscus. I felt that the lack of medical care for a period of three years, almost three years, was significant in that if there had been a significant meniscal tear as indicated in the MRI, the petitioner would have been unable to carry on activities of daily living or any normal functions without significant pain and would have required and sought treatment prior to three years. RXC, p. 9-10.

While Dr. Lieber acknowledged pain is subjective, he rejected the notion a high pain tolerance would explain the failure to seek treatment given the expected functional deficits such an injury engenders: "If he had a bucket-handle tear of his lateral meniscus, in my opinion, there is no way he would not have sought medical treatment for three years. His knee would not - - he would have had lack of motion. He would have had swelling. He would have had significant functional disabilities associated with that abnormality, and he would not - - they would not have waited three years to seek treatment...." RXC, p. 16.

The Commission finds the nearly three-year gap in treatment is incompatible with Petitioner having sustained a meniscal tear during the August 2009 accident. We emphasize

Petitioner did not simply return to performing activities of daily living. Rather, within a few weeks of his injury, Petitioner resumed working out and his usual routine involved rigorous lower body exercises. Petitioner was able to perform such exercises for several years, up to and including during his employment at Clubs at River City. The Commission finds Petitioner's level of function following the August 29, 2009 injury is not consistent with the accident having caused a cartilage injury which the physicians alternately described as "significant," "obvious," and "large." The Commission finds Dr. Lieber's opinion is most consistent with the evidence on this issue. The Commission finds Petitioner sustained a right knee strain as a result of his August 29, 2009 accident. Given Petitioner's testimony he resumed his full duties within a few weeks of his accident, we find Petitioner reached maximum medical improvement as of September 15, 2009.

Our causation finding necessarily implicates the award of benefits. As to medical expenses, we find the treatment rendered at Physicians Immediate Care on August 29, 2009 was reasonable, necessary, and related to the work accident. Respondent Five Star Fitness is ordered to pay those expenses pursuant to Section 8(a).

Regarding permanent disability, as the accidental injury at issue occurred prior to September 1, 2011, Section 8.1b is inapplicable. Consistent with our conclusion Petitioner sustained a knee strain and shortly thereafter resumed his usual activities, the Commission finds Petitioner sustained the 5% loss of use of the right leg under Section 8(e)12.

14 WC 9863; 14 WC 9895; 14 WC 10019; 14 WC 10068 – Jason Dallefeld v. Clubs at River City, Inc.

The Commission affirms the Arbitrator's denial of accident and causation. In addition to the salient facts detailed by the Arbitrator, we highlight Dr. Verma reviewed the MRI films from both the 2012 and 2014 scans, and Dr. Verma persuasively testified there was no interval change. RXD, p. 12, 27. We note the Arbitrator's Decision states, "The Arbitrator specifically finds that Petitioner's current condition of ill-being is solely causally related to his accident on 8/29/09." Based on our causation determination in consolidated matter 12 WC 25504, the Commission strikes that language.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on May 8, 2017, as modified above, is affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of temporary total disability benefits is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent Five Star Fitness pay to Petitioner the sum of $420.65 per week for a period of 10.75 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused 5% loss of use of the right leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent Five Star Fitness

pay the reasonable and necessary medical expenses incurred by Petitioner on August 29, 2009, pursuant to §8(a) and §8.2 of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $6,000.00. 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 9 2018

L. Elizabeth Coppoletti

LEC/mck

O: 8/29/18

43

L. Elizabeth Coppoletti

Charles J. DeVriendt

Joshua D. Luskin

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DALLEFELD, JASON
Employee/Petitioner

Case# **14WC010019**

14WC010068
14WC009863
14WC009895
12WC025504

CLUBS AT RIVER CITY INC
Employer/Respondent

18IWCC0644

On 5/8/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.97% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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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

Jason Dallefeld
Employee/Petitioner

v.

Clubs at River City, Inc.
Employer/Respondent

Case # 14 WC 10019

Consolidated cases: **14 WC 10068; 14 WC 9863; 14 WC 9895; 12 WC 25504**

18IWCC0644

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Doherty**, Arbitrator of the Commission, in the city of **New Lenox, IL** , on **March 16, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **January 31**, 2014, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

In the year preceding the injury, Petitioner earned **$38,118.60**; the average weekly wage was **$733.05**.

On the date of accident, Petitioner was **34** years of age, *single* with **0** dependent children.

No further findings made. SEE DECISION

ORDER

Because the Petitioner did not sustain an accident that arose out of and in the course of his employment, benefits are denied.

Because the Petitioner's current condition of ill-being is not causally related to the accident, benefits are denied.

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

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

Carolyn M. Caraway

Signature of Arbitrator

5/5/17
Date

ICArbDec p 2

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FINDINGS OF FACT

Petitioner presented five consolidated matters at trial. 12 WC 25504 was filed against the Respondent Five Star Fitness alleging an accident date of 8/29/09. ARB Ex 1. 14 WC 10068 was filed against Respondent The Clubs at River City alleging an accident date of 9/13/13. ARB Ex 2. 14 WC 10019 was filed against Respondent The Clubs at River City alleging an accident date of 1/31/14. ARB Ex 3. 14 WC 9863 was filed against Respondent The Clubs at River City alleging an accident date of 2/17/14. ARB Ex 4. 14 WC 9895 was filed against Respondent The Clubs at River City alleging an accident date of 3/5/14. ARB Ex 5. Respondents Five Star and The Clubs were represented at trial by separate counsel.

Petitioner testified that he was 29 years old when he began working for Five Star in July 2009 as a fitness consultant. Petitioner testified that Five Star was owned by three men – Herb, Bob and George. Petitioner's duties included selling gym memberships. Brian Kelly was his manager at the time. Petitioner sold memberships working from a desk. Petitioner alleges that on 8/29/09 there was renovation occurring at the club. Petitioner testified that he was moving a treadmill with Brian when while awkwardly lifting a treadmill he slipped on a water bottle and fell into a deep squat position while still holding the treadmill. He felt a pop in his right knee while still in the squat position. Petitioner testified that he heard a popping sound in his right knee which immediately swelled. Petitioner testified that he had pain down his calf and needed help to walk. Petitioner testified that he sat at his desk rest of day.

Petitioner testified that the next day Brian picked him up from home and they went to work. Brian then took Petitioner to Physicians Immediate Care where an MRI was recommended. Petitioner testified that he returned to work trying to keep weight off his leg using crutches. Petitioner testified that he continued to work at Five Star with crutches and that Brian said he would have to get permission for the MRI. Petitioner testified that no treatment was ever approved, including the follow up appointment and the MRI, and that he did not ask again for treatment after having been denied.

The Physicians Immediate Care records are dated 8/29/09, which is the same day of the alleged accident. PX 11. The records indicate a chief complaint of right knee pain. The records list Five Star Fitness as the guarantor and are also listed under the "insurance" section of the paperwork. The status is also referred to on the paper work as "W/C new." Brian Kelly's name is listed as the employer contact on the Return to Work Form on 8/29/09. A note on the bottom of the 8/29/09 doctor's notes reads "This case would be considered OSHA recordable unless deemed not to be compensable under workers compensation." The recorded history reads, "Jason is an employee of Five Star Fitness. At the time of the injury which started yesterday 8/28/09, he was squatting, lifting and moving equipment. He felt soreness in his right knee, mostly anteriorly. He said he tried to walk it off and he was limping on it, but it was not until today, on 8/29/09, when he stepped over an object, came down hard on his right knee, he developed a sharp burning pain along the lateral aspect of the knee. He has not been able to put full weight on it since. The pain was so severe it brought him to tears. He rates his pain at a constant 10/10 which is sharp in quality." PX 12.

Upon physical exam of the right knee, the doctor noted abnormal results including "... knee effusion. He is walking with a very significant antalgic gait, barely putting weight on that right leg. He has increased warmth to touch. There is no redness, abrasions or bruises. There is diffuse tenderness over the anterior knee and laterally along the lateral collateral ligament. He is able to extend to -10 degrees and flex to 90 degrees. There is also tenderness and swelling of the quadriceps muscle, particularly to the vastus medialis. There is no tenderness posteriorly." X-rays were normal. Following the exam, Petitioner was diagnosed with a right knee strain. He

was told to ice and elevate the knee, use crutches and a hinged patellar knee brace along with Naproxen. Petitioner was given work restrictions of "sit down work only until recheck" which was scheduled for 9/1/09. PX 12. No MRI order is present in these records.

Petitioner testified that he continued to work at Five Star and his knee slowly improved to the point where he was living with the improved but continued pain. He testified that he was not active but could function with minimal pain when standing. Petitioner testified that he left Five Star a few months after the accident.

On cross-exam, Petitioner testified that the initial medical records reflect accurate accident histories but disagreed with the records to the extent they reflect no MRI order. He further testified that he reported his injury to Brian Kelly as the "HR" person and that Brian told him no treatment would be available. Petitioner did not contract the owners directly about his accident or condition. Petitioner was not given an accident form to complete by Mr. Kelly. Petitioner further testified that he had no further treatment to his knee in 2009 and that he was told not to attend the follow up visit at Physician's Immediate Care.

Petitioner testified that he continued to work his desk duties through February 2010 and that he did notice improvement in his knee. He further agreed that he could still work out between August 2009 and February 2010 after his knee improved but only worked on ham string strength and light squats along with low impact cardio. He testified that elliptical use was fine in that he was gliding his legs back and forth without impact. Petitioner did not have health insurance while working at Five Star.

Respondent Five Star called Robert Rizell to testify in his capacity as one of the owners of Five Star. He testified that he hired Petitioner as a sales consultant in 2009 and that Brian Kelly was a manager at Five Star at the time. Mr. Kelly no longer works for Five Star. Mr. Rizell testified that Petitioner never reported an injury to him. He testified that Mr. Kelly never reported an injury to Petitioner at any time. Mr. Rizell testified that Petitioner continued to work for Five Star through February 2010 full duty and then just didn't show up one day for work. Mr. Rizell also testified that he never saw a report of injury at any time concerning Petitioner.

On cross-exam, Mr. Rizell testified that he co-owned Five Star with George Barr and Herb Landey and that Brian Kelly managed all employees at Five Star and reported directly to the witness and to Mr. Herb Landey. Mr. Rizell testified that he went to Five Star every day for a few hours in 2009. George never went and Herb Landey went occasionally. Mr. Rizell testified that he had a lot of interaction with Petitioner during his employment tenure at Five Star and that Petitioner never made any complaints of pain.

Mr. Rizell testified that injuries at Five Star are to be reported to the manager followed by completed paper work which was to be turned over by the manager. He has no personal knowledge if Petitioner completed an accident report but has never seen or heard of one for Petitioner. Mr. Rizell testified that his first knowledge of Petitioner's claimed accident was 10 days prior to trial. When he was notified he asked George and Herb if they ever heard of the alleged accident or injury to Petitioner they responded that they had not. Mr. Rizell testified that an accident or injury to Petitioner was never discussed over the ensuing years by the three owners as they had no knowledge. Finally, he testified that he did not personally look for a resignation given to Five Star by Petitioner.

After leaving Five Star Petitioner worked next at SC2 as a safety coordinator. He ordered supplies and performed safety investigations and write ups to present to management. He testified this was a desk job which he worked 40 hours per week at $11 per hour. Petitioner testified that he worked at this job through some time in 2013 and had health insurance for one year toward the end of 2013.

On cross-exam by Respondent Five Star, Petitioner testified that while working at SC2 as a safety coordinator, he gained knowledge of the accident reporting process for work related accidents. He also gave presentations on how to decrease the number of work place accidents.

While working for SC2 in 2012, Petitioner obtained an attorney and in 2012 filed his claim against Five Star. On cross-exam, Petitioner testified that because of his position at SC2, he discovered that he could proceed against Five Star for his knee related injury in 2009. At that point, Petitioner filed his claim against Five Star and sought medical care for his knee.

On re-direct, Petitioner testified that his knee improve enough after the 2009 accident such that he was able to return to daily activities but that his knee never returned to 100%. Petitioner testified that he simply lived with the knee problems until July 2012 when he realized he could pursue a workers' compensation claim against Five Star and sought medical care from Dr. Hoffman. Petitioner testified that he sought no treatment between 2009 and 2012 because he could not pay for it.

Petitioner testified that although he did not have health insurance in 2012 he saw Dr. Hoffman, a primary care doctor, on July 18, 2012. PX 13. At that visit, Dr. Hoffman noted, "This 32 year old male was employed by Five Star Fitness in Joliet as a Fitness Consultant. While at work on 8/29/09, he was moving a treadmill, tripped on a water jug landing on his right knee. The patient had x-rays taken at that time, however, he did not have an MRI. Since the injury he has had intermittent pain and swelling in the right knee." Exam of the right knee revealed "...pain with flexion to 90 degrees. Full extension. Stability normal. No spasm or atrophy." The diagnosis was "probable torn cartilage" and an MRI was ordered. PX 13. The MRI was done on July 19, 2012 and indicated a bucket handle tear of the lateral meniscus with thickened medial plica, small knee joint effusion and popliteal cyst. All other meniscus, ligament and tendon findings were normal. Dr Hoffman diagnosed Petitioner on 7/23/12 with "torn lateral cartilage" and made an "orthopedic referral." PX 13.

On July 25, 2012, Petitioner saw Dr. Rhode on the referral of Dr. Hoffman. Petitioner was solely working at SC2 at this time and did not have health insurance. Dr. Rhode's records indicate a consistent history of accident "2 years and 11 months" earlier while Petitioner was moving a treadmill, stepped on a water bottle and fell into a squatting position developing a sudden onset of lateral knee pain. Dr. Rhode then writes, "He states that he went to get evaluated for his work relate injury. He states that his employer never submitted his injury form to workers' compensation. He has continued to deal with his symptomatology of lateral joint line pain with locking and catching. He states that her recently realized his workers' compensation right and , therefore, has sought to gain access to medial treatment for which he has been denied over the last 2 years 11 months by his employer due to the fact that his employer never submitted his work injury to the insurance carrier. When asked why he has taken so long to seek treatment, Jason states that he did not realize his rights until recently."

At the July 25, 2012 exam, Dr. Hoffman noted a positive McMurray along the lateral joint line. He reviewed the MRI and noted "evidence of a lateral meniscus tear." Dr. Rhode noted, "Secondary to the fact that the patient has been living with this significant lateral meniscus tear for 2 years 11 months, I recommend proceeding with surgical intervention." He allowed Petitioner to continue to work full duty until surgery. Dr. Rhode continued to make the same surgical recommendation at the visits which occurred every 2 to 3 weeks in 2012 through 2014.

Petitioner attended a Section 12 exam with Dr. Lieber on January 28, 2013. Dr. Lieber testified that Petitioner reported moving the treadmill, kicking a small water bottle and falling into a full squat with immediate pain in his right knee. He reviewed the MRI of July 2012, and the records from Physician's Immediate Care, Dr. Hoffman, and Dr. Rhode. He noted that the MRI showed a bucket handle tear of the lateral meniscus and that

Drs. Hoffman and Rhode confirmed the need for surgery for the lateral meniscal tear. He also noted the Physician's Immediate records noting a work injury of August 28, 2009 and August 29, 2009 as noted above. Following an exam Dr. Lieber agreed there was internal knee derangement and a possible meniscal tear. However, he testified there was no direct relationship between the alleged accident and the condition stating, " I felt that the mechanism of injury as explained to me by Petitioner was not significant enough to cause a buckle-handle tear of the medial meniscus. I felt that the lack of medical care for a period of three years, ... was significant in that if there had been a significant meniscal tear as indicated in the MRI the Petitioner would have been unable to carry on activities of daily living or any normal functions without significant pain and would have required and sought treatment prior to three years." He placed Petitioner at MMI. RX C, p. 9-10.

On cross, Dr. Lieber testified that if Petitioner were holding the treadmill and fell into a squat position, such an incident is not a sufficient mechanism of injury to cause a bucket handle tear of the lateral meniscus. He opined that such a tear would be associated with a high contact, twisting injury with forces much greater than squatting and holding up the end of the treadmill. RX C, p. 14. He agreed with surgical repair. P . 15. He further testified that even in a person with a high pain tolerance, a person with a bucket handle tear of the lateral meniscus would have sought medical attention within the three years following the accident. P. 16.

On October 23, 2013, Dr. Rhode gave his deposition. In it, he again reiterated his diagnosis of lateral meniscal tear which he opined was causally related to Petitioner's treadmill lifting in 2009. He disagreed with Dr. Lieber's opinion that Petitioner would have sought medical treatment sooner if he sustained a meniscal tear in that the symptoms would have been acute. Dr. Rhode testified, "I disagree with Dr. Leiber that a bucket handle tear would have resulted in consistent and persistent significant symptomatology, and my specific point was that a reduced meniscus be it bucket handle or be it horizontal cleavage or any other tear pattern as long as it's reduced people can live with them. They'll have symptoms but they're not debilitating especially on the lateral side. Only when the meniscus displaces does it cause significant symptomatology." PX 17, p. 9-11. Dr. Rhode further testified that the MRI revealed a large tear but the meniscus was not displaced. He testified that Dr. Lieber did not discuss symptom likelihood in the context of a reduced vs. displaced meniscus. PX 17, p. 12. Lastly, Dr. Rhode reiterated his record notes citing that Petitioner did not seek medical care between 2010 and 2012 because he did not have health insurance and did not understand his rights as an injured worker. PX 17, p. 18-19.

While working at SC2 in 2013 Petitioner also worked part time for Respondent The Clubs at River City. Petitioner was already under the care of treating physicians for his right knee while still working for SC2 and while working part time for The Clubs in 2012-2013. Eventually he left SC2 in 2013 and began working full time for The Clubs at River City. Petitioner alleges in case 14 WC 10068 that while working solely for The Clubs he sustained an accident on 9/13/13. Petitioner testified that while walking to the back end of the club near the pool while wearing dress shoes he slipped on a wet mat in the locker room and fell down onto his right knee. He immediately felt pain in his right knee and reported his accident to "Lizzy" his manager. This time, Petitioner completed accident reports listing an accident date of 9/13/13. PX 6.

Petitioner testified to three more accidents which are the subject of the three remaining cases. On 1/31/14, Petitioner hopped over the front desk wall landing on his right leg. The impact caused pain in his right knee so he completed another accident report. PX 7. Petitioner alleges that on 2/27/14 he was moving a box of paper turned the corner and his right knee twisted and popped causing another pain flare up and worsening his limp. PX 8. Lastly, Petitioner alleges that on 3/5/14 he was carrying boxes down some stairs when he could not see the last step. He testified that he over stepped with too much weight on his right knee and fell on his right knee. PX 9. Petitioner testified that he worked full duty for each of his employers from 2009 through 2014.

On cross-exam by The Clubs, Petitioner testified that his job at The Clubs was a desk job in membership sales. He was also required to give tours of the facility. He received a free club membership as part of his job description. He testified that after the 9/13/13 accident at The Clubs he continued to exercise performing seated work outs of the upper body and lower body leg extensions and curls on a machine.

Petitioner further testified that he began seeing Dr. Rhode in July 2012 and saw him every two to three weeks through the date of his September 2013 accident. Petitioner continued to work full duty during his treatment. Petitioner further testified that Dr. Rhode allowed him to work full duty and continue his work-outs after the first 3 alleged accidents at The Clubs. Petitioner further testified that he first asked The Clubs for medical treatment after the March 5, 2014 accident. He further admitted that the January 31, 2014 alleged accident while jumping over the front desk was not an accident in that such activity was not part of his job duties.

Petitioner testified that he continued to see Dr. Rhode who continued to recommend the same surgery to his knee as was recommended in 2012 prior to Petitioner working part time or full time with The Clubs. Petitioner further testified that Dr. Rhode's surgical recommendation remained the same after each alleged accident at The Clubs. Petitioner testified that the March 2014 accident exacerbated his right knee condition to the point where his need for surgery was accelerated.

Dr. Rhode took Petitioner off work on March 26, 2014. Petitioner testified that he asked for light duty restrictions pending his surgery and that he gave those restrictions to Respondent. Petitioner testified that Respondent would not accommodate the light duty prior to Petitioner having the surgery. Petitioner then testified that his employment was terminated on June 1, 2014.

Petitioner underwent the right knee surgery on June 17, 2014 with Dr. Rhode. He was given a modified duty release in August 2014 but had already been let go by Respondent prior to his surgery.

Respondent The Clubs called Lisbeth Robinson to testify in her capacity as Vice President of Operations and Accounting at The Clubs for the previous 8 years. As such, she oversaw HR and payroll. Ms. Robinson was Petitioner's supervisor in 2013. She further testified that she was made aware of each of Petitioner's claimed accidents at The Clubs and that a form 45 was completed for each of the accidents. However, she testified that she never received any completed accident reports from Petitioner and does not know what happened to those reports or who prepared the form 45s. She further testified that she received notice of these accidents from Petitioner's attorney.

Ms. Robinson further testified that she was made aware that Petitioner was under treatment for his right knee prior to his first accident at The Clubs in September 2013. She further testified that Petitioner did not request medical attention for his right knee from The Clubs at any time after any accident. Rather, Petitioner continued to work after all four accidents and was only taken off work for the surgery in March 2014. She testified that Petitioner gave her an off work slip from Dr. Rhode on March 26, 2014. Lastly, she testified that Petitioner had group health insurance at the time of his alleged accidents in 2013 and 2014 while working at The Clubs.

On cross-exam, Ms. Robinson testified that Petitioner's employment with The Clubs was terminated on June 1, 2014. She testified that his employment was terminated because his position needed to be filled. She testified that Petitioner was still off work at the time and that she did not receive any request for modified duty at any time from Petitioner prior to his termination.

Petitioner testified that he has not sought any care for his right knee since his full duty release in February 2015. Petitioner found employment with a tree service company where he continues to work cutting down trees. He

testified that his pain has improved but that he has a limp in his right leg. Petitioner no longer runs, plays softball or rides a bike. He can no longer perform a normal work out. He testified that his biggest problems arise when he stands for a period of time.

Petitioner attended a Section 12 exam with Dr. Verma on December 18, 2014 at the request of Respondent The Clubs. The exam was after Petitioner's right knee surgery. Dr. Verma gave his deposition on 9/21/16. RX 1. Petitioner reported a consistent history of accident slipping while holding the treadmill in 2009. Petitioner advised that he was told by his supervisor that he should wait to see if his knee improved and that no care was authorized. Petitioner did not seek care until 2012 with an MRI and surgical recommendation. Dr. Verma noted Petitioner's subsequent employment with The Clubs and his slip by the pool in September 2013 along with the other claimed incidents. He reviewed the records of Dr. Hoffman and Dr. Rhode from 2012-2014. He reviewed the MRI from July 19 2012 and from March 21, 2014 prior to surgery. He agreed the July 2012 MRI showed a bucket handle tear of a lateral meniscus. The MRI of 2014 was unchanged. Dr. Verma examined Petitioner and diagnosed status post partial lateral meniscectomy with mild subjective discomfort.

Dr. Verma opined that Petitioner's condition was not related to any of his accidents claimed while he worked for The Clubs based on the fact that his condition was "clearly preexisting based on the objective findings on an MRI scan. I did not find any change in the objective findings on the MRI scan between 2012 and 2014. And the symptoms that the patient was describing during work activities during that time are consistent with the normal symptoms associated with his underlying prexisting knee condition." RX 1. P. 12. Dr. Verma testified that he was referencing Petitioner's job activities with The Clubs only. RX 1, p. 14. He opined that Petitioner's existing symptomatic knee condition was consistent with the diagnosis received prior to his employment with The Clubs in 2013 and Dr. Verma opined that those symptoms "would come about" with any type of activity whether work related or not. RX 1, p. 15.

Dr. Verma further agreed that the bucket handle tear diagnosed by Dr. Rhode in 2012 was traumatic in nature as they are consistent with traumatic events. RX 1, p. 19. However, Dr. Verma testified that he does not know what caused the bucket handle tear. RX 1, p. 25.

Dr. Lieber testified again via deposition on 10/19/16. RX D. He testified using the same Section 12 exam from 1/28/13. RX D, p. 7. He testified that Petitioner had no treatment to the knee between the 2009 Physician's Immediate care visit and the 2012 treatment with Dr. Hoffman. RX D, p. 7. Upon exam, Petitioner demonstrated positive McMurray and Steinman's test and tenderness upon extremes of motion, tenderness at the medial and lateral joint lines and bout the patellofemoral joint. RX D, p. 8. Dr. Lieber testified that the MRI of July 20, 2012 indicated a bucket handle tear of the lateral meniscus as read by the radiologist. He opined that Petitioner's right knee condition was not related to the event of August 2009 at Five Star fitness stating that if Petitioner had sustained a bucket handle tear at that time he would have been "quite symptomatic" in the following three years and would have sought treatment. RX D, p. 10. He also felt the mechanism of injury wasn't significant enough to cause a bucket handle tear of the lateral meniscus, which is a full tear of the mensical tissue and is associated with significant functional impairment. RX D, p. 11.

In his addendum report authored 2/12/13, Dr. Lieber opined that Petitioner was at MMI for the alleged 2009 work accident and that he needed no further treatment. Acknowledging his prior deposition, Dr. Lieber stated that he was not given any subsequent information to review and that his opinions had not changed.

On cross, Dr. Lieber testified that he was not convinced in reviewing the July 2012 MRI that Petitioner had a bucket handle tear. RX D, p. 13. He further agreed that his findings at the Section 12 exam of positive McMurray and Steinman's testing would indicate a bucket handle tear. He disagreed that bucket handle tears

are only traumatic in nature. RX D, p. 15. However, if they are traumatically induced, the involved mechanism would be twisting injury to the knee. RX D, pp 16-17.

CONCLUSIONS OF LAW

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

The following conclusions of law apply to all five of Petitioner's consolidated matters. However, a separate Decision is rendered in each case under separate cover and individual case number.

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

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Based upon a preponderance of the credible evidence at trial, the Arbitrator finds that Petitioner sustained a work related accident while employed by Respondent Five Star Fitness on August 29, 2009. In so finding, the Arbitrator notes Petitioner's credible testimony as bolstered by that of Mr. Rizell and the Physician's Immediate Care records that he worked for Five Star at the membership desk at the time of the accident. Petitioner's unrebutted and credible testimony is that he was moving a treadmill with Brian Kelly when he awkwardly tripped on a water bottle causing him to fall into a squat while still holding the treadmill resulting in immediate popping, pain and swelling in his right knee. This history of injury to the right knee is clearly supported by the initial treatment records at Physician's Immediate Care. The Arbitrator is not persuaded to find otherwise on the issues of accident or date of accident based on any minor discrepancy regarding the date or manor of accident presented by the Physician's Immediate Care records.

The Arbitrator further finds that timely notice of the accident was given to Respondent Five Star through the immediate involvement of Respondent's supervisor Brian Kelly. Petitioner's unrebutted testimony is that Mr. Kelly witnessed the accident and took him to Physician's Immediate Care. Those records clearly indicate that the injury was treated as a work injury at Five Star listing Brian Kelly as the corporate contact. In finding proper notice, the Arbitrator places greater weight on Petitioner's testimony and the records of Physician's Immediate Care than on the testimony offered by Mr. Rizell at trial.

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

The Arbitrator finds that Petitioner's condition of right knee torn meniscus is causally related to the injury and accident on 8/29/09. Petitioner sought immediate care on 8/29/09 for which he was given crutches, medication, work restrictions and a follow up visit date. Petitioner credibly testified that no further care was authorized by Respondent. The 2 year 11 month delay in treatment to Petitioner's right knee is not lost on the Arbitrator. However, under the specific facts and testimony presented in this matter, the Arbitrator is not persuaded to find a severance of causal relationship based on the lack of treatment. Petitioner credibly testified that he was told no treatment would be forthcoming and that he continued to work for Respondent while his symptoms subsided to a point where he could perform his daily activities. The Arbitrator notes Dr. Rhode's opinion that Petitioner's meniscal tear was reduced vs. displaced and that as such it was feasible Petitioner could perform his daily activities and live with the denial of treatment for a period. The Arbitrator further notes that once Petitioner educated himself on his rights as an injured worker, he pursued medical care for his knee injury in a timely manner first with Dr. Hoffman and then Dr. Rhode, despite not having insurance coverage. Based on the

record in its entirety, the Arbitrator finds Petitioner's right knee condition is causally related to the accident of August 29, 2009.

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

Based on the Arbitrator's findings on the issues of accident, notice and causal connection, the Arbitrator further finds that Respondent Five Star shall pay Petitioner's reasonable, necessary and causally related medical expenses incurred in the care and treatment of his right knee condition pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid, if any.

K. What temporary benefits are in dispute? TTD

The Petitioner testified and medical records reveal that Dr. Rhode kept the Petitioner off of work from March 26, 2014 to August 13, 2014. Petitioner's employment with his then current employer was terminated on June 1, 2014 during the period of time of instability in Petitioner's condition pending surgery. Petitioner testified and the medical records also reveal that from August 14, 2014 to February 25, 2015 the Petitioner was on modified duty restrictions. Petitioner was released full duty on February 25, 2015. The Arbitrator finds that the Petitioner is entitled to TTD benefits from March 26, 2014 to February 25, 2015, a period of 48-1/7 weeks to be paid by Respondent Five Star Fitness.

L. What is the nature and extent of injury?

Pursuant to 820 ILCS 305/8.1(b) the Arbitrator utilized the following factors in considering the Petitioner's nature and extent of the injury in this case:

1. The reported level of impairment pursuant to an AMA assessment.

The Arbitrator notes that there has been no AMA assessment performed in this case by either party. Therefore, the Arbitrator does not have any facts to consider as it relates to an AMA assessment and no weight is given to this factor.

2. The occupation of the injured employee.

The Arbitrator notes that the Petitioner at the time of the accident was a membership/sales coordinator. The Arbitrator notes that after being injured the Petitioner maintained this job and thereafter worked other jobs including a similar job at The Clubs at River City. The Arbitrator notes that the Petitioner testified his job to be a sit down job. The Arbitrator notes that the Petitioner's current restrictions would allow him to return back to this job or a similar job. Great weight is given to this factor.

3. The age of the employee at the time of the injury was 29 years old.

The Arbitrator notes that Petitioner was young on the date of injury and that no evidence in the record indicates that his age is a factor to be given great weight.

4. The employee's future earning capacity.

The Arbitrator notes that Dr. Rhode released the Petitioner with permanent duty restrictions. However, the Arbitrator also notes that Petitioner works currently as a tree cutter which is strenuous work. The Arbitrator finds no evidence of impaired future earnings capacity and given this factor little weight.

5. The evidence of disability corroborated with the treating physicians' medical records.

The Arbitrator notes that when the Petitioner last saw Dr. Rhode on January 28, 2015 Dr. Rhode did document that the Petitioner continued to experience lateral knee pain. The physical examination revealed lateral joint line tenderness and pain with patella femoral compression. Dr. Rhode at that time did provide the Petitioner with permanent work restrictions with medium heavy work and opined that the Petitioner could perform occasional ladders, squatting, kneeling, crawling, bending and stooping. Petitioner testified that he currently works as a tree cutter, a physically demanding job. At Petitioner's last visit with Dr. Rhode's office of February 26, 2015 Dr. Rhode's physicians' assistant once again noted that the Petitioner continued to experience lateral knee pain and the Petitioner will require future oral medications. Petitioner testified that he continued to experience pain with his right knee and specifically that he had difficulty when standing for a long period of time. Based on the foregoing, the Arbitrator finds that Petitioner sustained 15% loss of use of his right leg pursuant to Section 8(e) of the Act.

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The following conclusions of the Arbitrator apply to all four of Petitioner's matters against Respondent The Clubs at River City.

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

Based on the Arbitrator's decision in consolidated matter 12 WC 25504 finding accident on 8/29/09 as well as on the record in its entirety, the Arbitrator further finds that Petitioner did not sustain accidental injuries on September 13, 2013, January 31, 2014, February 27, 2014 or March 5, 2014 while working for Respondent The Clubs at River City. The Arbitrator specifically finds that Petitioner's current condition of ill-being is solely causally related to his accident on 8/29/09. In making these findings in the cases related to Respondent The Clubs, the Arbitrator further notes that well in advance of working for The Clubs in 2013, Petitioner sought treatment for his right knee in July 2012 from Dr. Rhode and obtained a surgical recommendation at that time. That surgical recommendation never changed during his period of employment with The Clubs. The objective test and exam results did not change. The record is devoid of any persuasive evidence to show that Petitioner's ultimate surgery while working for The Clubs was performed on an accelerated basis due to any of his alleged incidents with The Clubs. Accordingly, the Arbitrator finds that Petitioner's alleged incidents while working for The Clubs caused only minor or temporary exacerbations of Petitioner's long standing preexisting right knee condition insufficient to result in a finding of new accidental injury or sufficient aggravation of the preexisting injury.

Based on the foregoing findings on the issues of accident and causal connection in cases 14 WC 9863; 14 WC 10068; 14 WC 10019; 14 WC 9895, all remaining issues in each of these cases is rendered moot and no further findings are made. No benefits are awarded Petitioner in these matters.

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 DALLEFELD,

Petitioner,

vs.

NO: 14 WC 10068
14 WC 09863
14 WC 09895
14 WC 10019
12 WC 25504 (cons.)

CLUBS AT RIVER CITY, INC.,

Respondent.

18IWCC0645

DECISION AND OPINION ON REVIEW

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

Initially, the Commission observes there is a typographical error in the Decision. Five Star Fitness' witness is identified throughout the Decision as "Robert Rizell"; we correct the decision to reflect the individual's name is Robert Reszel, Jr.

12 WC 25504 – Jason Dallefeld v. Five Star Fitness

The Commission affirms the Arbitrator's analysis with respect to accident and notice. The Commission emphasizes the Physicians Immediate Care records document Petitioner's report of a right knee injury while moving exercise equipment as well as objective findings consistent with acute trauma, and are replete with references to this being a work-related injury: repeated notations of "WC Five Star Fitness" and "W/C New"; Five Star Fitness is listed as the Guarantor; on the

Work Form, Five Star Fitness is listed as the Employer and Brian Kelly is listed as the contact under "WC Notes"; and on the Return to Work Form, Dr. Metrou identified Brian Kelly as the contact and in the space for "Co. Contacted" the doctor initialed she had done so. We do not find Mr. Reszel's testimony on this issue persuasive. Mr. Reszel testified he was not made aware of Petitioner's work injury until 10 to 14 days prior to the March 16, 2017 hearing, this despite the fact Petitioner's Application for Adjustment of Claim was filed five years prior, in 2012. Given this lack of awareness, Mr. Reszel's assertion that he knew the accident was not reported to Herb or George because the three owners converse regularly and a work injury was never mentioned is not credible. The Commission affirms and adopts the Arbitrator's findings regarding accident and notice.

In finding Petitioner's current right knee condition is causally related to the August 29, 2009 work injury, the Arbitrator acknowledged the 2 year, 11 month gap in treatment was troublesome but ultimately found it did not defeat Petitioner's claim given the totality of the circumstances. The Commission views the evidence differently.

On August 29, 2009, Petitioner presented to Physicians Immediate Care where he was evaluated by Dr. Metrou. Dr. Metrou's physical examination findings included effusion, very significant antalgic gait, increased warmth to touch, diffuse tenderness over anterior knee and laterally along the lateral collateral ligament, and decreased range of motion. Diagnosing a right knee strain, Dr. Metrou dispensed crutches and a knee support, prescribed an anti-inflammatory, and restricted Petitioner to sit-down work only until a re-evaluation in three days. PX12. Petitioner testified Dr. Metrou advised he needed an MRI (T. 59), but the Commission notes there is no mention of an MRI nor an order for such in the record. Petitioner further testified he did not attend the scheduled follow-up appointment because he was told not to. T. 58.

Petitioner remained employed at Five Star for a few months following the incident. T. 26. Petitioner testified for the first few weeks he worked at the desk, but he thereafter resumed his regular duties. T. 59-60. He stated there were no job duties he was unable to perform. T. 60. Petitioner testified his knee improved to the point he was living with it, although some symptoms persisted. T. 27-28. He explained, within a few weeks of the accident, he stopped using the crutches and started working out again. T. 90. Germane to the issues here, Petitioner described a strenuous lower body regimen: "I did a lot of hamstring movements, cable, pin loading machines first of all to get the strength back in my knee. The stronger my hamstrings were, the better my knee felt. I would work on that quite a bit. I was able to do light squats at some point later on." T. 62-63. Petitioner continued this routine through the end of his employment with Five Star. T. 62. When Petitioner thereafter commenced employment with The Clubs at River City, one of his job requirements was to perform a physical workout at the facility at least once a week. Petitioner confirmed he fulfilled that requirement. T. 73.

The pertinent diagnostic imaging is the July 18, 2012 MRI. The radiologist's impression is bucket-handle tear of the lateral meniscus, thickened medial plica, small knee joint effusion, and popliteal cyst. PX11. In his July 25, 2012 office note, Dr. Rhode described this is a significant lateral meniscus tear (PX14), and during his deposition, labeled it an obvious tear. PX17, p. 7.

With these facts in mind, we turn to the conflicting causation opinions provided by Dr. Rhode and Dr. Lieber. Dr. Rhode opined Petitioner's knee condition is causally related to the August 2009 incident:

> Based upon the patient's stated mechanism of injury, specifically that he was - - he was moving a piece of heavy equipment, which specifically was a treadmill, stepped on a water bottle and twisted and fell into a deep squatting position with subsequent lateral knee pain, based upon the fact that the patient clinically demonstrated lateral joint line pain with a positive lateral McMurray with an MRI that demonstrated an obvious lateral meniscus tear, I believe that the described mechanism was causative to the patient's symptomatology. The patient did not relate an intervening accident that may have been a causative factor to his pathology. PX17, p. 9.

In addressing the gap in treatment, Dr. Rhode stated nondisplaced tears can be tolerated: "...a reduced meniscus be it bucket handle or be it horizontal cleavage or any other tear pattern as long as it's reduced people can live with them. They'll have symptoms, but they're not debilitating especially on the lateral side. Only when the meniscus displaces does it cause significant symptomatology." PX17, p. 10.

Dr. Lieber reached the contrary conclusion. Dr. Lieber, who reviewed the July 20, 2012 MRI as well as records from Dr. Hoffman, Dr. Rhode, and Physicians Immediate Care, opined there was no direct relationship between the August 2009 event and Petitioner's condition of ill-being. RXC, p. 9. Dr. Lieber explained the basis of his opinion was the severity of the tear coupled with the absence of documented ongoing pain complaints:

> I felt that the mechanism of injury as explained to me by the petitioner was not significant enough to cause a bucket-handle tear of the medial [*sic*] meniscus. I felt that the lack of medical care for a period of three years, almost three years, was significant in that if there had been a significant meniscal tear as indicated in the MRI, the petitioner would have been unable to carry on activities of daily living or any normal functions without significant pain and would have required and sought treatment prior to three years. RXC, p. 9-10.

While Dr. Lieber acknowledged pain is subjective, he rejected the notion a high pain tolerance would explain the failure to seek treatment given the expected functional deficits such an injury engenders: "If he had a bucket-handle tear of his lateral meniscus, in my opinion, there is no way he would not have sought medical treatment for three years. His knee would not - - he would have had lack of motion. He would have had swelling. He would have had significant functional disabilities associated with that abnormality, and he would not - - they would not have waited three years to seek treatment...." RXC, p. 16.

The Commission finds the nearly three-year gap in treatment is incompatible with Petitioner having sustained a meniscal tear during the August 2009 accident. We emphasize

Petitioner did not simply return to performing activities of daily living. Rather, within a few weeks of his injury, Petitioner resumed working out and his usual routine involved rigorous lower body exercises. Petitioner was able to perform such exercises for several years, up to and including during his employment at Clubs at River City. The Commission finds Petitioner's level of function following the August 29, 2009 injury is not consistent with the accident having caused a cartilage injury which the physicians alternately described as "significant," "obvious," and "large." The Commission finds Dr. Lieber's opinion is most consistent with the evidence on this issue. The Commission finds Petitioner sustained a right knee strain as a result of his August 29, 2009 accident. Given Petitioner's testimony he resumed his full duties within a few weeks of his accident, we find Petitioner reached maximum medical improvement as of September 15, 2009.

Our causation finding necessarily implicates the award of benefits. As to medical expenses, we find the treatment rendered at Physicians Immediate Care on August 29, 2009 was reasonable, necessary, and related to the work accident. Respondent Five Star Fitness is ordered to pay those expenses pursuant to Section 8(a).

Regarding permanent disability, as the accidental injury at issue occurred prior to September 1, 2011, Section 8.1b is inapplicable. Consistent with our conclusion Petitioner sustained a knee strain and shortly thereafter resumed his usual activities, the Commission finds Petitioner sustained the 5% loss of use of the right leg under Section 8(e)12.

14 WC 9863; 14 WC 9895; 14 WC 10019; 14 WC 10068 – Jason Dallefeld v. Clubs at River City, Inc.

The Commission affirms the Arbitrator's denial of accident and causation. In addition to the salient facts detailed by the Arbitrator, we highlight Dr. Verma reviewed the MRI films from both the 2012 and 2014 scans, and Dr. Verma persuasively testified there was no interval change. RXD, p. 12, 27. We note the Arbitrator's Decision states, "The Arbitrator specifically finds that Petitioner's current condition of ill-being is solely causally related to his accident on 8/29/09." Based on our causation determination in consolidated matter 12 WC 25504, the Commission strikes that language.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on May 8, 2017, as modified above, is affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of temporary total disability benefits is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent Five Star Fitness pay to Petitioner the sum of $420.65 per week for a period of 10.75 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused 5% loss of use of the right leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent Five Star Fitness

pay the reasonable and necessary medical expenses incurred by Petitioner on August 29, 2009, pursuant to §8(a) and §8.2 of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $6,000.00. 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 9 2018

L. Elizabeth Coppoletti

Charles J. DeVriendt

Joshua D. Luskin

LEC/mck

O: 8/29/18

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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DALLEFELD, JASON
Employee/Petitioner

Case# **14WC010068**

14WC010019
14WC009863
14WC009895
12WC025504

CLUBS AT RIVER CITY INC
Employer/Respondent

18IWCC0645

On 5/8/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.97% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1824 STRONG LAW OFFICES
HANIA SOHAIL
3100 N KNOXVILLE AVE
PEORIA, IL 61603

0507 RUSIN & MACIOROWSKI LTD
THOMAS P CROWLEY
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF Will)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Jason Dallefeld
Employee/Petitioner

v.

Clubs at River City, Inc.
Employer/Respondent

Case #14 WC 10068

Consolidated cases: **14 WC 10019; 14 WC 9863; 14 WC 9895; 12 WC 25504**

18IWCC0645

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Doherty**, Arbitrator of the Commission, in the city of **New Lenox, IL** , on **March 16, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **September 13, 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.

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

In the year preceding the injury, Petitioner earned **$38,118.60**; the average weekly wage was **$733.05**.

On the date of accident, Petitioner was **34** years of age, *single* with dependent children.

No further findings made. SEE DECISION

ORDER

Because the Petitioner did not sustain an accident that arose out of and in the course of his employment, benefits are denied.

Because the Petitioner's current condition of ill-being is not causally related to the accident, benefits are denied.

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

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

Carolyn M. Wheeler

Signature of Arbitrator

5/5/17

Date

MAY 8 - 2017

ICArbDec p. 2

FINDINGS OF FACT

Petitioner presented five consolidated matters at trial. 12 WC 25504 was filed against the Respondent Five Star Fitness alleging an accident date of 8/29/09. ARB Ex 1. 14 WC 10068 was filed against Respondent The Clubs at River City alleging an accident date of 9/13/13. ARB Ex 2. 14 WC 10019 was filed against Respondent The Clubs at River City alleging an accident date of 1/31/14. ARB Ex 3. 14 WC 9863 was filed against Respondent The Clubs at River City alleging an accident date of 2/17/14. ARB Ex 4. 14 WC 9895 was filed against Respondent The Clubs at River City alleging an accident date of 3/5/14. ARB Ex 5. Respondents Five Star and The Clubs were represented at trial by separate counsel.

Petitioner testified that he was 29 years old when he began working for Five Star in July 2009 as a fitness consultant. Petitioner testified that Five Star was owned by three men – Herb, Bob and George. Petitioner's duties included selling gym memberships. Brian Kelly was his manager at the time. Petitioner sold memberships working from a desk. Petitioner alleges that on 8/29/09 there was renovation occurring at the club. Petitioner testified that he was moving a treadmill with Brian when while awkwardly lifting a treadmill he slipped on a water bottle and fell into a deep squat position while still holding the treadmill. He felt a pop in his right knee while still in the squat position. Petitioner testified that he heard a popping sound in his right knee which immediately swelled. Petitioner testified that he had pain down his calf and needed help to walk. Petitioner testified that he sat at his desk rest of day.

Petitioner testified that the next day Brian picked him up from home and they went to work. Brian then took Petitioner to Physicians Immediate Care where an MRI was recommended. Petitioner testified that he returned to work trying to keep weight off his leg using crutches. Petitioner testified that he continued to work at Five Star with crutches and that Brian said he would have to get permission for the MRI. Petitioner testified that no treatment was ever approved, including the follow up appointment and the MRI, and that he did not ask again for treatment after having been denied.

The Physicians Immediate Care records are dated 8/29/09, which is the same day of the alleged accident. PX 11. The records indicate a chief complaint of right knee pain. The records list Five Star Fitness as the guarantor and are also listed under the "insurance" section of the paperwork. The status is also referred to on the paper work as "W/C new." Brian Kelly's name is listed as the employer contact on the Return to Work Form on 8/29/09. A note on the bottom of the 8/29/09 doctor's notes reads "This case would be considered OSHA recordable unless deemed not to be compensable under workers compensation." The recorded history reads, "Jason is an employee of Five Star Fitness. At the time of the injury which started yesterday 8/28/09, he was squatting, lifting and moving equipment. He felt soreness in his right knee, mostly anteriorly. He said he tried to walk it off and he was limping on it, but it was not until today, on 8/29/09, when he stepped over an object, came down hard on his right knee, he developed a sharp burning pain along the lateral aspect of the knee. He has not been able to put full weight on it since. The pain was so severe it brought him to tears. He rates his pain at a constant 10/10 which is sharp in quality." PX 12.

Upon physical exam of the right knee, the doctor noted abnormal results including "... knee effusion. He is walking with a very significant antalgic gait, barely putting weight on that right leg. He has increased warmth to touch. There is no redness, abrasions or bruises. There is diffuse tenderness over the anterior knee and laterally along the lateral collateral ligament. He is able to extend to -10 degrees and flex to 90 degrees. There is also tenderness and swelling of the quadriceps muscle, particularly to the vastus medialis. There is no tenderness posteriorly." X-rays were normal. Following the exam, Petitioner was diagnosed with a right knee strain. He

was told to ice and elevate the knee, use crutches and a hinged patellar knee brace along with Naproxen. Petitioner was given work restrictions of "sit down work only until recheck" which was scheduled for 9/1/09. PX 12. No MRI order is present in these records.

Petitioner testified that he continued to work at Five Star and his knee slowly improved to the point where he was living with the improved but continued pain. He testified that he was not active but could function with minimal pain when standing. Petitioner testified that he left Five Star a few months after the accident.

On cross-exam, Petitioner testified that the initial medical records reflect accurate accident histories but disagreed with the records to the extent they reflect no MRI order. He further testified that he reported his injury to Brian Kelly as the "HR" person and that Brian told him no treatment would be available. Petitioner did not contract the owners directly about his accident or condition. Petitioner was not given an accident form to complete by Mr. Kelly. Petitioner further testified that he had no further treatment to his knee in 2009 and that he was told not to attend the follow up visit at Physician's Immediate Care.

Petitioner testified that he continued to work his desk duties through February 2010 and that he did notice improvement in his knee. He further agreed that he could still work out between August 2009 and February 2010 after his knee improved but only worked on ham string strength and light squats along with low impact cardio. He testified that elliptical use was fine in that he was gliding his legs back and forth without impact. Petitioner did not have health insurance while working at Five Star.

Respondent Five Star called Robert Rizell to testify in his capacity as one of the owners of Five Star. He testified that he hired Petitioner as a sales consultant in 2009 and that Brian Kelly was a manager at Five Star at the time. Mr. Kelly no longer works for Five Star. Mr. Rizell testified that Petitioner never reported an injury to him. He testified that Mr. Kelly never reported an injury to Petitioner at any time. Mr. Rizell testified that Petitioner continued to work for Five Star through February 2010 full duty and then just didn't show up one day for work. Mr. Rizell also testified that he never saw a report of injury at any time concerning Petitioner.

On cross-exam, Mr. Rizell testified that he co-owned Five Star with George Barr and Herb Landey and that Brian Kelly managed all employees at Five Star and reported directly to the witness and to Mr. Herb Landey. Mr. Rizell testified that he went to Five Star every day for a few hours in 2009. George never went and Herb Landey went occasionally. Mr. Rizell testified that he had a lot of interaction with Petitioner during his employment tenure at Five Star and that Petitioner never made any complaints of pain.

Mr. Rizell testified that injuries at Five Star are to be reported to the manager followed by completed paper work which was to be turned over by the manager. He has no personal knowledge if Petitioner completed an accident report but has never seen or heard of one for Petitioner. Mr. Rizell testified that his first knowledge of Petitioner's claimed accident was 10 days prior to trial. When he was notified he asked George and Herb if they ever heard of the alleged accident or injury to Petitioner they responded that they had not. Mr. Rizell testified that an accident or injury to Petitioner was never discussed over the ensuing years by the three owners as they had no knowledge. Finally, he testified that he did not personally look for a resignation given to Five Star by Petitioner.

After leaving Five Star Petitioner worked next at SC2 as a safety coordinator. He ordered supplies and performed safety investigations and write ups to present to management. He testified this was a desk job which he worked 40 hours per week at $11 per hour. Petitioner testified that he worked at this job through some time in 2013 and had health insurance for one year toward the end of 2013.

On cross-exam by Respondent Five Star, Petitioner testified that while working at SC2 as a safety coordinator, he gained knowledge of the accident reporting process for work related accidents. He also gave presentations on how to decrease the number of work place accidents.

While working for SC2 in 2012, Petitioner obtained an attorney and in 2012 filed his claim against Five Star. On cross-exam, Petitioner testified that because of his position at SC2, he discovered that he could proceed against Five Star for his knee related injury in 2009. At that point, Petitioner filed his claim against Five Star and sought medical care for his knee.

On re-direct, Petitioner testified that his knee improve enough after the 2009 accident such that he was able to return to daily activities but that his knee never returned to 100%. Petitioner testified that he simply lived with the knee problems until July 2012 when he realized he could pursue a workers' compensation claim against Five Star and sought medical care from Dr. Hoffman. Petitioner testified that he sought no treatment between 2009 and 2012 because he could not pay for it.

Petitioner testified that although he did not have health insurance in 2012 he saw Dr. Hoffman, a primary care doctor, on July 18, 2012. PX 13. At that visit, Dr. Hoffman noted, "This 32 year old male was employed by Five Star Fitness in Joliet as a Fitness Consultant. While at work on 8/29/09, he was moving a treadmill, tripped on a water jug landing on his right knee. The patient had x-rays taken at that time, however, he did not have an MRI. Since the injury he has had intermittent pain and swelling in the right knee." Exam of the right knee revealed "...pain with flexion to 90 degrees. Full extension. Stability normal. No spasm or atrophy." The diagnosis was "probable torn cartilage" and an MRI was ordered. PX 13. The MRI was done on July 19, 2012 and indicated a bucket handle tear of the lateral meniscus with thickened medial plica, small knee joint effusion and popliteal cyst. All other meniscus, ligament and tendon findings were normal. Dr Hoffman diagnosed Petitioner on 7/23/12 with "torn lateral cartilage" and made an "orthopedic referral." PX 13.

On July 25, 2012, Petitioner saw Dr. Rhode on the referral of Dr. Hoffman. Petitioner was solely working at SC2 at this time and did not have health insurance. Dr. Rhode's records indicate a consistent history of accident "2 years and 11 months" earlier while Petitioner was moving a treadmill, stepped on a water bottle and fell into a squatting position developing a sudden onset of lateral knee pain. Dr. Rhode then writes, "He states that he went to get evaluated for his work relate injury. He states that his employer never submitted his injury form to workers' compensation. He has continued to deal with his symptomatology of lateral joint line pain with locking and catching. He states that her recently realized his workers' compensation right and , therefore, has sought to gain access to medial treatment for which he has been denied over the last 2 years 11 months by his employer due to the fact that his employer never submitted his work injury to the insurance carrier. When asked why he has taken so long to seek treatment, Jason states that he did not realize his rights until recently."

At the July 25, 2012 exam, Dr. Hoffman noted a positive McMurray along the lateral joint line. He reviewed the MRI and noted "evidence of a lateral meniscus tear." Dr. Rhode noted, "Secondary to the fact that the patient has been living with this significant lateral meniscus tear for 2 years 11 months, I recommend proceeding with surgical intervention." He allowed Petitioner to continue to work full duty until surgery. Dr. Rhode continued to make the same surgical recommendation at the visits which occurred every 2 to 3 weeks in 2012 through 2014.

Petitioner attended a Section 12 exam with Dr. Lieber on January 28, 2013. Dr. Lieber testified that Petitioner reported moving the treadmill, kicking a small water bottle and falling into a full squat with immediate pain in his right knee. He reviewed the MRI of July 2012, and the records from Physician's Immediate Care, Dr. Hoffman, and Dr. Rhode. He noted that the MRI showed a bucket handle tear of the lateral meniscus and that

Drs. Hoffman and Rhode confirmed the need for surgery for the lateral meniscal tear. He also noted the Physician's Immediate records noting a work injury of August 28, 2009 and August 29, 2009 as noted above. Following an exam Dr. Lieber agreed there was internal knee derangement and a possible meniscal tear. However, he testified there was no direct relationship between the alleged accident and the condition stating, " I felt that the mechanism of injury as explained to me by Petitioner was not significant enough to cause a buckle-handle tear of the medial meniscus. I felt that the lack of medical care for a period of three years, ... was significant in that if there had been a significant meniscal tear as indicated in the MRI the Petitioner would have been unable to carry on activities of daily living or any normal functions without significant pain and would have required and sought treatment prior to three years." He placed Petitioner at MMI. RX C, p. 9-10.

On cross, Dr. Lieber testified that if Petitioner were holding the treadmill and fell into a squat position, such an incident is not a sufficient mechanism of injury to cause a bucket handle tear of the lateral meniscus. He opined that such a tear would be associated with a high contact, twisting injury with forces much greater than squatting and holding up the end of the treadmill. RX C, p. 14. He agreed with surgical repair. P . 15. He further testified that even in a person with a high pain tolerance, a person with a bucket handle tear of the lateral meniscus would have sought medical attention within the three years following the accident. P. 16.

On October 23, 2013, Dr. Rhode gave his deposition. In it, he again reiterated his diagnosis of lateral meniscal tear which he opined was causally related to Petitioner's treadmill lifting in 2009. He disagreed with Dr. Lieber's opinion that Petitioner would have sought medical treatment sooner if he sustained a meniscal tear in that the symptoms would have been acute. Dr. Rhode testified, "I disagree with Dr. Leiber that a bucket handle tear would have resulted in consistent and persistent significant symptomatology, and my specific point was that a reduced meniscus be it bucket handle or be it horizontal cleavage or any other tear pattern as long as it's reduced people can live with them. They'll have symptoms but they're not debilitating especially on the lateral side. Only when the meniscus displaces does it cause significant symptomatology." PX 17, p. 9-11. Dr. Rhode further testified that the MRI revealed a large tear but the meniscus was not displaced. He testified that Dr. Lieber did not discuss symptom likelihood in the context of a reduced vs. displaced meniscus. PX 17, p. 12. Lastly, Dr. Rhode reiterated his record notes citing that Petitioner did not seek medical care between 2010 and 2012 because he did not have health insurance and did not understand his rights as an injured worker. PX 17, p. 18-19.

While working at SC2 in 2013 Petitioner also worked part time for Respondent The Clubs at River City. Petitioner was already under the care of treating physicians for his right knee while still working for SC2 and while working part time for The Clubs in 2012-2013. Eventually he left SC2 in 2013 and began working full time for The Clubs at River City. Petitioner alleges in case 14 WC 10068 that while working solely for The Clubs he sustained an accident on 9/13/13. Petitioner testified that while walking to the back end of the club near the pool while wearing dress shoes he slipped on a wet mat in the locker room and fell down onto his right knee. He immediately felt pain in his right knee and reported his accident to "Lizzy" his manager. This time, Petitioner completed accident reports listing an accident date of 9/13/13. PX 6.

Petitioner testified to three more accidents which are the subject of the three remaining cases. On 1/31/14, Petitioner hopped over the front desk wall landing on his right leg. The impact caused pain in his right knee so he completed another accident report. PX 7. Petitioner alleges that on 2/27/14 he was moving a box of paper turned the corner and his right knee twisted and popped causing another pain flare up and worsening his limp. PX 8. Lastly, Petitioner alleges that on 3/5/14 he was carrying boxes down some stairs when he could not see the last step. He testified that he over stepped with too much weight on his right knee and fell on his right knee. PX 9. Petitioner testified that he worked full duty for each of his employers from 2009 through 2014.

On cross-exam by The Clubs, Petitioner testified that his job at The Clubs was a desk job in membership sales. He was also required to give tours of the facility. He received a free club membership as part of his job description. He testified that after the 9/13/13 accident at The Clubs he continued to exercise performing seated work outs of the upper body and lower body leg extensions and curls on a machine.

Petitioner further testified that he began seeing Dr. Rhode in July 2012 and saw him every two to three weeks through the date of his September 2013 accident. Petitioner continued to work full duty during his treatment. Petitioner further testified that Dr. Rhode allowed him to work full duty and continue his work-outs after the first 3 alleged accidents at The Clubs. Petitioner further testified that he first asked The Clubs for medical treatment after the March 5, 2014 accident. He further admitted that the January 31, 2014 alleged accident while jumping over the front desk was not an accident in that such activity was not part of his job duties.

Petitioner testified that he continued to see Dr. Rhode who continued to recommend the same surgery to his knee as was recommended in 2012 prior to Petitioner working part time or full time with The Clubs. Petitioner further testified that Dr. Rhode's surgical recommendation remained the same after each alleged accident at The Clubs. Petitioner testified that the March 2014 accident exacerbated his right knee condition to the point where his need for surgery was accelerated.

Dr. Rhode took Petitioner off work on March 26, 2014. Petitioner testified that he asked for light duty restrictions pending his surgery and that he gave those restrictions to Respondent. Petitioner testified that Respondent would not accommodate the light duty prior to Petitioner having the surgery. Petitioner then testified that his employment was terminated on June 1, 2014.

Petitioner underwent the right knee surgery on June 17, 2014 with Dr. Rhode. He was given a modified duty release in August 2014 but had already been let go by Respondent prior to his surgery.

Respondent The Clubs called Lisbeth Robinson to testify in her capacity as Vice President of Operations and Accounting at The Clubs for the previous 8 years. As such, she oversaw HR and payroll. Ms. Robinson was Petitioner's supervisor in 2013. She further testified that she was made aware of each of Petitioner's claimed accidents at The Clubs and that a form 45 was completed for each of the accidents. However, she testified that she never received any completed accident reports from Petitioner and does not know what happened to those reports or who prepared the form 45s. She further testified that she received notice of these accidents from Petitioner's attorney.

Ms. Robinson further testified that she was made aware that Petitioner was under treatment for his right knee prior to his first accident at The Clubs in September 2013. She further testified that Petitioner did not request medical attention for his right knee from The Clubs at any time after any accident. Rather, Petitioner continued to work after all four accidents and was only taken off work for the surgery in March 2014. She testified that Petitioner gave her an off work slip from Dr. Rhode on March 26, 2014. Lastly, she testified that Petitioner had group health insurance at the time of his alleged accidents in 2013 and 2014 while working at The Clubs.

On cross-exam, Ms. Robinson testified that Petitioner's employment with The Clubs was terminated on June 1, 2014. She testified that his employment was terminated because his position needed to be filled. She testified that Petitioner was still off work at the time and that she did not receive any request for modified duty at any time from Petitioner prior to his termination.

Petitioner testified that he has not sought any care for his right knee since his full duty release in February 2015. Petitioner found employment with a tree service company where he continues to work cutting down trees. He

testified that his pain has improved but that he has a limp in his right leg. Petitioner no longer runs, plays softball or rides a bike. He can no longer perform a normal work out. He testified that his biggest problems arise when he stands for a period of time.

Petitioner attended a Section 12 exam with Dr. Verma on December 18, 2014 at the request of Respondent The Clubs. The exam was after Petitioner's right knee surgery. Dr. Verma gave his deposition on 9/21/16. RX 1. Petitioner reported a consistent history of accident slipping while holding the treadmill in 2009. Petitioner advised that he was told by his supervisor that he should wait to see if his knee improved and that no care was authorized. Petitioner did not seek care until 2012 with an MRI and surgical recommendation. Dr. Verma noted Petitioner's subsequent employment with The Clubs and his slip by the pool in September 2013 along with the other claimed incidents. He reviewed the records of Dr. Hoffman and Dr. Rhode from 2012-2014. He reviewed the MRI from July 19 2012 and from March 21, 2014 prior to surgery. He agreed the July 2012 MRI showed a bucket handle tear of a lateral meniscus. The MRI of 2014 was unchanged. Dr. Verma examined Petitioner and diagnosed status post partial lateral meniscectomy with mild subjective discomfort.

Dr. Verma opined that Petitioner's condition was not related to any of his accidents claimed while he worked for The Clubs based on the fact that his condition was "clearly preexisting based on the objective findings on an MRI scan. I did not find any change in the objective findings on the MRI scan between 2012 and 2014. And the symptoms that the patient was describing during work activities during that time are consistent with the normal symptoms associated with his underlying prexisting knee condition." RX 1. P. 12. Dr. Verma testified that he was referencing Petitioner's job activities with The Clubs only. RX 1, p. 14. He opined that Petitioner's existing symptomatic knee condition was consistent with the diagnosis received prior to his employment with The Clubs in 2013 and Dr. Verma opined that those symptoms "would come about" with any type of activity whether work related or not. RX 1, p. 15.

Dr. Verma further agreed that the bucket handle tear diagnosed by Dr. Rhode in 2012 was traumatic in nature as they are consistent with traumatic events. RX 1, p. 19. However, Dr. Verma testified that he does not know what caused the bucket handle tear. RX 1, p. 25.

Dr. Lieber testified again via deposition on 10/19/16. RX D. He testified using the same Section 12 exam from 1/28/13. RX D, p. 7. He testified that Petitioner had no treatment to the knee between the 2009 Physician's Immediate care visit and the 2012 treatment with Dr. Hoffman. RX D, p. 7. Upon exam, Petitioner demonstrated positive McMurray and Steinman's test and tenderness upon extremes of motion, tenderness at the medial and lateral joint lines and bout the patellofemoral joint. RX D, p. 8. Dr. Lieber testified that the MRI of July 20, 2012 indicated a bucket handle tear of the lateral meniscus as read by the radiologist. He opined that Petitioner's right knee condition was not related to the event of August 2009 at Five Star fitness stating that if Petitioner had sustained a bucket handle tear at that time he would have been "quite symptomatic" in the following three years and would have sought treatment. RX D, p. 10. He also felt the mechanism of injury wasn't significant enough to cause a bucket handle tear of the lateral meniscus, which is a full tear of the mensical tissue and is associated with significant functional impairment. RX D, p. 11.

In his addendum report authored 2/12/13, Dr. Lieber opined that Petitioner was at MMI for the alleged 2009 work accident and that he needed no further treatment. Acknowledging his prior deposition, Dr. Lieber stated that he was not given any subsequent information to review and that his opinions had not changed.

On cross, Dr. Lieber testified that he was not convinced in reviewing the July 2012 MRI that Petitioner had a bucket handle tear. RX D, p. 13. He further agreed that his findings at the Section 12 exam of positive McMurray and Steinman's testing would indicate a bucket handle tear. He disagreed that bucket handle tears

are only traumatic in nature. RX D, p. 15. However, if they are traumatically induced, the involved mechanism would be twisting injury to the knee. RX D, pp 16-17.

CONCLUSIONS OF LAW

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

The following conclusions of law apply to all five of Petitioner's consolidated matters. However, a separate Decision is rendered in each case under separate cover and individual case number.

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

12 WC 25504- Jason Dallefeld v. Five Star Fitness

Based upon a preponderance of the credible evidence at trial, the Arbitrator finds that Petitioner sustained a work related accident while employed by Respondent Five Star Fitness on August 29, 2009. In so finding, the Arbitrator notes Petitioner's credible testimony as bolstered by that of Mr. Rizell and the Physician's Immediate Care records that he worked for Five Star at the membership desk at the time of the accident. Petitioner's unrebutted and credible testimony is that he was moving a treadmill with Brian Kelly when he awkwardly tripped on a water bottle causing him to fall into a squat while still holding the treadmill resulting in immediate popping, pain and swelling in his right knee. This history of injury to the right knee is clearly supported by the initial treatment records at Physician's Immediate Care. The Arbitrator is not persuaded to find otherwise on the issues of accident or date of accident based on any minor discrepancy regarding the date or manor of accident presented by the Physician's Immediate Care records.

The Arbitrator further finds that timely notice of the accident was given to Respondent Five Star through the immediate involvement of Respondent's supervisor Brian Kelly. Petitioner's unrebutted testimony is that Mr. Kelly witnessed the accident and took him to Physician's Immediate Care. Those records clearly indicate that the injury was treated as a work injury at Five Star listing Brian Kelly as the corporate contact. In finding proper notice, the Arbitrator places greater weight on Petitioner's testimony and the records of Physician's Immediate Care than on the testimony offered by Mr. Rizell at trial.

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

The Arbitrator finds that Petitioner's condition of right knee torn meniscus is causally related to the injury and accident on 8/29/09. Petitioner sought immediate care on 8/29/09 for which he was given crutches, medication, work restrictions and a follow up visit date. Petitioner credibly testified that no further care was authorized by Respondent. The 2 year 11 month delay in treatment to Petitioner's right knee is not lost on the Arbitrator. However, under the specific facts and testimony presented in this matter, the Arbitrator is not persuaded to find a severance of causal relationship based on the lack of treatment. Petitioner credibly testified that he was told no treatment would be forthcoming and that he continued to work for Respondent while his symptoms subsided to a point where he could perform his daily activities. The Arbitrator notes Dr. Rhode's opinion that Petitioner's meniscal tear was reduced vs. displaced and that as such it was feasible Petitioner could perform his daily activities and live with the denial of treatment for a period. The Arbitrator further notes that once Petitioner educated himself on his rights as an injured worker, he pursued medical care for his knee injury in a timely manner first with Dr. Hoffman and then Dr. Rhode, despite not having insurance coverage. Based on the

record in its entirety, the Arbitrator finds Petitioner's right knee condition is causally related to the accident of August 29, 2009.

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

Based on the Arbitrator's findings on the issues of accident, notice and causal connection, the Arbitrator further finds that Respondent Five Star shall pay Petitioner's reasonable, necessary and causally related medical expenses incurred in the care and treatment of his right knee condition pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid, if any.

K. What temporary benefits are in dispute? TTD

The Petitioner testified and medical records reveal that Dr. Rhode kept the Petitioner off of work from March 26, 2014 to August 13, 2014. Petitioner's employment with his then current employer was terminated on June 1, 2014 during the period of time of instability in Petitioner's condition pending surgery. Petitioner testified and the medical records also reveal that from August 14, 2014 to February 25, 2015 the Petitioner was on modified duty restrictions. Petitioner was released full duty on February 25, 2015. The Arbitrator finds that the Petitioner is entitled to TTD benefits from March 26, 2014 to February 25, 2015, a period of 48-1/7 weeks to be paid by Respondent Five Star Fitness.

L. What is the nature and extent of injury?

Pursuant to 820 ILCS 305/8.1(b) the Arbitrator utilized the following factors in considering the Petitioner's nature and extent of the injury in this case:

1. The reported level of impairment pursuant to an AMA assessment.

The Arbitrator notes that there has been no AMA assessment performed in this case by either party. Therefore, the Arbitrator does not have any facts to consider as it relates to an AMA assessment and no weight is given to this factor.

2. The occupation of the injured employee.

The Arbitrator notes that the Petitioner at the time of the accident was a membership/sales coordinator. The Arbitrator notes that after being injured the Petitioner maintained this job and thereafter worked other jobs including a similar job at The Clubs at River City. The Arbitrator notes that the Petitioner testified his job to be a sit down job. The Arbitrator notes that the Petitioner's current restrictions would allow him to return back to this job or a similar job. Great weight is given to this factor.

3. The age of the employee at the time of the injury was 29 years old.

The Arbitrator notes that Petitioner was young on the date of injury and that no evidence in the record indicates that his age is a factor to be given great weight.

4. The employee's future earning capacity.

The Arbitrator notes that Dr. Rhode released the Petitioner with permanent duty restrictions. However, the Arbitrator also notes that Petitioner works currently as a tree cutter which is strenuous work. The Arbitrator finds no evidence of impaired future earnings capacity and given this factor little weight.

5. The evidence of disability corroborated with the treating physicians' medical records.

The Arbitrator notes that when the Petitioner last saw Dr. Rhode on January 28, 2015 Dr. Rhode did document that the Petitioner continued to experience lateral knee pain. The physical examination revealed lateral joint line tenderness and pain with patella femoral compression. Dr. Rhode at that time did provide the Petitioner with permanent work restrictions with medium heavy work and opined that the Petitioner could perform occasional ladders, squatting, kneeling, crawling, bending and stooping. Petitioner testified that he currently works as a tree cutter, a physically demanding job. At Petitioner's last visit with Dr. Rhode's office of February 26, 2015 Dr. Rhode's physicians' assistant once again noted that the Petitioner continued to experience lateral knee pain and the Petitioner will require future oral medications. Petitioner testified that he continued to experience pain with his right knee and specifically that he had difficulty when standing for a long period of time. Based on the foregoing, the Arbitrator finds that Petitioner sustained 15% loss of use of his right leg pursuant to Section 8(e) of the Act.

14 WC 9863; 14 WC 10068; 14 WC 10019; 14 WC 9895 – Jason Dallefeld v. The Clubs at River City, Inc

The following conclusions of the Arbitrator apply to all four of Petitioner's matters against Respondent The Clubs at River City.

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

Based on the Arbitrator's decision in consolidated matter 12 WC 25504 finding accident on 8/29/09 as well as on the record in its entirety, the Arbitrator further finds that Petitioner did not sustain accidental injuries on September 13, 2013, January 31, 2014, February 27, 2014 or March 5, 2014 while working for Respondent The Clubs at River City. The Arbitrator specifically finds that Petitioner's current condition of ill-being is solely causally related to his accident on 8/29/09. In making these findings in the cases related to Respondent The Clubs, the Arbitrator further notes that well in advance of working for The Clubs in 2013, Petitioner sought treatment for his right knee in July 2012 from Dr. Rhode and obtained a surgical recommendation at that time. That surgical recommendation never changed during his period of employment with The Clubs. The objective test and exam results did not change. The record is devoid of any persuasive evidence to show that Petitioner's ultimate surgery while working for The Clubs was performed on an accelerated basis due to any of his alleged incidents with The Clubs. Accordingly, the Arbitrator finds that Petitioner's alleged incidents while working for The Clubs caused only minor or temporary exacerbations of Petitioner's long standing preexisting right knee condition insufficient to result in a finding of new accidental injury or sufficient aggravation of the preexisting injury.

Based on the foregoing findings on the issues of accident and causal connection in cases 14 WC 9863; 14 WC 10068; 14 WC 10019; 14 WC 9895, all remaining issues in each of these cases is rendered moot and no further findings are made. No benefits are awarded Petitioner in these matters.

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 DALLEFELD,

Petitioner,

vs.

NO: 14 WC 09895
14 WC 09863
14 WC 10019
14 WC 10068
12 WC 25504 (cons.)

CLUBS AT RIVER CITY, INC.,

Respondent.

18IWCC0646

DECISION AND OPINION ON REVIEW

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

Initially, the Commission observes there is a typographical error in the Decision. Five Star Fitness' witness is identified throughout the Decision as "Robert Rizell"; we correct the decision to reflect the individual's name is Robert Reszel, Jr.

12 WC 25504 – Jason Dallefeld v. Five Star Fitness

The Commission affirms the Arbitrator's analysis with respect to accident and notice. The Commission emphasizes the Physicians Immediate Care records document Petitioner's report of a right knee injury while moving exercise equipment as well as objective findings consistent with acute trauma, and are replete with references to this being a work-related injury: repeated notations of "WC Five Star Fitness" and "W/C New"; Five Star Fitness is listed as the Guarantor; on the

Work Form, Five Star Fitness is listed as the Employer and Brian Kelly is listed as the contact under "WC Notes"; and on the Return to Work Form, Dr. Metrou identified Brian Kelly as the contact and in the space for "Co. Contacted" the doctor initialed she had done so. We do not find Mr. Reszel's testimony on this issue persuasive. Mr. Reszel testified he was not made aware of Petitioner's work injury until 10 to 14 days prior to the March 16, 2017 hearing, this despite the fact Petitioner's Application for Adjustment of Claim was filed five years prior, in 2012. Given this lack of awareness, Mr. Reszel's assertion that he knew the accident was not reported to Herb or George because the three owners converse regularly and a work injury was never mentioned is not credible. The Commission affirms and adopts the Arbitrator's findings regarding accident and notice.

In finding Petitioner's current right knee condition is causally related to the August 29, 2009 work injury, the Arbitrator acknowledged the 2 year, 11 month gap in treatment was troublesome but ultimately found it did not defeat Petitioner's claim given the totality of the circumstances. The Commission views the evidence differently.

On August 29, 2009, Petitioner presented to Physicians Immediate Care where he was evaluated by Dr. Metrou. Dr. Metrou's physical examination findings included effusion, very significant antalgic gait, increased warmth to touch, diffuse tenderness over anterior knee and laterally along the lateral collateral ligament, and decreased range of motion. Diagnosing a right knee strain, Dr. Metrou dispensed crutches and a knee support, prescribed an anti-inflammatory, and restricted Petitioner to sit-down work only until a re-evaluation in three days. PX12. Petitioner testified Dr. Metrou advised he needed an MRI (T. 59), but the Commission notes there is no mention of an MRI nor an order for such in the record. Petitioner further testified he did not attend the scheduled follow-up appointment because he was told not to. T. 58.

Petitioner remained employed at Five Star for a few months following the incident. T. 26. Petitioner testified for the first few weeks he worked at the desk, but he thereafter resumed his regular duties. T. 59-60. He stated there were no job duties he was unable to perform. T. 60. Petitioner testified his knee improved to the point he was living with it, although some symptoms persisted. T. 27-28. He explained, within a few weeks of the accident, he stopped using the crutches and started working out again. T. 90. Germane to the issues here, Petitioner described a strenuous lower body regimen: "I did a lot of hamstring movements, cable, pin loading machines first of all to get the strength back in my knee. The stronger my hamstrings were, the better my knee felt. I would work on that quite a bit. I was able to do light squats at some point later on." T. 62-63. Petitioner continued this routine through the end of his employment with Five Star. T. 62. When Petitioner thereafter commenced employment with The Clubs at River City, one of his job requirements was to perform a physical workout at the facility at least once a week. Petitioner confirmed he fulfilled that requirement. T. 73.

The pertinent diagnostic imaging is the July 18, 2012 MRI. The radiologist's impression is bucket-handle tear of the lateral meniscus, thickened medial plica, small knee joint effusion, and popliteal cyst. PX11. In his July 25, 2012 office note, Dr. Rhode described this is a significant lateral meniscus tear (PX14), and during his deposition, labeled it an obvious tear. PX17, p. 7.

With these facts in mind, we turn to the conflicting causation opinions provided by Dr. Rhode and Dr. Lieber. Dr. Rhode opined Petitioner's knee condition is causally related to the August 2009 incident:

> Based upon the patient's stated mechanism of injury, specifically that he was - - he was moving a piece of heavy equipment, which specifically was a treadmill, stepped on a water bottle and twisted and fell into a deep squatting position with subsequent lateral knee pain, based upon the fact that the patient clinically demonstrated lateral joint line pain with a positive lateral McMurray with an MRI that demonstrated an obvious lateral meniscus tear, I believe that the described mechanism was causative to the patient's symptomatology. The patient did not relate an intervening accident that may have been a causative factor to his pathology. PX17, p. 9.

In addressing the gap in treatment, Dr. Rhode stated nondisplaced tears can be tolerated: "...a reduced meniscus be it bucket handle or be it horizontal cleavage or any other tear pattern as long as it's reduced people can live with them. They'll have symptoms, but they're not debilitating especially on the lateral side. Only when the meniscus displaces does it cause significant symptomatology." PX17, p. 10.

Dr. Lieber reached the contrary conclusion. Dr. Lieber, who reviewed the July 20, 2012 MRI as well as records from Dr. Hoffman, Dr. Rhode, and Physicians Immediate Care, opined there was no direct relationship between the August 2009 event and Petitioner's condition of ill-being. RXC, p. 9. Dr. Lieber explained the basis of his opinion was the severity of the tear coupled with the absence of documented ongoing pain complaints:

> I felt that the mechanism of injury as explained to me by the petitioner was not significant enough to cause a bucket-handle tear of the medial [*sic*] meniscus. I felt that the lack of medical care for a period of three years, almost three years, was significant in that if there had been a significant meniscal tear as indicated in the MRI, the petitioner would have been unable to carry on activities of daily living or any normal functions without significant pain and would have required and sought treatment prior to three years. RXC, p. 9-10.

While Dr. Lieber acknowledged pain is subjective, he rejected the notion a high pain tolerance would explain the failure to seek treatment given the expected functional deficits such an injury engenders: "If he had a bucket-handle tear of his lateral meniscus, in my opinion, there is no way he would not have sought medical treatment for three years. His knee would not - - he would have had lack of motion. He would have had swelling. He would have had significant functional disabilities associated with that abnormality, and he would not - - they would not have waited three years to seek treatment...." RXC, p. 16.

The Commission finds the nearly three-year gap in treatment is incompatible with Petitioner having sustained a meniscal tear during the August 2009 accident. We emphasize

Petitioner did not simply return to performing activities of daily living. Rather, within a few weeks of his injury, Petitioner resumed working out and his usual routine involved rigorous lower body exercises. Petitioner was able to perform such exercises for several years, up to and including during his employment at Clubs at River City. The Commission finds Petitioner's level of function following the August 29, 2009 injury is not consistent with the accident having caused a cartilage injury which the physicians alternately described as "significant," "obvious," and "large." The Commission finds Dr. Lieber's opinion is most consistent with the evidence on this issue. The Commission finds Petitioner sustained a right knee strain as a result of his August 29, 2009 accident. Given Petitioner's testimony he resumed his full duties within a few weeks of his accident, we find Petitioner reached maximum medical improvement as of September 15, 2009.

Our causation finding necessarily implicates the award of benefits. As to medical expenses, we find the treatment rendered at Physicians Immediate Care on August 29, 2009 was reasonable, necessary, and related to the work accident. Respondent Five Star Fitness is ordered to pay those expenses pursuant to Section 8(a).

Regarding permanent disability, as the accidental injury at issue occurred prior to September 1, 2011, Section 8.1b is inapplicable. Consistent with our conclusion Petitioner sustained a knee strain and shortly thereafter resumed his usual activities, the Commission finds Petitioner sustained the 5% loss of use of the right leg under Section 8(e)12.

14 WC 9863; 14 WC 9895; 14 WC 10019; 14 WC 10068 – Jason Dallefeld v. Clubs at River City, Inc.

The Commission affirms the Arbitrator's denial of accident and causation. In addition to the salient facts detailed by the Arbitrator, we highlight Dr. Verma reviewed the MRI films from both the 2012 and 2014 scans, and Dr. Verma persuasively testified there was no interval change. RXD, p. 12, 27. We note the Arbitrator's Decision states, "The Arbitrator specifically finds that Petitioner's current condition of ill-being is solely causally related to his accident on 8/29/09." Based on our causation determination in consolidated matter 12 WC 25504, the Commission strikes that language.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on May 8, 2017, as modified above, is affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of temporary total disability benefits is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent Five Star Fitness pay to Petitioner the sum of $420.65 per week for a period of 10.75 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused 5% loss of use of the right leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent Five Star Fitness

pay the reasonable and necessary medical expenses incurred by Petitioner on August 29, 2009, pursuant to §8(a) and §8.2 of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $6,000.00. 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 29 2018

L. Elizabeth Coppoletti

Charles J. DeVriendt

Joshua D. Luskin

LEC/mck

O: 8/29/18

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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DALLEFELD, JASON
Employee/Petitioner

Case# **14WC009895**

14WC010068
14WC010019
14WC009863
12WC025504

CLUBS AT RIVER CITY INC
Employer/Respondent

18IWCC0646

On 5/8/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.97% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1824 STRONG LAW OFFICES
HANIA SOHAIL
3100 N KNOXVILLE AVE
PEORIA, IL 61603

0507 RUSIN & MACIOROWSKI LTD
THOMAS P CROWLEY
10 S RIVERSIDE PLZ SUITE1925
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF Will)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Jason Dallefeld
Employee/Petitioner

v.

Case # 14 WC 9895

Consolidated cases: 14 WC 10068; 14 WC 10019; 14 WC 9863; 12 WC 25504

Clubs at River City, Inc.
Employer/Respondent

18IWCC0646

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Doherty**, Arbitrator of the Commission, in the city of **New Lenox, IL** , on **March 16, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **March 5, 2014**, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner *did 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 **$41,310.36**; the average weekly wage was **$794.43**.

On the date of accident, Petitioner was **34** years of age, *single* with **0** dependent children.

No further findings are made. SEE DECISION

ORDER

Because the Petitioner did not sustain an accident that arose out of and in the course of his employment, benefits are denied.

Because the Petitioner's current condition of ill-being is not causally related to the accident, benefits are denied.

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

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

Signature of Arbitrator

5/5/17
Date

ICArbDec p 2

MAY 8 - 2017

FINDINGS OF FACT

Petitioner presented five consolidated matters at trial. 12 WC 25504 was filed against the Respondent Five Star Fitness alleging an accident date of 8/29/09. ARB Ex 1. 14 WC 10068 was filed against Respondent The Clubs at River City alleging an accident date of 9/13/13. ARB Ex 2. 14 WC 10019 was filed against Respondent The Clubs at River City alleging an accident date of 1/31/14. ARB Ex 3. 14 WC 9863 was filed against Respondent The Clubs at River City alleging an accident date of 2/17/14. ARB Ex 4. 14 WC 9895 was filed against Respondent The Clubs at River City alleging an accident date of 3/5/14. ARB Ex 5. Respondents Five Star and The Clubs were represented at trial by separate counsel.

Petitioner testified that he was 29 years old when he began working for Five Star in July 2009 as a fitness consultant. Petitioner testified that Five Star was owned by three men – Herb, Bob and George. Petitioner's duties included selling gym memberships. Brian Kelly was his manager at the time. Petitioner sold memberships working from a desk. Petitioner alleges that on 8/29/09 there was renovation occurring at the club. Petitioner testified that he was moving a treadmill with Brian when while awkwardly lifting a treadmill he slipped on a water bottle and fell into a deep squat position while still holding the treadmill. He felt a pop in his right knee while still in the squat position. Petitioner testified that he heard a popping sound in his right knee which immediately swelled. Petitioner testified that he had pain down his calf and needed help to walk. Petitioner testified that he sat at his desk rest of day.

Petitioner testified that the next day Brian picked him up from home and they went to work. Brian then took Petitioner to Physicians Immediate Care where an MRI was recommended. Petitioner testified that he returned to work trying to keep weight off his leg using crutches. Petitioner testified that he continued to work at Five Star with crutches and that Brian said he would have to get permission for the MRI. Petitioner testified that no treatment was ever approved, including the follow up appointment and the MRI, and that he did not ask again for treatment after having been denied.

The Physicians Immediate Care records are dated 8/29/09, which is the same day of the alleged accident. PX 11. The records indicate a chief complaint of right knee pain. The records list Five Star Fitness as the guarantor and are also listed under the "insurance" section of the paperwork. The status is also referred to on the paper work as "W/C new." Brian Kelly's name is listed as the employer contact on the Return to Work Form on 8/29/09. A note on the bottom of the 8/29/09 doctor's notes reads "This case would be considered OSHA recordable unless deemed not to be compensable under workers compensation." The recorded history reads, "Jason is an employee of Five Star Fitness. At the time of the injury which started yesterday 8/28/09, he was squatting, lifting and moving equipment. He felt soreness in his right knee, mostly anteriorly. He said he tried to walk it off and he was limping on it, but it was not until today, on 8/29/09, when he stepped over an object, came down hard on his right knee, he developed a sharp burning pain along the lateral aspect of the knee. He has not been able to put full weight on it since. The pain was so severe it brought him to tears. He rates his pain at a constant 10/10 which is sharp in quality." PX 12.

Upon physical exam of the right knee, the doctor noted abnormal results including "... knee effusion. He is walking with a very significant antalgic gait, barely putting weight on that right leg. He has increased warmth to touch. There is no redness, abrasions or bruises. There is diffuse tenderness over the anterior knee and laterally along the lateral collateral ligament. He is able to extend to -10 degrees and flex to 90 degrees. There is also tenderness and swelling of the quadriceps muscle, particularly to the vastus medialis. There is no tenderness posteriorly." X-rays were normal. Following the exam, Petitioner was diagnosed with a right knee strain. He

was told to ice and elevate the knee, use crutches and a hinged patellar knee brace along with Naproxen. Petitioner was given work restrictions of "sit down work only until recheck" which was scheduled for 9/1/09. PX 12. No MRI order is present in these records.

Petitioner testified that he continued to work at Five Star and his knee slowly improved to the point where he was living with the improved but continued pain. He testified that he was not active but could function with minimal pain when standing. Petitioner testified that he left Five Star a few months after the accident.

On cross-exam, Petitioner testified that the initial medical records reflect accurate accident histories but disagreed with the records to the extent they reflect no MRI order. He further testified that he reported his injury to Brian Kelly as the "HR" person and that Brian told him no treatment would be available. Petitioner did not contract the owners directly about his accident or condition. Petitioner was not given an accident form to complete by Mr. Kelly. Petitioner further testified that he had no further treatment to his knee in 2009 and that he was told not to attend the follow up visit at Physician's Immediate Care.

Petitioner testified that he continued to work his desk duties through February 2010 and that he did notice improvement in his knee. He further agreed that he could still work out between August 2009 and February 2010 after his knee improved but only worked on ham string strength and light squats along with low impact cardio. He testified that elliptical use was fine in that he was gliding his legs back and forth without impact. Petitioner did not have health insurance while working at Five Star.

Respondent Five Star called Robert Rizell to testify in his capacity as one of the owners of Five Star. He testified that he hired Petitioner as a sales consultant in 2009 and that Brian Kelly was a manager at Five Star at the time. Mr. Kelly no longer works for Five Star. Mr. Rizell testified that Petitioner never reported an injury to him. He testified that Mr. Kelly never reported an injury to Petitioner at any time. Mr. Rizell testified that Petitioner continued to work for Five Star through February 2010 full duty and then just didn't show up one day for work. Mr. Rizell also testified that he never saw a report of injury at any time concerning Petitioner.

On cross-exam, Mr. Rizell testified that he co-owned Five Star with George Barr and Herb Landey and that Brian Kelly managed all employees at Five Star and reported directly to the witness and to Mr. Herb Landey. Mr. Rizell testified that he went to Five Star every day for a few hours in 2009. George never went and Herb Landey went occasionally. Mr. Rizell testified that he had a lot of interaction with Petitioner during his employment tenure at Five Star and that Petitioner never made any complaints of pain.

Mr. Rizell testified that injuries at Five Star are to be reported to the manager followed by completed paper work which was to be turned over by the manager. He has no personal knowledge if Petitioner completed an accident report but has never seen or heard of one for Petitioner. Mr. Rizell testified that his first knowledge of Petitioner's claimed accident was 10 days prior to trial. When he was notified he asked George and Herb if they ever heard of the alleged accident or injury to Petitioner they responded that they had not. Mr. Rizell testified that an accident or injury to Petitioner was never discussed over the ensuing years by the three owners as they had no knowledge. Finally, he testified that he did not personally look for a resignation given to Five Star by Petitioner.

After leaving Five Star Petitioner worked next at SC2 as a safety coordinator. He ordered supplies and performed safety investigations and write ups to present to management. He testified this was a desk job which he worked 40 hours per week at $11 per hour. Petitioner testified that he worked at this job through some time in 2013 and had health insurance for one year toward the end of 2013.

On cross-exam by Respondent Five Star, Petitioner testified that while working at SC2 as a safety coordinator, he gained knowledge of the accident reporting process for work related accidents. He also gave presentations on how to decrease the number of work place accidents.

While working for SC2 in 2012, Petitioner obtained an attorney and in 2012 filed his claim against Five Star. On cross-exam, Petitioner testified that because of his position at SC2, he discovered that he could proceed against Five Star for his knee related injury in 2009. At that point, Petitioner filed his claim against Five Star and sought medical care for his knee.

On re-direct, Petitioner testified that his knee improve enough after the 2009 accident such that he was able to return to daily activities but that his knee never returned to 100%. Petitioner testified that he simply lived with the knee problems until July 2012 when he realized he could pursue a workers' compensation claim against Five Star and sought medical care from Dr. Hoffman. Petitioner testified that he sought no treatment between 2009 and 2012 because he could not pay for it.

Petitioner testified that although he did not have health insurance in 2012 he saw Dr. Hoffman, a primary care doctor, on July 18, 2012. PX 13. At that visit, Dr. Hoffman noted, "This 32 year old male was employed by Five Star Fitness in Joliet as a Fitness Consultant. While at work on 8/29/09, he was moving a treadmill, tripped on a water jug landing on his right knee. The patient had x-rays taken at that time, however, he did not have an MRI. Since the injury he has had intermittent pain and swelling in the right knee." Exam of the right knee revealed "...pain with flexion to 90 degrees. Full extension. Stability normal. No spasm or atrophy." The diagnosis was "probable torn cartilage" and an MRI was ordered. PX 13. The MRI was done on July 19, 2012 and indicated a bucket handle tear of the lateral meniscus with thickened medial plica, small knee joint effusion and popliteal cyst. All other meniscus, ligament and tendon findings were normal. Dr Hoffman diagnosed Petitioner on 7/23/12 with "torn lateral cartilage" and made an "orthopedic referral." PX 13.

On July 25, 2012, Petitioner saw Dr. Rhode on the referral of Dr. Hoffman. Petitioner was solely working at SC2 at this time and did not have health insurance. Dr. Rhode's records indicate a consistent history of accident "2 years and 11 months" earlier while Petitioner was moving a treadmill, stepped on a water bottle and fell into a squatting position developing a sudden onset of lateral knee pain. Dr. Rhode then writes, "He states that he went to get evaluated for his work relate injury. He states that his employer never submitted his injury form to workers' compensation. He has continued to deal with his symptomatology of lateral joint line pain with locking and catching. He states that her recently realized his workers' compensation right and . therefore, has sought to gain access to medial treatment for which he has been denied over the last 2 years 11 months by his employer due to the fact that his employer never submitted his work injury to the insurance carrier. When asked why he has taken so long to seek treatment, Jason states that he did not realize his rights until recently."

At the July 25, 2012 exam, Dr. Hoffman noted a positive McMurray along the lateral joint line. He reviewed the MRI and noted "evidence of a lateral meniscus tear." Dr. Rhode noted, "Secondary to the fact that the patient has been living with this significant lateral meniscus tear for 2 years 11 months, I recommend proceeding with surgical intervention." He allowed Petitioner to continue to work full duty until surgery. Dr. Rhode continued to make the same surgical recommendation at the visits which occurred every 2 to 3 weeks in 2012 through 2014.

Petitioner attended a Section 12 exam with Dr. Lieber on January 28, 2013. Dr. Lieber testified that Petitioner reported moving the treadmill, kicking a small water bottle and falling into a full squat with immediate pain in his right knee. He reviewed the MRI of July 2012, and the records from Physician's Immediate Care, Dr. Hoffman, and Dr. Rhode. He noted that the MRI showed a bucket handle tear of the lateral meniscus and that

Drs. Hoffman and Rhode confirmed the need for surgery for the lateral meniscal tear. He also noted the Physician's Immediate records noting a work injury of August 28, 2009 and August 29, 2009 as noted above. Following an exam Dr. Lieber agreed there was internal knee derangement and a possible meniscal tear. However, he testified there was no direct relationship between the alleged accident and the condition stating, " I felt that the mechanism of injury as explained to me by Petitioner was not significant enough to cause a buckle-handle tear of the medial meniscus. I felt that the lack of medical care for a period of three years, ... was significant in that if there had been a significant meniscal tear as indicated in the MRI the Petitioner would have been unable to carry on activities of daily living or any normal functions without significant pain and would have required and sought treatment prior to three years." He placed Petitioner at MMI. RX C, p. 9-10.

On cross, Dr. Lieber testified that if Petitioner were holding the treadmill and fell into a squat position, such an incident is not a sufficient mechanism of injury to cause a bucket handle tear of the lateral meniscus. He opined that such a tear would be associated with a high contact, twisting injury with forces much greater than squatting and holding up the end of the treadmill. RX C, p. 14. He agreed with surgical repair. P . 15. He further testified that even in a person with a high pain tolerance, a person with a bucket handle tear of the lateral meniscus would have sought medical attention within the three years following the accident. P. 16.

On October 23, 2013, Dr. Rhode gave his deposition. In it, he again reiterated his diagnosis of lateral meniscal tear which he opined was causally related to Petitioner's treadmill lifting in 2009. He disagreed with Dr. Lieber's opinion that Petitioner would have sought medical treatment sooner if he sustained a meniscal tear in that the symptoms would have been acute. Dr. Rhode testified, "I disagree with Dr. Leiber that a bucket handle tear would have resulted in consistent and persistent significant symptomatology, and my specific point was that a reduced meniscus be it bucket handle or be it horizontal cleavage or any other tear pattern as long as it's reduced people can live with them. They'll have symptoms but they're not debilitating especially on the lateral side. Only when the meniscus displaces does it cause significant symptomatology." PX 17, p. 9-11. Dr. Rhode further testified that the MRI revealed a large tear but the meniscus was not displaced. He testified that Dr. Lieber did not discuss symptom likelihood in the context of a reduced vs. displaced meniscus. PX 17, p. 12. Lastly, Dr. Rhode reiterated his record notes citing that Petitioner did not seek medical care between 2010 and 2012 because he did not have health insurance and did not understand his rights as an injured worker. PX 17, p. 18-19.

While working at SC2 in 2013 Petitioner also worked part time for Respondent The Clubs at River City. Petitioner was already under the care of treating physicians for his right knee while still working for SC2 and while working part time for The Clubs in 2012-2013. Eventually he left SC2 in 2013 and began working full time for The Clubs at River City. Petitioner alleges in case 14 WC 10068 that while working solely for The Clubs he sustained an accident on 9/13/13. Petitioner testified that while walking to the back end of the club near the pool while wearing dress shoes he slipped on a wet mat in the locker room and fell down onto his right knee. He immediately felt pain in his right knee and reported his accident to "Lizzy" his manager. This time, Petitioner completed accident reports listing an accident date of 9/13/13. PX 6.

Petitioner testified to three more accidents which are the subject of the three remaining cases. On 1/31/14, Petitioner hopped over the front desk wall landing on his right leg. The impact caused pain in his right knee so he completed another accident report. PX 7. Petitioner alleges that on 2/27/14 he was moving a box of paper turned the corner and his right knee twisted and popped causing another pain flare up and worsening his limp. PX 8. Lastly, Petitioner alleges that on 3/5/14 he was carrying boxes down some stairs when he could not see the last step. He testified that he over stepped with too much weight on his right knee and fell on his right knee. PX 9. Petitioner testified that he worked full duty for each of his employers from 2009 through 2014.

On cross-exam by The Clubs, Petitioner testified that his job at The Clubs was a desk job in membership sales. He was also required to give tours of the facility. He received a free club membership as part of his job description. He testified that after the 9/13/13 accident at The Clubs he continued to exercise performing seated work outs of the upper body and lower body leg extensions and curls on a machine.

Petitioner further testified that he began seeing Dr. Rhode in July 2012 and saw him every two to three weeks through the date of his September 2013 accident. Petitioner continued to work full duty during his treatment. Petitioner further testified that Dr. Rhode allowed him to work full duty and continue his work-outs after the first 3 alleged accidents at The Clubs. Petitioner further testified that he first asked The Clubs for medical treatment after the March 5, 2014 accident. He further admitted that the January 31, 2014 alleged accident while jumping over the front desk was not an accident in that such activity was not part of his job duties.

Petitioner testified that he continued to see Dr. Rhode who continued to recommend the same surgery to his knee as was recommended in 2012 prior to Petitioner working part time or full time with The Clubs. Petitioner further testified that Dr. Rhode's surgical recommendation remained the same after each alleged accident at The Clubs. Petitioner testified that the March 2014 accident exacerbated his right knee condition to the point where his need for surgery was accelerated.

Dr. Rhode took Petitioner off work on March 26, 2014. Petitioner testified that he asked for light duty restrictions pending his surgery and that he gave those restrictions to Respondent. Petitioner testified that Respondent would not accommodate the light duty prior to Petitioner having the surgery. Petitioner then testified that his employment was terminated on June 1, 2014.

Petitioner underwent the right knee surgery on June 17, 2014 with Dr. Rhode. He was given a modified duty release in August 2014 but had already been let go by Respondent prior to his surgery.

Respondent The Clubs called Lisbeth Robinson to testify in her capacity as Vice President of Operations and Accounting at The Clubs for the previous 8 years. As such, she oversaw HR and payroll. Ms. Robinson was Petitioner's supervisor in 2013. She further testified that she was made aware of each of Petitioner's claimed accidents at The Clubs and that a form 45 was completed for each of the accidents. However, she testified that she never received any completed accident reports from Petitioner and does not know what happened to those reports or who prepared the form 45s. She further testified that she received notice of these accidents from Petitioner's attorney.

Ms. Robinson further testified that she was made aware that Petitioner was under treatment for his right knee prior to his first accident at The Clubs in September 2013. She further testified that Petitioner did not request medical attention for his right knee from The Clubs at any time after any accident. Rather, Petitioner continued to work after all four accidents and was only taken off work for the surgery in March 2014. She testified that Petitioner gave her an off work slip from Dr. Rhode on March 26, 2014. Lastly, she testified that Petitioner had group health insurance at the time of his alleged accidents in 2013 and 2014 while working at The Clubs.

On cross-exam, Ms. Robinson testified that Petitioner's employment with The Clubs was terminated on June 1, 2014. She testified that his employment was terminated because his position needed to be filled. She testified that Petitioner was still off work at the time and that she did not receive any request for modified duty at any time from Petitioner prior to his termination.

Petitioner testified that he has not sought any care for his right knee since his full duty release in February 2015. Petitioner found employment with a tree service company where he continues to work cutting down trees. He

testified that his pain has improved but that he has a limp in his right leg. Petitioner no longer runs, plays softball or rides a bike. He can no longer perform a normal work out. He testified that his biggest problems arise when he stands for a period of time.

Petitioner attended a Section 12 exam with Dr. Verma on December 18, 2014 at the request of Respondent The Clubs. The exam was after Petitioner's right knee surgery. Dr. Verma gave his deposition on 9/21/16. RX 1. Petitioner reported a consistent history of accident slipping while holding the treadmill in 2009. Petitioner advised that he was told by his supervisor that he should wait to see if his knee improved and that no care was authorized. Petitioner did not seek care until 2012 with an MRI and surgical recommendation. Dr. Verma noted Petitioner's subsequent employment with The Clubs and his slip by the pool in September 2013 along with the other claimed incidents. He reviewed the records of Dr. Hoffman and Dr. Rhode from 2012-2014. He reviewed the MRI from July 19 2012 and from March 21, 2014 prior to surgery. He agreed the July 2012 MRI showed a bucket handle tear of a lateral meniscus. The MRI of 2014 was unchanged. Dr. Verma examined Petitioner and diagnosed status post partial lateral meniscectomy with mild subjective discomfort.

Dr. Verma opined that Petitioner's condition was not related to any of his accidents claimed while he worked for The Clubs based on the fact that his condition was "clearly preexisting based on the objective findings on an MRI scan. I did not find any change in the objective findings on the MRI scan between 2012 and 2014. And the symptoms that the patient was describing during work activities during that time are consistent with the normal symptoms associated with his underlying prexisting knee condition." RX 1. P. 12. Dr. Verma testified that he was referencing Petitioner's job activities with The Clubs only. RX 1, p. 14. He opined that Petitioner's existing symptomatic knee condition was consistent with the diagnosis received prior to his employment with The Clubs in 2013 and Dr. Verma opined that those symptoms "would come about" with any type of activity whether work related or not. RX 1, p. 15.

Dr. Verma further agreed that the bucket handle tear diagnosed by Dr. Rhode in 2012 was traumatic in nature as they are consistent with traumatic events. RX 1, p. 19. However, Dr. Verma testified that he does not know what caused the bucket handle tear. RX 1, p. 25.

Dr. Lieber testified again via deposition on 10/19/16. RX D. He testified using the same Section 12 exam from 1/28/13. RX D, p. 7. He testified that Petitioner had no treatment to the knee between the 2009 Physician's Immediate care visit and the 2012 treatment with Dr. Hoffman. RX D, p. 7. Upon exam, Petitioner demonstrated positive McMurray and Steinman's test and tenderness upon extremes of motion, tenderness at the medial and lateral joint lines and bout the patellofemoral joint. RX D, p. 8. Dr. Lieber testified that the MRI of July 20, 2012 indicated a bucket handle tear of the lateral meniscus as read by the radiologist. He opined that Petitioner's right knee condition was not related to the event of August 2009 at Five Star fitness stating that if Petitioner had sustained a bucket handle tear at that time he would have been "quite symptomatic" in the following three years and would have sought treatment. RX D, p. 10. He also felt the mechanism of injury wasn't significant enough to cause a bucket handle tear of the lateral meniscus, which is a full tear of the mensical tissue and is associated with significant functional impairment. RX D, p. 11.

In his addendum report authored 2/12/13, Dr. Lieber opined that Petitioner was at MMI for the alleged 2009 work accident and that he needed no further treatment. Acknowledging his prior deposition, Dr. Lieber stated that he was not given any subsequent information to review and that his opinions had not changed.

On cross, Dr. Lieber testified that he was not convinced in reviewing the July 2012 MRI that Petitioner had a bucket handle tear. RX D, p. 13. He further agreed that his findings at the Section 12 exam of positive McMurray and Steinman's testing would indicate a bucket handle tear. He disagreed that bucket handle tears

are only traumatic in nature. RX D, p. 15. However, if they are traumatically induced, the involved mechanism would be twisting injury to the knee. RX D, pp 16-17.

CONCLUSIONS OF LAW

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

The following conclusions of law apply to all five of Petitioner's consolidated matters. However, a separate Decision is rendered in each case under separate cover and individual case number.

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

12 WC 25504- Jason Dallefeld v. Five Star Fitness

Based upon a preponderance of the credible evidence at trial, the Arbitrator finds that Petitioner sustained a work related accident while employed by Respondent Five Star Fitness on August 29, 2009. In so finding, the Arbitrator notes Petitioner's credible testimony as bolstered by that of Mr. Rizell and the Physician's Immediate Care records that he worked for Five Star at the membership desk at the time of the accident. Petitioner's unrebutted and credible testimony is that he was moving a treadmill with Brian Kelly when he awkwardly tripped on a water bottle causing him to fall into a squat while still holding the treadmill resulting in immediate popping, pain and swelling in his right knee. This history of injury to the right knee is clearly supported by the initial treatment records at Physician's Immediate Care. The Arbitrator is not persuaded to find otherwise on the issues of accident or date of accident based on any minor discrepancy regarding the date or manor of accident presented by the Physician's Immediate Care records.

The Arbitrator further finds that timely notice of the accident was given to Respondent Five Star through the immediate involvement of Respondent's supervisor Brian Kelly. Petitioner's unrebutted testimony is that Mr. Kelly witnessed the accident and took him to Physician's Immediate Care. Those records clearly indicate that the injury was treated as a work injury at Five Star listing Brian Kelly as the corporate contact. In finding proper notice, the Arbitrator places greater weight on Petitioner's testimony and the records of Physician's Immediate Care than on the testimony offered by Mr. Rizell at trial.

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

The Arbitrator finds that Petitioner's condition of right knee torn meniscus is causally related to the injury and accident on 8/29/09. Petitioner sought immediate care on 8/29/09 for which he was given crutches, medication, work restrictions and a follow up visit date. Petitioner credibly testified that no further care was authorized by Respondent. The 2 year 11 month delay in treatment to Petitioner's right knee is not lost on the Arbitrator. However, under the specific facts and testimony presented in this matter, the Arbitrator is not persuaded to find a severance of causal relationship based on the lack of treatment. Petitioner credibly testified that he was told no treatment would be forthcoming and that he continued to work for Respondent while his symptoms subsided to a point where he could perform his daily activities. The Arbitrator notes Dr. Rhode's opinion that Petitioner's meniscal tear was reduced vs. displaced and that as such it was feasible Petitioner could perform his daily activities and live with the denial of treatment for a period. The Arbitrator further notes that once Petitioner educated himself on his rights as an injured worker, he pursued medical care for his knee injury in a timely manner first with Dr. Hoffman and then Dr. Rhode, despite not having insurance coverage. Based on the

record in its entirety, the Arbitrator finds Petitioner's right knee condition is causally related to the accident of August 29, 2009.

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

Based on the Arbitrator's findings on the issues of accident, notice and causal connection, the Arbitrator further finds that Respondent Five Star shall pay Petitioner's reasonable, necessary and causally related medical expenses incurred in the care and treatment of his right knee condition pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid, if any.

K. What temporary benefits are in dispute? TTD

The Petitioner testified and medical records reveal that Dr. Rhode kept the Petitioner off of work from March 26, 2014 to August 13, 2014. Petitioner's employment with his then current employer was terminated on June 1, 2014 during the period of time of instability in Petitioner's condition pending surgery. Petitioner testified and the medical records also reveal that from August 14, 2014 to February 25, 2015 the Petitioner was on modified duty restrictions. Petitioner was released full duty on February 25, 2015. The Arbitrator finds that the Petitioner is entitled to TTD benefits from March 26, 2014 to February 25, 2015, a period of 48-1/7 weeks to be paid by Respondent Five Star Fitness.

L. What is the nature and extent of injury?

Pursuant to 820 ILCS 305/8.1(b) the Arbitrator utilized the following factors in considering the Petitioner's nature and extent of the injury in this case:

1. The reported level of impairment pursuant to an AMA assessment.

The Arbitrator notes that there has been no AMA assessment performed in this case by either party. Therefore, the Arbitrator does not have any facts to consider as it relates to an AMA assessment and no weight is given to this factor.

2. The occupation of the injured employee.

The Arbitrator notes that the Petitioner at the time of the accident was a membership/sales coordinator. The Arbitrator notes that after being injured the Petitioner maintained this job and thereafter worked other jobs including a similar job at The Clubs at River City. The Arbitrator notes that the Petitioner testified his job to be a sit down job. The Arbitrator notes that the Petitioner's current restrictions would allow him to return back to this job or a similar job. Great weight is given to this factor.

3. The age of the employee at the time of the injury was 29 years old.

The Arbitrator notes that Petitioner was young on the date of injury and that no evidence in the record indicates that his age is a factor to be given great weight.

4. The employee's future earning capacity.

The Arbitrator notes that Dr. Rhode released the Petitioner with permanent duty restrictions. However, the Arbitrator also notes that Petitioner works currently as a tree cutter which is strenuous work. The Arbitrator finds no evidence of impaired future earnings capacity and given this factor little weight.

5. The evidence of disability corroborated with the treating physicians' medical records.

The Arbitrator notes that when the Petitioner last saw Dr. Rhode on January 28, 2015 Dr. Rhode did document that the Petitioner continued to experience lateral knee pain. The physical examination revealed lateral joint line tenderness and pain with patella femoral compression. Dr. Rhode at that time did provide the Petitioner with permanent work restrictions with medium heavy work and opined that the Petitioner could perform occasional ladders, squatting, kneeling, crawling, bending and stooping. Petitioner testified that he currently works as a tree cutter, a physically demanding job. At Petitioner's last visit with Dr. Rhode's office of February 26, 2015 Dr. Rhode's physicians' assistant once again noted that the Petitioner continued to experience lateral knee pain and the Petitioner will require future oral medications. Petitioner testified that he continued to experience pain with his right knee and specifically that he had difficulty when standing for a long period of time. Based on the foregoing, the Arbitrator finds that Petitioner sustained 15% loss of use of his right leg pursuant to Section 8(e) of the Act.

14 WC 9863; 14 WC 10068; 14 WC 10019; 14 WC 9895 – Jason Dallefeld v. The Clubs at River City, Inc

The following conclusions of the Arbitrator apply to all four of Petitioner's matters against Respondent The Clubs at River City.

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

Based on the Arbitrator's decision in consolidated matter 12 WC 25504 finding accident on 8/29/09 as well as on the record in its entirety, the Arbitrator further finds that Petitioner did not sustain accidental injuries on September 13, 2013, January 31, 2014, February 27, 2014 or March 5, 2014 while working for Respondent The Clubs at River City. The Arbitrator specifically finds that Petitioner's current condition of ill-being is solely causally related to his accident on 8/29/09. In making these findings in the cases related to Respondent The Clubs, the Arbitrator further notes that well in advance of working for The Clubs in 2013, Petitioner sought treatment for his right knee in July 2012 from Dr. Rhode and obtained a surgical recommendation at that time. That surgical recommendation never changed during his period of employment with The Clubs. The objective test and exam results did not change. The record is devoid of any persuasive evidence to show that Petitioner's ultimate surgery while working for The Clubs was performed on an accelerated basis due to any of his alleged incidents with The Clubs. Accordingly, the Arbitrator finds that Petitioner's alleged incidents while working for The Clubs caused only minor or temporary exacerbations of Petitioner's long standing preexisting right knee condition insufficient to result in a finding of new accidental injury or sufficient aggravation of the preexisting injury.

Based on the foregoing findings on the issues of accident and causal connection in cases 14 WC 9863; 14 WC 10068; 14 WC 10019; 14 WC 9895, all remaining issues in each of these cases is rendered moot and no further findings are made. No benefits are awarded Petitioner in these matters.

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

Melissa Sosnoski,
Petitioner,

vs. No: 16 WC 05497

Countryside Fire Protection District,
Respondent.

18IWCC0647

DECISION AND OPINION ON REVIEW

A Petition for Review having been filed timely by Respondent herein and notice given to all parties, the Commission, after considering the issues of average weekly wage and the nature and extent of Petitioner's permanent partial disability and being advised of the facts and law, affirms the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission notes that the parties stipulated to the duration of the temporary total disability. It was acknowledged by both parties that the claimant received salary continuation during her absence from work pursuant to the Public Employees Disability Act (PEDA). No further temporary disability benefits appear to be due and owing. The employer shall receive credit for all amounts paid, but shall hold the claimant harmless from any recoupment efforts regarding these funds, pursuant to Section 8(j) of the Workers' Compensation Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on June 6, 2017, is hereby affirmed.

18IWCC0647

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $735.37 per week for a period of 75 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the loss of use of the person as a whole to the extent of 15%.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $398.42 for medical expenses under §8(a) of the Act, subject to the limits of §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to credit for all amounts paid in regard to this matter.

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

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 9 2018

o-10/24/18
jdl/ac
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Joshua D. Luskin

Charles J DeVriendt

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SOSNOSKI, MELISSA
Employee/Petitioner

Case# **16WC005497**

COUNTRY FIRE PROTECTION DISTRICT
Employer/Respondent

18IWCC0647

On 6/6/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0013 DUDLEY & LAKE LLC
PETER SCHLAX
325 N MILWAUKEE AVE SUITE 202
LIBERTYVILLE, IL 60048

0507 RUSIN & MACIOROWSKI LTD
JOSEPH STACHO
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF Lake)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Melissa Sosnoski
Employee/Petitioner

v.

Countryside Fire Protection District
Employer/Respondent

Case # **16** WC **5497**

Consolidated cases: _____

18IWCC0647

An *Application for Adjustment 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 **Waukegan, Illinois**, on **04/27/2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance 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 **10/04/14**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$98,744.09**; the average weekly wage was **$1,832.04**.

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

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

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

Respondent shall be given a credit of **$52,241.30** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$52,241.30**.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1,221.36/week for 46-2/7 weeks, commencing 10/05/14 through 08/25/15, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $398.42, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for all amounts for medical benefits that have been paid against these charges.

Respondent shall pay Petitioner permanent partial disability benefits $735.37 per week for 75 weeks, because the injuries sustained caused the 15% loss of the person as a whole, as provided in Section 8(d)(2) of the Act.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date list nt; however, if an employee's appeal results in either no change or a ue.

↑ $56,531.52

Signature of Arbitrator

STATEMENT OF FACTS:

Petitioner, Melissa Sososnki, is employed as a firefighter for the Countryside Fire Protection District and had been so employed for approximately the past 12 years. On October 4, 2014, while at a fire call, she tripped and fell on her left knee and shoulder while repositioning a fire hose. Petitioner testified that she felt immediate pain. Petitioner initially sought treatment on October 6, 2014 with Dr. David Hamming at Illinois Bone & Joint. Records submitted show she complained of left shoulder pain and left knee stiffness. Dr. Hamming diagnosed left low-grade AC sprain and left anterior knee contusion. Petitioner was released to return to work with restrictions of no lifting, carrying, pushing, or pulling with the left arm in excess of 10 pounds. (Pet. Ex. 1, pp. 28-29)

Petitioner returned to Dr. Hamming on October 20, 2014. Petitioner reported continued left shoulder pain. Specifically, she noted left shoulder pain when performing overhead work or moving her left arm across her body. She had no significant numbness or tingling. Physical examination revealed elevation of the left arm to 180-degrees. She had 5/5 rotator cuff strength. She had pointed tenderness over the left AC joint and pain with cross chest adduction. There was also pain with Hawkins testing and speed testing. Dr. Hamming diagnosed persistent left shoulder pain, most consistent with an AC sprain. The doctor referred Petitioner for a MRI and continued her work restrictions. (Pet. Ex. 1, pp. 25-26) The MRI when carried out on October 23, 2014, demonstrated moderate impingement with moderate tendinopathy. The radiologist noted that there was no sign of a complete or incomplete full thickness rotator cuff tear. Also noted was no sign of a labral injury. (Pet. Ex. 1, p.36)

Petitioner returned to Dr. Hamming on October 31, 2014. Dr. Hamming believed Petitioner was still behaving as if she had an AC sprain. Dr. Hamming reviewed the left shoulder MRI report and images. He believed she had quite a bit of edema in the distal clavicle. He was also in agreement that there was no rotator cuff or labral pathology. He diagnosed a left AC sprain and distal clavicle edema. He recommended formal physical therapy, which commenced on November 18, 2014, and continued the work restrictions. (Pet. Ex. 1, pp. 22-23)

On November 20, 2014, Dr. Hamming noted that Petitioner reported that her left shoulder pain was persistent and getting worse. The pain was in the superior portion of her left shoulder. Dr. Hamming continued to assess left AC sprain. He offered Petitioner an AC injection, which was declined. He prescribed Naproxen, advised Petitioner to continue in physical therapy and continued her work restrictions. (Pet. Ex. 1, p.20) By December 17, 2014, Petitioner reported that her left shoulder was 40% better but she still had pain when lifting overhead or moving her arm across her chest and body. Petitioner was advised to continue with physical therapy and her anti-inflammatories. She again refused an AC joint injection. Her work restrictions were continued. Dr. Hamming noted she may require an injection or even a distal clavicle resection. (Pet. Ex. 1, p.18)

Petitioner testified that "on her own" she chose to undertake treatment with Dr. Chams, also at Illinois Bone & Joint. Petitioner initially saw Dr. Chams on January 12, 2015. Petitioner reported having pain in her left shoulder since October 8, 2014 when she suffered an accident at work. Dr. Chams believed Petitioner had a left shoulder AC joint strain, but he wanted to rule out a labral tear. He recommended an MR arthrogram of the left shoulder, prescribed continued physical therapy and released Petitioner to return to restricted work. (Pet. Ex. 1, pp. 15-16)

Petitioner underwent the prescribed MR arthrogram on January 26, 2015. The arthrogram demonstrated moderate impingement with moderate tendinopathy. There was degenerative fraying inferior with a partial tear through the superior glenohumeral ligament. (Pet. Ex. 1, pp.31-32)

Petitioner followed with Dr. Chams on February 2, 2015. The doctor reviewed the MR arthrogram results indicating same revealed rotator cuff tendonitis with a partial thickness rotator cuff tear. He noted definite abnormal changes in the labrum which looked to be degenerative versus structural in nature. He also noted some AC joint degenerative changes. Dr. Chams diagnosed left shoulder AC degenerative joint disease and a labral tear. He recommended surgery consisting of a left shoulder arthroscopy, decompression, Mumford procedure, possible labral repair, and possible rotator cuff repair. Petitioner's light duty restrictions were continued. (Pet. Ex. 1, p12)

Petitioner was evaluated at Respondent's request by Dr. William Vitello on February 18, 2015. In his report of February 23, 2015, Dr. Vitello documented a history of accident, performed an examination and reviewed Petitioner's medical records. Dr. Vitello assessed tendinopathy and impingement of the left shoulder with possible labral tear and symptomatic left AC joint. The doctor opined that Petitioner's injury was a competent mechanism causing the impingement, tendinopathy, labral tearing and AC joint pathology. Dr. Vitello noted that Petitioner had failed conservative management. He opined that surgical repair was appropriate. (Resp. Ex. 3)

Dr. Chams recommended surgical repair which completed on March 10, 2015. The surgery consisted of a SLAP reconstruction, Bankart reconstruction, reverse Bankart reconstruction, subacromial decompression, distal clavicle resection or Mumford procedure as well as debridement of the bursa side rotator cuff. (Pet. Grp. Ex. 1. P. 42) The repair was completed with debridement and decortification of bone, placement of several anchors. (Pet. Ex. 1. pp. 42-46)

Petitioner underwent post-surgical therapy and work hardening before being released to return to work after her final visit with Dr. Chams on August 25, 2015. On that date, the doctor noted she had improved strength and range of motion significantly. The doctor indicated she was not having any discomfort or pain other than some anterior shoulder pain occasionally especially with repetitive activities over her shoulder. Petitioner was deemed at maximum medical improvement and released to full duty work. (Pet. Grp. Ex. 1. Pp.1-2)

At Respondent's request, Petitioner was re-evaluated by Dr. Vitello on August 30, 2016. The doctor also testified via deposition in this matter. At the time of the evaluation, Dr. Vitello documented Petitioner's complaints of occasional pain with certain activities such as recreational activities and reaching behind herself to hook her bra or wash her back. An examination revealed that Petitioner had no tenderness over the anterior shoulder, over the AC joint, or subacromial space. The parascapular, rhomboids, and posterior shoulder were nontender. Petitioner had a negative O'Brien's test and 5/5 rotator cuff strength with internal and external rotation. Petitioner also had a negative Hawkin's and negative Jobe's test. Dr. Vitello opined resolved left shoulder SLAP tear with Bankart reconstruction. He opined that Petitioner's treatment was reasonable, necessary, and causally related to the October 4, 2014 injury. The doctor felt Petitioner could work full duty and had reached maximum medical improvement as of August 2015. (Resp. Ex. 4, 5)

At Respondent's request, Dr. Vitello also performed an AMA impairment rating on August 30, 2016. Based upon the losses in range of motion in extension, adduction, abduction and rotation, Dr. Vitello assessed a 7% upper extremity upper impairment or 4% whole person impairment. (Resp. Ex. 4) When posed as to his evaluation regarding Petitioner's strength, the doctor provided that his evaluation of Petitioner's strength was limited to how much strength she applied in opposition to his resistance rather than an evaluation of the extremes of her strength capacity such as would impact her ability to carry hoses, rescue people from burning

buildings and other firefighter duties. Dr. Vitello testified that Petitioner's lack of strength does not come into play as part of her impairment calculation. (Resp. Ex. 5, pp. 26-29)

Petitioner testified that she has no medical care since being released by Dr. Chams on August 25, 2015. She testified that she can perform all of her duties as a firefighter. She testified that she still experiences soreness with repetitive overheard use, lifting weight out in front of her and with reaching behind her. She experiences this pain while performing necessary firefighting duties such as advancing hose lines, pulling down ceiling tiles, and putting on and wearing her air pack. She has difficulty with dive team duties including donning the 95 pounds of equipment and swimming. She has difficulty dressing, sleeping and reaching for her seat belt. She has given up volleyball and golfing. She occasionally takes over the counter medication to address her residual pin.

Petitioner's supervisor, Deputy Chief of Support Services, Chuck Smith, testified on behalf of Respondent. Deputy Chief Smith testified that Petitioner's shift consisted of 24 hours on duty followed by 48 hours off duty. He stated that pay periods would range from 120 hours per pay period to 96 hours per pay period. He stated that these shifts are mandatory and that Petitioner is not allowed to leave her shift early.

Deputy Chief Smith testified that firefighters depend on one another to be able to physically perform all of the duties involved in addressing emergency situations. He agreed that to preserve confidence in one another, firefighters, including Petitioner, are not apt to complain about aches and pains. Deputy Chief Chuck Smith testified that it would be brought to his attention if a firefighter/paramedic was unable to perform their job. Deputy Chief Smith testified that he has talked to Petitioner regarding her shoulder surgery. He had asked about her surgery because he was contemplating his own shoulder surgery and saw the success of Petitioner's surgery. Deputy Chief Smith testified that Petitioner told him that her shoulder had occasional soreness.

Deputy Chief Smith testified that he receives the department's yearly physical fitness examination reports. He testified that Petitioner passed her 2016 physical fitness examination. (Resp. Ex. 6) Deputy Chief Smith indicated that Petitioner took her 2017 examination in February or March. He indicated that he usually receives the reports in late May or early June. Deputy Chief Smith testified that the doctor performing the tests will email him shortly after the examination if a firefighter had failed the examination; therefore, he believed that Petitioner passed her 2017 fitness examination as he had not received an email from the doctor. Lastly, Deputy Chief Smith testified that Petitioner was a reliable, and "100% truthful employee.

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING "F" IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CASUALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner testified that prior to her work accident on October 4, 2014, she had experienced no problems with respect to her left shoulder. Following her accident, she had an immediate onset of pain. She promptly sought treatment and ultimately underwent surgery. Respondent's Section 12 examining physician, Dr. Vitello, agreed that Petitioner's fall onto her shoulder was a competent mechanism for causing the pathology which was repaired by Dr. Chams. There is no evidence of an intervening or subsequent injury to Petitioner's left shoulder. The Arbitrator therefore concludes that Petitioner's current left shoulder condition of ill-being is causally connected to her October 4, 2014 work accident.

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING "G" WHAT WERE PETITIONER'S EARNINGS, THE ARBITRATOR FINDS AS FOLLOWS:

Supervisor, Deputy Chief Charles Smith, testified that Petitioner's regular shifts consisted of 24 hours of mandatory continuous duty, followed by 48 hours off duty. He testified that the pay periods ranged between 96 and 120 hours. His testimony is substantiated by Petitioner's wage statement (Pet. Grp. Ex. 3) which reveals complete pay periods ranging between 96 hours and 171.5 hours. The 52 week wage statement reveals gross regular earnings of $88,310.68 and gross overtime earnings of $10,433.41 between October 6, 2013 and October 5, 2014. During that time frame she worked overtime in fifteen (15) of the twenty-six (26) complete pay periods, or 57.7%. Reducing the gross overtime earnings to straight time yields a total of $6,955.61, which, when added to the gross regular earnings, yields a combined gross of regular and straight rate overtime earnings of $95,266.29. When divided by 52 weeks, an average weekly wage calculates to $1,832.04. Both Petitioner and Deputy Chief Smith testified that all hours worked were mandatory and that Petitioner was not free to leave her shift early. Accordingly, the Arbitrator finds that Petitioner's average weekly wage properly calculates to $1,832.04 per week.

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING "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, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner's Group Ex. 2 consists of the itemized charges from Illinois Bone & Joint for physical therapy and work hardening services. Page 18 of the document reveals a balance due of $398.42. The Arbitrator finds that Respondent is liable for the $398.42 balance subject to the Fee Schedule and further finds that pursuant to the party's stipulation, Respondent is entitled to a credit for any payments previously made against these charges.

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING "L" WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

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

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

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

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

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

(i) The reported level of impairment;

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

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that the record contains an impairment rating of 7% of the upper extremity that coincides with 4% of an individual as a whole as determined by Dr. Vitello. The Arbitrator notes that this level of impairment does not necessarily equate to permanent partial disability under the Workers' Compensation Act, but instead is a factor to be considered in making such a disability evaluation. In making his evaluation, Dr. Vitello noted a reduction in ranges of motion and conceded that his evaluation did not particularly take into account or address the strength requirements of Petitioner's duties as a firefighter. Because of these facts, the Arbitrator therefore gives some weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner was employed as a firefighter/paramedic and a member of the Dive Team at the time of the accident and that she was released to return to work, with no restrictions. Petitioner had passed her most available physical fitness examination by the Countryside F.P.D. doctor and was cleared for duty. As of the date of the arbitration hearing, Petitioner continues to perform all of her firefighter duties without restriction. Petitioner did voice credible residual complaints of soreness in connection with performance of several of her job duties. Because of these facts, the Arbitrator therefore gives greater to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 40 years old at the time of the accident. Because of her relatively young age and Petitioner's anticipated remaining work life as a firefighter, the Arbitrator therefore gives some weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner was released to return to her regular job without restrictions and has been working in that capacity. There is no evidence that Petitioner has experienced a diminishment in her weekly pay. Because of this, the Arbitrator therefore gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner underwent a substantial surgical procedure to repair her damaged shoulder. Surgery included debridement of soft tissues, decortification of bone and placement of several anchors. The procedures included SLAP reconstruction, Bankart reconstruction, reverse Bankart reconstruction, subacromial decompression, distal clavicle resection or Mumford procedure as well as debridement of bursa side rotator cuff tear. Petitioner credibly testified to ongoing persistent complaints of pain and soreness in her shoulder while fulfilling necessary duties as a firefighter. Both her own treating physician, Dr. Chams, as well as Respondent's examining and evaluating physician, Dr. Vitello, document Petitioner's persistent complaints of pain. Dr. Vitello also documented Petitioner's loss of motion in at least four separate planes. Based on these facts, the Arbitrator therefore gives greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 15% loss of use of the man as a whole pursuant to §8(d)(2) of the Act.

With respect to Petitioner's left knee, the Arbitrator notes that her testimony and the initial treating records show that in addition to her left shoulder condition of ill-being, she also had complaints of left knee stiffness. Other than the initial visit with Dr. Hamming who diagnosed left knee contusion, there are no other references in the record of left knee complaints or treatment. Also, Petitioner testified that her knee "healed 100%." As such, the Arbitrator declines to award any permanent partial disability to her left knee.

STATE OF ILLINOIS)
) SS.
COUNTY OF CHAMPAIGN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Scott Young,
Petitioner,

vs. No. 14 WC 28615

Eli Lloyd, Inc.,
Respondent.

18IWCC0648

DECISION AND OPINION ON REVIEW

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

Petitioner testified that on March 13, 2014 he was employed by Respondent as a laborer, working at a job on a grain dryer in Mississippi. While carrying a load of screens he tripped and fell to the concrete on his left knee. He went to the medical center and received an x-ray to his left knee and pain medication. Upon returning home from Mississippi, Petitioner underwent an MRI to his left knee which revealed a complex tear of the medial meniscus. On June 3, 2014 Petitioner's orthopedic surgeon, Dr. Leo Ludwig, performed a left knee arthroscopy with partial medial meniscectomy and debridement of patella. Following physical therapy, Petitioner was given restrictions and released to work in August 2014. However, three days later his left knee swelled up. Petitioner returned to Dr. Ludwig who took him off work. On October 23, 2014, given Petitioner's ongoing symptoms, Dr. Ludwig considered the possibility of another surgery: either a resurfacing of Petitioner's patella with an articular cartilage plug, or a tibial tubercle elevating procedure.

At Respondent's request, on February 2, 2015, Petitioner was examined by its Section 12 expert, Dr. John Krause. Dr. Krause agreed that a tibial tubercle elevation procedure would not be unreasonable although he believed Petitioner's prognosis following such surgery would be guarded at best. After Dr. Krause reviewed a second MRI of Petitioner's left knee and his arthroscopy photos, Dr. Krause reported that the only procedure he would recommend would be an arthroscopic evaluation and potential tibial tubercle elevation type procedure. Dr. Krause did not believe an osteochondral transfer would be a reasonable option for Petitioner.

After examining Petitioner on March 4, 2015 and reviewing Dr. Krause's February 2015 report, Dr. Ludwig wrote, "The bottom line is I do not think I would recommend any further surgery to him because I cannot guarantee him return to full duty with another surgery." On March 30, 2015, Dr. Krause reviewed Dr. Ludwig's March 4, 2015 note and reported it did not change any of his earlier opinions.

In April 2015, Petitioner returned to work at Respondent. Dr. Ludwig gave Petitioner permanent restrictions of no crawling, limited kneeling on his left knee, no working at heights and no lifting weights over 50 lbs. Petitioner last saw Dr. Ludwig on January 21, 2016. Although Dr. Ludwig reported there was no cure for Petitioner's patellofemoral problem, he discussed the possibility of doing a patella cartilage implant and a tibial tubercle osteotomy. He cautioned Petitioner that this would be a very invasive procedure which could take up to one year for recovery with no guarantee of pain improvement. The best option, Dr. Ludwig recommended, would be for Petitioner to undergo occupational rehabilitation and training for a job not requiring heavy repetitive use of his left knee.

Two months after his last visit with Dr. Ludwig, Petitioner began a new full-time, seasonal job as a construction manager for Space Age Construction at a higher rate of pay. He remains under restrictions, but his new employer has been able to accommodate them. Petitioner still experiences constant left knee pain, for which he takes Norco, twice a day. He testified he would like to undergo the procedure "recommended" by Dr. Ludwig, to reduce his need for narcotic medication.

The Commission finds that Petitioner has been presented with multiple treatment options for his work-related, left knee condition of ill-being. Further, at trial Petitioner testified he was unsure of the exact procedure being recommended, and he was not inclined to undergo a procedure which broke his bone i.e. tibial tubercle osteotomy. T. 19. Although Dr. Ludwig, "discussed the possibility" of another left knee surgery with Petitioner at his last visit in January 2016, Dr. Ludwig stopped short of "recommending" it. Instead, he reported that Petitioner's "best option" would probably be to undergo occupational rehabilitation and training for a new position.

The Commission finds Petitioner's complaints of pain are real and corroborated by his medical records. However, given Dr. Ludwig's hesitancy to recommend surgery as well as the length of time which has passed since Petitioner last saw Dr. Ludwig, the Commission declines to award Petitioner prospective surgery at this time and reverses the Arbitrator's award of it. While Petitioner may still require another left knee surgery for his work-related knee injury, the Commission finds the need for it now to be uncertain and be speculative, especially in light of Petitioner's ability to work full-time at his new job. Accordingly, the Commission finds Petitioner entitled to a consultation with Dr. Ludwig for his current recommendations for treatment and surgery, if any.

The Commission generally affirms all other findings of the Arbitrator, with the exception of the award of temporary total disability. The Commission finds that at arbitration, the parties stipulated that Petitioner was, *"entitled to TTD period(s): 4/21/14 through 8/3/14 and 8/7/14 through 4/18/15, representing 51-3/7 weeks."* The Arbitrator offered no explanation why he did not award TTD for the number of weeks or for the periods of time to which the parties stipulated.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 11, 2017, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of temporary total disability benefits is modified, and Respondent shall pay Petitioner temporary total disability benefits of $319.18 per week for 51-3/7 weeks, for the periods of April 21, 2014 through August 3, 2014, and from August 7, 2014 through April 18, 2015.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of prospective surgical care ordered by the Arbitrator is reversed. Instead, Respondent shall authorize and pay for a consultation visit with Dr. Ludwig, or another physician of Petitioner's choosing if Dr. Ludwig is unavailable, for that doctor's recommendations for treatment and/or surgery for Petitioner's left knee, pursuant to Section 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 shall pay to Petitioner interest under §19(n) of the Act, if any.

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

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

No bond is required for 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 29 2018

o-9/11/18
jdl/mcp
68

Joshua D. Luskin

Charles J. DeVriendt

L. Elizabeth Coppoletti

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

YOUNG, SCOTT
Employee/Petitioner

Case# **14WC028615**

ELI LLOYD INC
Employer/Respondent

18IWCC0648

On 5/11/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.01% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1315 DWORKIN AND MACIARIELLO
PATRICK SHIFLEY
134 N LASALLE ST SUITE 650
CHICAGO, IL 60602

0265 HEYL ROYSTER VOELKER & ALLEN
DANIEL R SIMMONS
PO BOX 9678
SPRINGFIELD, IL 62791

STATE OF ILLINOIS)
)SS.
COUNTY OF Champaign)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Scott Young
Employee/Petitioner

v.

Eli LLoyd Inc
Employer/Respondent

18IWCC0648

Case # 14 WC 28615

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Urbana**, on **April 11, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

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

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

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

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

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

In the year preceding the injury, Petitioner earned **$24,880.44**; the average weekly wage was **$478.77**.

On the date of accident, Petitioner was **49** 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 **$15,583.42** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$15,583.42**.

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 $319.18 per week for 49 4/7 weeks, for the time periods of April 21, 2014 through August 3, 2014 and August 7, 2014 through April 3, 2015, as provided in Section 8(b) of the Act.

Respondent shall be given credit of $15,853.42 for temporary total disability benefits that have been paid.

Prospective care, including surgical care by Dr. Ludwig, is granted.

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

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

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

Signature of Arbitrator

5/9/17
Date

ICArbDec19(b)

MAY 11 2017

MEMORANDUM OF DECISION OF ARBITRATOR

In support of the Arbitrator's Decision related to:

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

The Arbitrator finds the following facts:

FINDINGS OF FACT

The Petitioner testified that he was in Mississippi in March of 2014 working for Respondent to build a grain dryer. On the third day of assembly he was carrying a screen cover when he tripped and fell on his left knee. He struck his left knee against the concrete floor. He testified that he felt severe pain at that time

Upon returning to Illinois he was seen by his primary care physician, Dr. John Cochran.

On April 15, 2014 the Petitioner underwent an MRI of the left knee. The impression was a complex tear of the posterior horn and body of the medial meniscus with focal subcortical bone marrow edema in the patella. (Px 4 p 86)

On April 21, 2014, Dr. Cochran recommended he see an orthopedic surgeon. (Px 4 p 8)

The Petitioner was seen by Dr. Leo Ludwig on May 21, 2014. At that time he had pain and swelling around his knee. Dr. Ludwig diagnosed him with a torn medial meniscus with a patellar contusion and likely articular cartilage damage of the patellofemoral joint. (Px 3)

On June 13, 2014 the Petitioner underwent a left knee arthroscopy and partial medial meniscectomy. His postoperative diagnosis was left knee torn medial meniscus with chondral injury of the patella. (Px 1)

From June 25, 2014 through July 30, 2014 Petitioner was seen for post operative physical therapy at St. Francis Rehab. (Px 2)

On July 10, 2014 the Petitioner was seen by Dr. Ludwig. The Petitioner was doing well after surgical treatment. Further therapy was recommended, and he was continued off work. (Px 3)

On July 30, 3014 the Petitioner was seen by Dr. Ludwig. The plan was for the Petitioner to return to work beginning August 4, 2014. (Px 3)

On August 4, 2014 the Petitioner was released to full duty work. (Px 3)

On August 7, 2014 the Petitioner returned to Dr. Ludwig complaining that he was experiencing significant pain and a decreased range of motion. The Petitioner was continued off work from that time. (Px 3)

On October 23, 2014 the Petitioner was seen by Dr. Ludwig. At the time a repeat MRI, a tibial tubercle elevation, and an IME were discussed as possible options for further treatment. Petitioner was continued off work. (Px 3)

A repeat MRI performed on November 4, 2014 showed evidence of an increase in severity of the osteoarthritic changes. (Px 3)

On November 10, 2014 the Petitioner was seen by Dr. Ludwig. The Petitioner's major problem was a lesion under his patella. A cartilage resurfacing along with a tibial tubercle elevated procedure. (Rx 3)

On February 2, 2015 the Petitioner was seen by the Respondent's Section 12 examiner, Dr. Krause. Dr. Krause diagnosed the Petitioner with a left medial meniscus tear with injury from March 13, 2014. Dr. Krause also diagnosed the Petitioner with preexisting degenerative joint disease at his patellofemoral joint that was aggravated with his March 13, 2014 fall. His subjective pain was deemed to be a consequence of the aggravated degenerative joint disease. Prospective care was recommended, and the Petitioner was placed at light duty. (Rx 1)

On February 4, 2015 Dr. Krause authored an IME addendum. At that time Dr. Krause found the history of the Petitioner's treatment appropriate and adequate. He diagnosed the degenerative changes to the patellofemoral joint as causally related to the injury of March 13, 2014. He continued to recommend prospective care. (Rx 1)

On March 4, 2015 the Petitioner was seen by Dr. Ludwig. At that time Dr. Ludwig discussed surgery as a treatment option he did not recommend as he could not guarantee a return to full duty in the construction industry after surgery. He was placed off work pending further notice. (Px 3)

On March 30, 2015 Dr. Krause authored a second IME addendum. Dr. Krause continued his opinion that the injury of 3/14/15 is causally related to the patient's current patellofemoral degenerative joint disease. The Petitioner was placed at light duty, and it was stated that if the Petitioner were to receive no further treatment he would be at MMI. (Rx 1)

On April 7, 2015 Dr. Ludwig provided Petitioner with a set of restrictions allowing him to lift up to 50lbs, with no crawling, limited kneeling, and no work at heights. (Px 3)

On June 25, 2015 Petitioner was seen by Dr. Cochran and reported ongoing pain complaints, for which he was prescribed pain medication. (Px 4 p 3)

On January 21, 2016, the Petitioner was seen by Dr. Ludwig. At that time he reported a history of having returned to work, but having continued to have pain. (Px 3) Dr. Ludwig discussed the possibility of a juvenile cartilage implant and surgical treatment as one of the Petitioner's treatment options. (Px 3)

The Bills of St. Francis Hospital show a balance of $320.83. (Px 1)

The records of Orthopedic Center of Illinois shows an unpaid balance of $4,042.50. (Px 3)

The Petitioner confirmed that he has returned to work within his restrictions with a third party employer. However, he reports constant pain and pain medication use related to his left knee.

Petitioner testified that he had no issues with his left knee prior to his accident, that he had no injuries subsequent to his accident, and that he has had no problems with his right knee.

Petitioner testified that he still wished for prospective care by his treating physician Dr. Ludwig, including the prospective surgical procedure.

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING (K) IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE? THE ARBITRATOR CONCLUDES AS FOLLOWS:

The Arbitrator finds that the Petitioner has met his burden of proof by preponderance of the evidence that his condition requires prospective care. The opinions of the Section 12 examiner, and the Petitioner's treating physician are in agreement that prospective care includes a surgical alternative for the Petitioner. The Petitioner's testimony that he is currently experiencing pain is credible and consistent with the medical records.

Petitioner's treating physician, Dr. Ludwig, stated in his records that the surgery Petitioner has requested is not guaranteed to improve the Petitioner's pain, but that the Petitioner should consider his options. The Petitioner wishes to proceed with this surgery rather than continue to live in pain.

Section 8(a) of the Act provides that the employer shall provide and pay for all the necessary surgical services and all necessary medical, surgical and hospital services which are reasonably required to cure or relieve from the effects of the accidental injury. As the Petitioner continues to experience significant pain as a symptom of his injury, his choice to pursue surgical care to alleviate that pain is reasonable and appropriate under the Act.

Carl Lee — 5/9/10

Date — Honorable Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Causal connection reached MMI 4/18/16	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

James Strom,

Petitioner,

vs. NO: 16 WC 16568

Blue Island Home Care Services,

Respondent.

18IWCC0649

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability-(TTD), 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 compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

- Petitioner was a 62-year-old employee of Respondent, who described his job as a home health care nurse. Petitioner has a Bachelor's degree in nursing from St. Xavier University, 1980. He had an Associate's degree in nursing 1974. He had worked in a psychiatric unit at a community hospital for about 18 years and he went into pharmaceutical research when he decided to go to the University of Chicago. He had

worked at the HIV project there and was recruited to start working with spine surgery research with Dr. Phillips. He held research positions at U of Chgo for 3 years and then went to Rush when recruited by Dr. Phillips at Midwest Ortho; for 2 years. He had left nursing when his mother became ill as in research he had to go out of town a lot; so he decided to seek out home health to be near his mother for availability. Petitioner began working for Respondent for about 3 years before his accident. Petitioner stated that he was their top producer as a visiting nurse. Petitioner testified that he had a case load of 5-8 patients per day that he saw in their homes and they were all non-ambulatory patients. He had a lot of diabetic patients with foot ulcers, and knee issues, and heart issues, and he did monitoring and dressing changes. He scheduled his patient load. Petitioner stated he was the only male nurse and he was sent to the more dangerous neighborhoods to begin with. He went to various areas and, if needed, to Skokie. He had worked 14-15-hour days, depending on circumstances; he had to take care of the patients no matter what the problem was. He worked 5-6 days per week; usually 5. He was required to work one weekend per month on call. He drove his private car to the patient homes. Respondent had provided him with basic equipment to treat the patients. On the date of accident, July 21, 2015, Petitioner testified that he had sustained a right knee injury, which impacted his ability to do his job; not at all able. Petitioner testified that prior to that date he had no surgery recommendations regarding his right knee; no recommendations for total knee replacement. Petitioner testified that prior to that day he was very healthy. On the date of accident, about 4:30pm, Petitioner said he had been seeing a patient and he finished and was going to his car when he stepped off the curb with his right foot. Petitioner stated there was a piece of loose concrete he had not seen and he had stepped on it and twisted and wrenched his knee and he fell to the ground. He stated he was not in excruciating pain then but he knew the swelling was going to get bad-(he had no prior knee swelling issues). Petitioner stated he had training as a research nurse in orthopedics and as a home health nurse he had to evaluate knee problems all of the time, so he knew what happens.

- Petitioner sought medical care after the incident. Petitioner stated that he first called his supervisor and then went to the Emergency Room where he was examined and released. On July 31, 2015 Petitioner sought treatment with Dr. Rhode at Orland Park Orthopedics. Petitioner stated that Orland Park Orthopedics was in his group plan through Respondent; he would have preferred seeing someone he knew. Petitioner indicated that he went to Dr. Rhode because his knee was still hurting. Petitioner testified that he was still under care of Dr. Rhode regarding the knee condition. Petitioner testified that he had no new traumas since this incident. Petitioner did have a fall and fracture of his wrist; his knee gave out, but no additional knee trauma. Petitioner testified that when Dr. Rhode saw the x-ray he said surgery was needed and that was done December 8, 2015. After surgery Petitioner went through rehab at Dr. Rhode's facility. Petitioner agreed Dr. Rhode released him to modified work on April 18, 2016. Petitioner testified since that date he had not been offered a position at Respondent within those restrictions. Petitioner testified that he was terminated from Respondent's employment by letter from Community Health Systems; the clearing company for Respondent. Petitioner never

returned to work for Respondent; Petitioner was never offered any positions since receipt of that letter. Petitioner indicated there was never an explanation regarding why he was terminated from Respondent. Respondent had requested a drug screen, per policy, after the injury, and Petitioner had tested positive for marijuana.

- Petitioner was familiar with the Dr. Rhode restrictions and those from April 18, 2016 had never been removed. Petitioner testified with those restrictions he could not reliably carried out his work responsibilities. The 50-pound lifting restriction would not have been a problem; lifting was not an issue. As to stairs, he stated he went to homes and some patients were 3rd floor apartments; he had one with an elevator out, frequently in the inner city, and he would have to walk up 8 floors; each home was at least a flight of stairs. He had to deal with whatever he encountered. He did not have to climb ladders. He indicated restriction on squatting, kneeling, crawling would affect his ability to perform his job duties. He never needed to crawl but frequently he had to squat or kneel with patients for dressing changes and things; you cannot change a foot dressing while standing. He stated he could not be a home health care nurse with those restrictions. There were no positions with Respondent going out and doing some tasks and not others. When he worked there, there was only one time they sent 2 people to the same patient; during orientation. Once he started full time he was always on his own. He testified that there was lifting associated with his job; like if a patient needed to get into bed or needed to go to the restroom, or to a porta-potty, he helped; that was occasionally. It would affect his knee if he had to put pressure on it. He had no arm problems. He noted lifting a 200-pound patient could damage his knee. He had to bend and stoop on his job, at least 50% of the patients. He would have to bend over or stoop to take vital signs on every patient. Petitioner testified that he remained on the same restrictions set April 2016.

- On cross examination, Petitioner agreed that while in post-op care he had sustained a right hand injury March 2, 2016 (about 3 months after knee surgery). That accident happened at home in his woodworking shop. He had a table saw and wood and he was doing some carpentry work making a kitchen cabinet. He stated the distal phalanges of 2 fingers were completely severed and he had to undergo immediate surgery (3rd and 4th fingers). They did microsurgery to re-attach them and they did an excellent job per Petitioner. He had been cutting one side to level it off when the accident occurred. He had put the cabinet on a stand then. He was released by Dr. Rhode at that point with restrictions and he said he knew he could not return to work as a visiting nurse with those restrictions, not per job description. He was at MMI per Rhode with the permanent restrictions April 18, 2016.

- Petitioner testified that his right knee condition has worsened. He noted the joint was looser than before. If he does not use it much it is better, but if he walked a lot it is progressively worse, every week, not dramatically but progressing. Petitioner brought his cane to hearing; it was given after surgery. He does not use the cane all of the time. He stated it depended on how the knee was actually feeling. Going downstairs he has the

cane with him. He does not do a lot of walking so he does not use it every day; he brings it with stairs or with walking a lot. Petitioner was taking medications (Norco and Norcosoft-(laxative prescribed by Dr. Rhode. Petitioner testified that Dr. Rhode has recommended total knee replacement surgery. Petitioner testified that he could not see himself going much longer without a total knee replacement. Petitioner viewed PX 4 and identified it as medical bills incurred regarding his treatment, before and after 4/16. Petitioner testified that he is no longer working as he is retired.

- Petitioner agreed he was seen for an §12 (IME) by Dr. Neal for Respondent. The exam lasted about 20 minutes. Petitioner indicated Dr. Neal questioned the nature of the injury. He noted Neal never measured the middle of the knees to check swelling (Petitioner did ortho research). He indicated it was not a thorough exam as he would give to a new

patient. Petitioner testified that his symptoms had never resolved. Currently he stated he has to be very careful when walking; he does not get around as much as before, intentionally. He stated he had sleeping problems at times, and he had lost 40 pounds since the accident due to the pain medication and nausea; his life was totally different now. He had retired and he indicated he had hired nurses and he could have been a good supervisor in the office but he could not go back to his old job; he cannot count on his knee. He could not now guarantee every day ability to walk a flight of stairs and kneel and stoop and everything else needed. He stated he is now 64 and questioned who would hire him now with restrictions, certainly not a visiting nurse. He stated they cut his TTD benefits so he had no other choice so he retired early.

The Commission finds that Petitioner's testimony is unrebutted and supported in the records. Petitioner described leaving a patient home and getting to the curb, stepping off and stepping onto loose concrete/stone that caused him to fall. Respondent stated they accepted the causal connection to April 2016. Petitioner is clearly a traveling employee exposed to greater risk than the general public. The Commission, with the evidence and testimony finds that Petitioner's met the burden of proving accident arose out of and in the course of employment. The Commission affirms and adopts the Arbitrator's finding of accident.

The Commission finds that Respondent's §12 examiner-(IME), Dr. Neal, found a causal connection–(CC) to the meniscal tear and need for the arthroscopy-(but not total knee replacement). The evidence and testimony clearly supports that need for the arthroscopy that was performed. Dr. Rhode testified at deposition, that after the arthroscopic surgery, follow ups and therapy showed the continued complaints of medial joint line tenderness and intermittently patellofemoral findings that are pre-existing. Dr. Rhode agreed the note of March 21, 2016 noted Petitioner had a complex hand surgery and Petitioner had used a cane continually. He documented that Petitioner noted anterior pain with stair ambulation; a new complaint. Dr. Rhode agreed the note indicated patellofemoral exam was conducted; and a post-operative exam. He agreed that visit was the first time he noted the possibility of a total knee replacement, based

on continued significant subjective complaints of Petitioner. Dr. Rhode agreed April 18, 2016, he indicated Petitioner's condition had plateaued and he had reached MMI and had permanent restrictions; he only documented future oral medications and Petitioner could return if needed. He agreed the May 13, 2016 note indicated he was essentially unchanged and Dr. Rhode still considered Petitioner at MMI; same June 22, 2016 and July 18, 2016. Dr. Rhode released Petitioner to sedentary work. He agreed Petitioner did not feel capable of performing at his previous restriction level. Dr. Rhode agreed the exam findings July 2016 were the same as prior. Dr. Rhode testified Petitioner then had noted falling twice in the prior 2.5 weeks; that was new and a component to change restriction to sedentary work. It was unclear if the falls were related to advancement of symptoms. He had no knowledge of the mechanism of the falls. Petitioner had noted 9/23/16 of falling again. He agreed basically from 9/16 to the last visit, Petitioner had no significant changes on exams. Dr. Rhode noted Petitioner continued to have medial line tenderness and patellofemoral compression pain which was pre-existing. Dr. Rhode testified that he agreed a portion of the complaints could be attributable to the patellofemoral condition and not the work injury.

The Commission finds that Dr. Neal testified he examined Petitioner and noted Petitioner disheveled; an unexpected presentation from a medical professional. Petitioner had presented with a cane and walked down the hall without it and a very slow gait, and awkward. He stated he was familiar with gait patterns and it was very abnormal and rather unusual for chronic knee problems, more likely with hip problems. Dr. Neal had also viewed some surveillance video. He noted he saw on video a male walking quickly with easy gait; different from what he observed. He noted a short segment with a trace limp, but majority was with no limp. He noted no antalgic gait. Dr. Neal noted later the male walked with a cane and walked briskly. He indicated he did not appear to bear weight on the cane. Dr. Neal stated his diagnosis was residual right knee pain of unknown etiology, subjectively greater than expected and with unusual findings suspicious of symptom magnification; status post arthroscopy, meniscectomy. Dr. Neal indicated he felt there were multiple factors with elements of symptom magnification. Dr. Neal noted that Petitioner had been declared at MMI. Dr. Neal found a causal connection between the incident producing a meniscal tear that required surgery. He stated the use of the cane was not necessary for the knee condition presently.

The Commission finds that Dr. Rhode saw Petitioner throughout and opined a causal connection to his current condition of ill-being. Dr. Rhode's opinions with his medical records support Petitioner's testimony of a condition of ill-being. There is no evidence to even suggest any significant symptoms prior to the accident through the arthroscopy; clearly evidencing an aggravation/exacerbation of that condition, in addition to the acute tears that had required the arthroscopy. There were delays for that surgery due to utilization review denials, but Petitioner had the arthroscopy December 8, 2015 and went through recovery care. Dr. Rhode found Petitioner at maximum medical improvement-(MMI), April 18, 2016, other than the option of the replacement which is when the patient felt the quality of life with the pain can no longer go on that way. Petitioner claims he had now reached that point and desired the arthroplasty. The records clearly noted his ongoing complaints throughout and Petitioner even noted he felt worse

since the arthroscopy. There is no evidence of any intervening injury, but Petitioner had essentially had no treatment for his knee for about a year and a half to the hearing, but no convincing evidence to support an ongoing causal connection to his current condition of ill-being, other than Dr. Rhode recommending the arthroplasty when Petitioner could no longer deal with the pain. Petitioner testified that his right knee condition had worsened. The Commission finds that there may be some credibility questions. The Commission notes that while in post-operative care from this injury, Petitioner had sustained finger injuries while building cabinets; that injury required two fingers to be surgically reattached. Those cabinet building activities would appear to be more strenuous than his normal job duties. The evidence and testimony find that Petitioner's met the burden of proving a condition causally related to the accident through to the arthroscopy and recovery, but not beyond the date he was found at MMI by Dr. Rhode, April 18, 2016. The Commission finds the decision of the Arbitrator as contrary to the weight of the evidence, as to his current condition of ill-being. The Commission, herein, modifies the Arbitrator's causal connection to find Petitioner reached maximum medical improvement April 18, 2016 and his current condition of ill-being is no longer related to the injury. Therefore, all temporary total disability benefits, medical expense benefits, and prospective medical care are denied after April 18, 2016.

The Commission, with the finding that Petitioner reached MMI April 18, 2016, finds Petitioner met the burden of proving entitlement to TTD benefits July 22, 2015 through April 18, 2016 (38-5/7 weeks, at $755.22 per week, total TTD $29,237.80); any benefits beyond April 18, 2016 are denied. Respondent is entitled to credit for TTD benefits, maintenance benefits and other benefits paid.

The Commission, with the finding that Petitioner reached MMI April 18, 2016, finds Petitioner met the burden of proving entitlement to medical expense benefits through April 18, 2016 and medical expenses and prospective care thereafter are denied. The Commission finds the decision of the Arbitrator as contrary to the weight of the evidence, and, herein, modifies the decision the Arbitrator's to deny any and all medical expenses and prospective medical care after Petitioner reached MMI April 18, 2016.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $755.22 per week for a period of 38-5/7 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.

18IWCC0649

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner medical expenses, through the date Petitioner reached MMI, April 18, 2016, under §8(a) of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $10,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

Stephen J. Mathis

Stephen Mathis

DATED: OCT 2 9 2018
o-8/30/18
DLG/jsf
045

Deborah L. Simpson

Deborah Simpson

Dissent

I respectfully dissent from the majority decision and would affirm the Arbitrator's well reasoned decision in its entirety.

David L. Gore

David L. Gore

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

STROM, JAMES
Employee/Petitioner

Case# **16WC016568**

BLUE ISLAND HOME CARE SERVICES
Employer/Respondent

18IWCC0649

On 2/16/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.78% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2208 CAPRON & AVGERINOS PC
STEPHEN J SMALLINGS
500 W MONROE ST SUITE 900
CHICAGO, IL 60603

0075 POWER & CRONIN LTD
KIRK KUHNS
900 COMMERCE DR SUITE 300
OAKBROOK, IL 60523

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

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

James Strom — Case # **16 WC 016568**
Employee/Petitioner
v.
Blue Island Home Care Services — **Consolidated cases:**
Employer/Respondent

18IWCC0649

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

DISPUTED ISSUES

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

N. ☐ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On the date of accident, **July 21, 2015**, 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, Petitioner earned **$81,692.00**; the average weekly wage was **$1,571.00**.

On the date of accident, Petitioner was *62* 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 *$42.965.13* for TTD, $0 for TPD, $0 for maintenance, and *$16,766.88* for other benefits, for a total credit of *$59,732.01*.

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

ORDER

Respondent shall pay $14,566.11 to Orland Park Orthopedics/Dr. Rhode, pursuant to §8(a) of the Act and adjusted in accord with the medical fee schedule provided by §8.2 of the Act.

Respondent shall pay Total Temporary Disability benefits from July 22, 2015 through April 18, 2016, at a rate of $755.22 per week, and is entitled to Maintenance from April 19, 2016 through the date of the arbitration hearing, at a rate of $755.22 per week through June 30, 2016 and at a rate of $775.18 per week thereafter.

Respondent shall authorize and pay for the total right arthroplasty recommended by Dr. Rhode, as well as all reasonable and necessary after care. Payment shall be in accord with the medical fee schedule provided by §8.2 of the Act.

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

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

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

Signature of Arbitrator

February 16, 2018
Date

JAMES STROM v. BLUE ISLAND HOME CARE SERVICES
16 WC 16568

INTRODUCTION

This matter proceeded to hearing before Arbitrator Steven Fruth. The disputed issues were: ***C:*** Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?; ***F:*** Is Petitioner's current condition of ill-being causally related to the accident?; ***J:*** Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?; ***K:*** Is Petitioner entitled to prospective medical care?; ***L:*** What temporary benefits are in dispute? TTD

The parties stipulated that Petitioner's average weekly wage was $1,571.00.

FINDINGS OF FACT

Petitioner worked for Respondent as a home healthcare nurse since 2013. His employment required him to see 5-7 patients per day. The patients were typically non-ambulatory. He would travel to their home with his own vehicle. He worked 5-6 days per week and was on call one weekend per month. Respondent provided his equipment and supplies.

On July 21, 2015, Petitioner was leaving a patient's home at approximately 4:00 p.m. and stepped off a curb onto "a loose piece of concrete" and fell to the ground, injuring his right knee. Petitioner testified he did not have prior problems with his right knee and had been a very health individual.

Petitioner completed a post-accident drug screen on July 23, 2015. The results were positive for marijuana. Petitioner confirmed knowledge and understanding of the positive drug screen. Petitioner was terminated from employment on August 13, 2015 (PX #5). He testified he did not know why he was terminated.

Petitioner was evaluated in the emergency room at Metro South on July 21. Thereafter, he came under the care of Dr. Blair Rhode, an orthopedic surgeon at Orland Park Orthopedics (Orland Park Ortho). Petitioner was examined by P.A. Mark Bordick July 31, 2015 at Orland Park Ortho. Petitioner gave a history of his fall while stepping off a curb going to a patient's house July 21, 2015. He reported that emergency room x-rays of his right ankle were negative for fracture. Petitioner reported that at the time of his exam Jul 31 his ankle was improved but that his right knee was more symptomatic. He denied any instability.

On examination P.A. Bordick found normal range of motion and strength in both knees. Testing for ligament damage was negative. There was medial joint line tenderness and a positive McMurray in the right knee with a negative McMurray along the lateral joint line; the left knee was normal for meniscal tear. A plain x-ray showed narrowing of the right knee medial joint line. P.A. Bordick diagnosed a right medial meniscus tear and ordered an MRI. P.A. Bordick was signed off by Dr. Rhode.

The right knee MRI was done August 5, 2015. The radiologist noted a low-grade sprain of the tibial collateral ligament, tears of the posterior horn of the medial meniscus, and chondromalacia of the patellofemoral articulation and posterior tibial condyle.

Petitioner returned to Orland Park Ortho on August 10, 2015 (PX #1). Dr. Rhode noted the MRI finding and added his suspicion of a lateral meniscus tear also. Petitioner's right knee was injected with Kenalog and Lidocaine. Dr. Rhode noted that the injury was work related and recommended arthroscopic surgery to repair the torn meniscus. Dr. Rhode performed the arthroscopic repair of Petitioner's right medial meniscus (PX #1). P.A Bordick assisted. Dr. Rhode debrided 50% of the posterior horn of the meniscus. He noted grade III-IV changes along the weight-bearing portion of the medial tibial plateau below the meniscus tear. There were no changes in the articular cartilage of the medial femoral condyle. There were no changes in the lateral meniscus, lateral tibial plateau, or the lateral femoral condyle. He also found no loose bodies or osteophytes.

Petitioner followed with post-operative physical therapy. While Petitioner followed with therapy he sustained a non-occupational injury to his right hand. Petitioner admitted on March 2, 2016, he was at home in his basement performing carpentry work with a table saw. He was working with lumber, building a cabinet. Petitioner lifted the cabinet up onto the saw table stand. He sustained almost complete amputation to two fingers and required immediate surgery on March 2, 2016 with pin placement. Petitioner confirmed he was restricted relative to his right hand thereafter, but was unable to provide specific evidence of whether he was released full duty from the hand injury.

Approximately 6 weeks after Petitioner's non-occupational injury right hand injury, April 8, 2016, Dr. Rhode released Petitioner at MMI relative to his right knee. Dr. Rhode placed medium duty work restrictions, 50 lb. max lift/carry limitation and 25 lb. frequent, along with no squatting/kneeling/crawling (PX #1). Dr. Rhode reiterated the MMI assessment and restrictions on May 13 and June 22, 2016. X-rays on May 13 showed near bone-on-bone in the tunnel view.

Petitioner returned to Dr. Rhode July 18, 2016. It was noted that "he does not feel

capable of performing within the current restrictions." Dr. Rhode revised Petitioner's restrictions to "sedentary" duty but still noted Petitioner was at MMI (PX #1).

Dr. Rhode noted on August 12, 2016 that an FCE would be appropriate. Petitioner admitted he was unable to proceed with the FCE due to his right hand injury. Petitioner acknowledged he was still treating for his injury at the time and the pins had not been removed. Petitioner admitted he has never participated in a FCE recommended by Dr. Rhode.

Petitioner testified that he would babysit his grand-daughter 3 days a week over a 4-5 month period. He would babysit from 8 or 9 a.m. until 3:00 p.m. Petitioner acknowledged and agreed he would have to bend/squat/kneel/lift in caring for his grand-daughter. However, Petitioner was unable to remember what specific 4-5 month period of time he did babysit his grand-daughter.

Petitioner continued to follow up with Dr. Rhode for ongoing management of his knee. On January 20, 2107 Dr. Rhode recommended a total knee arthroplasty (PX #1), which has not been approved.

Petitioner's Exhibit #2 and Respondent's Exhibit # 2, relating to video surveillance of Petitioner, were admitted without objection. Petitioner was surveilled from May 24, 2016 through February 9, 2017. On May 24, 2016 Petitioner was twice observed walking without a cane and without any apparent impairment in his gait. On June 18, 2016 Petitioner was again observed walking without a cane and with no apparent impairment in his gait. On August 8, 2016 Petitioner was observed using a cane in his left hand as he walked and with a slight limp. On August 8 Petitioner was again observed using a cane, this time with his right hand, and with no apparent impairment in his gait. On November 11, 2016 Petitioner was observed running with an obvious limp, carrying his cane in his right hand and using a phone with his left hand. On November 12, 2016 Petitioner was observed lifting a garbage bag into the trunk of a car without apparent limitation or restriction.

Petitioner was not observed in surveillance on August 20, 2016, February 7, 2017, and February 9, 2017. All in all, each video clip was but a few seconds long.

Petitioner has continued under the care of Dr. Rhode. He was examined on January 20, 2017. It was noted he had no significant change in his symptoms and was continuing to utilize a cane for assistance in ambulation. Given his lack of response to conservative care and the failure of his symptoms to resolve, Dr. Rhode again recommended a total knee arthroplasty due to the progression of symptoms following his

knee injury (PX #1). Petitioner testified that he can longer function on the knee as it currently exists and he wants to have the total knee replacement procedure prescribed by Dr. Rhode.

Petitioner testified about the impact of specific restrictions outlined in Dr. Rhode's April 18, 2016 work status note (PX #1). With respect to the lifting limitation, Petitioner did not feel it would impact him other than put him at risk with respect to the use of his knee in lifting a heavy patient. The restriction of no squatting, kneeling, or crawling would effectively preclude him from engaging in a substantial portion of the duties required of him as a visiting nurse. In addition, the restriction of only occasional bending or stooping likewise would impact on his ability to perform the job duties associated with treating the patients for a variety of medical conditions which require these physical activities.

Petitioner testified that his knee symptoms continue to progress and deteriorate up through the date of the hearing. He uses a cane which had been provided to him by his girlfriend at some point during his treatment. The cane had not been formally prescribed but Petitioner testified Dr. Rhode had no objection given the fact he had fallen a couple of times due to the condition of his knee. Petitioner takes Norco daily together with a laxative to counteract the effect of the Norco on his digestive system.

Petitioner testified that he has not sought further employment due to the condition of his knee. He feels he cannot function in the absence of a total knee replacement. Given his financial situation and medical condition, he retired.

Petitioner's Exhibit #4 was the outstanding billing from Orland Park Orthopedics/Dr. Rhode, totaling $14,566.11.

Dr. Bryan Neal IME and deposition

Orthopedic surgeon Dr. M. Bryan Neal at Arlington Orthopedic & Hand Surgery Specialists, Ltd., performed a §12 IME October 19, 2016 (RX #1 & Neal DepX #2). Dr. Neal reviewed Petitioner's medical records from Metro South Emergency Department, clinical notes by P.A. Bordick and Dr. Blair Rhode, Dr. Rhode's December 8, 2015 operative report, the August 8, 2015 right knee MRI, physical therapy records, Peer Physician reports by Dr. Khalid Yousuf dated October 14, 2015 and by Dr. Junaid Makda dated November 12, 2015, and video surveillance clips. Dr. Neal practices general orthopedic surgery: upper and lower extremities, hips, and knees. He performs about 6 IMEs a week, the "vast" majority for respondents. He generally charges $1,700 for each IME.

Dr. Neal gave his evidence deposition April 11, 2017 (RX #2). He testified from his report (RX #1 & DepX #2). He summarized Petitioner's medical care up to the time of the IME. He noted Petitioner was diagnosed with a right knee contusion when he was seen in the emergency department of MetroSouth on July 21, 2015. X-rays of the right knee on that day were unremarkable. Petitioner followed with Dr. Rhode and P.A. Bordick at Orland Park Orthopedics. X-rays on July 31, 2015 noted narrowing of the medial joint line. An MRI August 5, 2015 showed a horizontal tear of the posterior horn of the medial meniscus with mild chondromalacia in the medial tibial condyle and in the patellofemoral articulation. Petitioner had minimal relief from a corticosteroid injection August 10, 2015. Dr. Rhode performed arthroscopic surgery December 8, 2015. Dr. Rhode performed a partial right medial meniscectomy, involving 50% debridement of the posterior horn. He also found grade II changes to the central patella and grade III-IV changes in the medial tibial plateau. Petitioner continued to have pain after surgery, therapy, and another corticosteroid injection. On March 21, 2016 Dr. Rhode noted that Petitioner may require a total knee replacement. X-rays May 13, 2016 showed near bone-on-bone articulation. Dr. Rhode noted on May 13 that Petitioner was at MMI and "permanent." Petitioner continued with Dr. Rhode and P.A. Bordick through October 2016.

Petitioner presented for the IME with complaints of right knee pain in the medial aspect since his work accident July 21, 2015. He denied any prior right knee problems but admitted to occasional clicking in both knees. He further reported full range of motion prior to his accident and denied prior medical intervention for his right knee, including physical therapy, chiropractic care, injections, and x-rays or MRIs. Petitioner reported that his primary physician was Dr. Woo through the VA, but had been Dr. Woo's patient for about one year. Petitioner denied having a primary physician before Dr. Woo, which Dr. Neal found to be unusual. Petitioner also gave a history of hepatitis infection and treatment while in the military. Petitioner was unsure if he was infected with Hepatitis A or Hepatitis B. In addition, Petitioner reported a 50-pound weight loss since his knee surgery, also found to be unusual by Dr. Neal.

Dr. Neal also reviewed 4 surveillance videos clips. He testified that on May 24, 2016 Petitioner demonstrated an east reciprocal gait, which was different from that at the IME October 19, 2016. He did not observe any limp by Petitioner on June 18 or August 8, 2016. He noted that on August 8 Petitioner was walking in a serpentine fashion which stresses knees. He also noted Petitioner was using a cane on August 8 but was not putting weight on the cane. He was not told there were additional surveillance video clips. Also, Dr. Neal believed Petitioner magnified his symptoms.

Dr. Neal agreed that Petitioner sustained a meniscus tear. He also agreed that the arthroscopic surgical repair. He further opined that the meniscus tear and surgery were

causally related to the work accident on July 21, 2015. Dr. Neal diagnosed residual right knee pain with unknown etiology with subjective complaints greater than expected from the objective findings. He could not conclude that Petitioner's "current subjective complaints to be causally related to his work fall of July 21, 2015." In addition, Dr. Neal opined that Petitioner is not a candidate for a total knee replacement, noting total knee replacements are principally done for significant arthritic pain which significantly affects the quality of one's life and which is refractory to non-operative modalities. Finally, Dr. Neal opined that Petitioner was capable of full duty work without medical restrictions, and in the alternative, stated the restrictions assigned by Dr. Rhode at the "medium work level" would allow Petitioner to perform his regular work as a home health nurse.

Dr. Neal also conducted an AMA Impairment rating. He found that Petitioner had a 2% impairment of a lower extremity.

Dr. Blair Rhode deposition

Dr. Rhode gave his evidence deposition April 10, 2017. He is a board certified in orthopedic surgery and in sports medicine. He primarily treats orthopedic problems involving shoulders, elbows, and knees. He testified from notes in Petitioner's clinical record. He also reviewed Dr. Neal's October 19, 2016 IME report.

Dr. Rhode reiterated and reviewed his care of Petitioner's right knee injury. He noted that there was evidence of grade II patellofemoral changes which were present before Petitioner's work accident. He diagnosed a tear of the posterior horn of the medial meniscus which required surgical repair December 8, 2015. He removed approximately 50% of the meniscus. He also diagnosed grade III-IV cartilage loss below the medial meniscus tear. He described this as a unipolar cartilage injury to the medial tibial plateau. Unipolar cartilage loss is an indication of traumatic cause rather than arthritic. Dr. Rhode opined that these injuries were causally related to Petitioner's work accident.

Dr. Rhode supervised Petitioner's post-surgical care, including physical therapy, and progress. He noted that Petitioner continued to have complaints with his knee throughout 2016. By March 21, 2016 Dr. Rhode believed Petitioner was a candidate for a total knee replacement. By April 18, 2016 Dr. Rhode found Petitioner had plateaued even though he continued to have significant medial compartment symptoms. He found Petitioner at MMI on April 18 and gave medium duty work status with no kneeling, squatting, or crawling. He noted Petitioner should limit walking up and down stairs. However, by July 18, 2016, he placed Petitioner on sedentary work status due to his continuing complaints. He last saw Petitioner March 31, 2017. He did not change his diagnosis of recommendation for surgery based on that consultation.

Dr. Rhode confirmed his opinion that Petitioner requires a total right knee replacement. He bases his opinions to recommend surgery on the patient's objective presentation. Here, Petitioner has near bone-on-bone in his right knee. The final decision to do ahead with surgery is up to the patient and their tolerance of their subjective symptoms. Dr. Rhode believe that the need for the knee replacement is causally connected to Petitioner's work accident.

Dr. Rhode did not agree with Dr. Neal's findings and opinions. He disputed Dr. Neal's finding of a normal knee exam. Dr. Rhode specifically noted that he did not observe symptom magnification in the 20 to 25 visits he had with Petitioner. He would be leery of recommending surgery for a patient with subjective complaints that were inconsistent with objective findings.

Dr. Rhode acknowledged that he had not seen any video surveillance of Petitioner. He testified that a cane should be used on the contralateral (opposite) side for a hip problem. A patient with a knee problem can use a cane on either side depending on which side worked better for the patient.

Corrected CONCLUSIONS OF LAW

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

The Arbitrator finds that Petitioner proved that he did sustain an accidental injury to his right knee that arose out of and in the course of his employment with Respondent. In doing so, the Arbitrator notes Petitioner was working for the Respondent on July 21, 2015, and at that time, Petitioner had traveled to a patient's home via his own vehicle to perform his required job duties. Petitioner was leaving a patient's home on a July 21, 2015 at approximately 4:30 p.m. and stepped off a curb and onto "a loose piece of concrete" and fell to the ground – injuring his right knee. It was not genuinely disputed that Petitioner was a traveling employee.

Injuries sustained by employees traveling to or from the workplace are generally not compensable. There is an exception where an employee's work duties require travel away from the work site. An injury sustained by a traveling employee away from the work site is compensable if at the time of the accident the employee's conduct was reasonable and that the risk of injury was foreseeable. There are three types of risks to which an employee may be exposed: 1) risks distinctly associated with the employment, 2) risks which are personal to the employee, and 3) neutral risks which have no employment or personal characteristic. An injury resulting from a neutral risk is compensable if the employee was exposed to a risk greater than the general public would be exposed to.

Here, Petitioner, by virtue to the requirements of his job was exposed to a risk that was greater than a risk the general public would be exposed to. Petitioner's job required providing health and nursing care to individuals in their homes. The job required traversing a wide variety of sidewalks, steps, and porches in order to get to and from a patient's home more often that the general public, which was incidental to his work. This particular aspect of the job exposed Petitioner to the risk of encountering uneven, broken, or even missing pathways to and from a patient's doorway. This is a risk greater than one normally encountered by the general public.

Therefore, the Arbitrator finds Petitioner proved his accident on July 21, 2015 arose out of and in the course of his employment.

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

The Arbitrator finds that Petitioner proved that his current condition of ill-being in his right knee is causally related to his work accident on July 21, 2015. Such a finding is necessarily reliant on Petitioner's credibility. The Arbitrator notes that Petitioner's credibility is challenged.

Petitioner sustained an off-work hand injury while working on cabinetry in his basement. The Arbitrator notes that carpentry often requires standing, stooping, and kneeling, all of which stress knees. Carpentry also often requires picking up and carrying heavy or awkwardly shaped items which also stress the knees. Petitioner's off-duty injury while building cabinetry in his home workshop suggests that that his claimed limitations with his knee is not as severe as claimed. In addition, the Arbitrator also notes that babysitting young children, such as a 2-year-old grandchild, requires keeping up with the child that also stresses knees.

Petitioner testified that during military service he was diagnosed and treated for hepatitis. He could not remember whether it was hepatitis A or B. The Arbitrator notes that a healthcare professional such as petitioner would know the difference between hepatitis A and hepatitis B, as well as the treatment protocols for each.

Furthermore, the surveillance video demonstrated that Petitioner was able to ambulate with no apparent restriction or limitation. Petitioner was twice observed on surveillance using a cane to walk. He used the cane with his right hand in one video clip and with is left hand in another clip. There was no indication that Petitioner was using the cane for support or balance on either occasion.

Finally, the Arbitrator finds that Petitioner was not credible when he denied knowing the reason for his termination after a post-accident drug test was positive for marijuana. The Arbitrator notes that failed drug testing is a common, almost universal, basis for terminating employment.

All the foregoing aside, Petitioner objectively sustained a torn medial meniscus overlying a pre-existing degenerative condition. He had reasonable and necessary medical care which included arthroscopic surgical removal of 50% of his right medial meniscus. There was no dispute that Petitioner's injury and subsequent medical care was causally related to the work accident. What is disputed is whether Petitioner's current complaints and clinical condition are causally related.

The Arbitrator reviewed and evaluated the conflicting causation opinions of Petitioner's treating orthopedist, Dr. Blair Rhode, and Respondent's §12 examining orthopedist, Dr. Bryan Neal. The Arbitrator finds Dr. Rhode's opinions reasonable and persuasive. The Arbitrator did not find Dr. Neal's opinions persuasive and therefore adopts the opinions of Dr. Rhode.

Dr. Rhode treated Petitioner for more than a year and a half, comprising 20 – 25 clinical encounters. Dr. Rhode limits his orthopedic practice to sports joint problems. His opinions are based on his clinical encounters with Petitioner, his ability to visually assess Petitioner's knee during surgery, and objective radiology studies. That Dr. Rhode did not review surveillance videos of Petitioner did not distract from the reasonableness of his opinions.

Dr. Neal's bias was palpable. He performs 6 IMEs a week for $1700 each. The "vast" majority of his IMEs are for respondents. This accounts for about $500,00 a year from only one side of the adversarial equation.

Neal testified that he performs a wide variety of orthopedic surgeries rather that limiting himself to a focus where he could master one area or two of orthopedic surgery. His background does not qualify him to give opinions regarding the limited scope of knee injuries contradicting opinions of Dr. Rhode, who has greater expertise. Furthermore, the Arbitrator finds Dr. Neal's opinion that Petitioner does not require a total knee replacement with a bone-on-bone presentation to be totally unreasonable.

An employer takes its employee as they find the employee, meaning an employee with a pre-existing condition may have a compensable claim when they are injured in a work-related accident that aggravates or exacerbates the pre-existing condition. Such is the case here. The evidence is clear that Petitioner's pre-existing degenerative knee was exacerbated by his work 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?

The medical expenses incurred for the treatment of Petitioner's right knee condition are contained in Petitioner's Exhibit #4. Respondent has not disputed the reasonableness and necessity of Dr. Rhode's care up to April 18, 2016, when Dr. Rhode found Petitioner at MMI. Petitioner continued to have symptomatic complaints which Dr. Rhode found to be related to Petitioner's original work injury. As stated above, the Arbitrator found Dr. Rhode's opinions more persuasive than the opinions of Dr. Neal. Correspondingly, the Arbitrator finds that all the professional charges for care by Dr. Rhode at Orland Park Orthopedics are reasonable, inasmuch as the underlying medical care was necessary to cure or relieve the effects of Petitioner's work injury.

Based on the foregoing, Respondent shall pay reasonable and necessary medical charges of $14,566.11 as contained in Petitioner's Exhibit #4, pursuant to §8(a) of the Act and adjusted in accord the medical fee schedule as provided by §8.2 of the Act.

K: Is Petitioner entitled to prospective medical care?

For reasons stated above, the Arbitrator finds that petitioner proved that he is entitled to the prospective medical care recommended by his treating orthopedist, Dr. Blair Rhode. As stated above, the Arbitrator for Dr. Rhode's opinions more reasonable and persuasive than the opinions of Respondent's §12 examining orthopedist Dr. Bryan Neal.

Accordingly, Respondent shall authorize and pay for the total right arthroplasty recommended by Dr. Rhode, as well as all reasonable and necessary after care. Payment shale be in accord with the medical fee schedule as provided by §8.2 of the Act.

L: What temporary benefits are in dispute? TTD

A claimant is entitled to temporary total disability benefits from the time an injury incapacitates him from work until such time as he is has recovered or restored as the permanent character of his injury will permit. Petitioner remains subject to restrictions with a surgical recommendation confirming that he has yet to reach maximum medical improvement.

Dr. Rhode found Petitioner at MMI on April 18, 2016 and reiterated that opinion on May 13, 2016. However, in that same time Dr. Rhode was recommending a total knee replacement. As noted above, the Arbitrator found Dr. Rhode's recommendation for a total knee replacement to ne reasonable and persuasive. Dr. Rhode gave work restrictions for Petitioner's return to

work. However, there was no evidence that Respondent attempted to accommodate those restrictions. Petitioner's testimony that he could no longer perform his regular job duties given those restrictions was corroborated by Dr. Rhode's findings and opinions.

Dr. Rhode opined that it is feasible that Petitioner's restrictions could be modified following the performance of the total knee replacement, at which time he would be deemed to be at MMI with his functional status able to be assessed. Based upon the foregoing, the Arbitrator finds that the Petitioner was temporarily and totally disabled for the period July 22, 2015 through the date of the hearing, June 27, 2017.

The Arbitrator finds that Petitioner is entitled Total Temporary Disability benefits from July 22, 2015 through April 18, 2016 and is entitled to Maintenance from April 19, 2016 through the date of the arbitration hearing due to the lack of evidence that Respondent made any effort to accommodate Petitioner's work restrictions.

Steven J. Fruth, Arbitrator

February 16, 2018

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Luz Preciado,

Petitioner,

vs. NO: 16 WC 3632

GCA Services,

Respondent.

18IWCC0650

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 23, 2018, is hereby affirmed and adopted.

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

18IWCC0650

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 $3,000.00. 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 29 2018
o101118
DLG/mw
045

David L. Gore

Stephen Mathis

Deborah Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PRECIADO, LUZ
Employee/Petitioner

Case# **16WC003632**

GCA SERVICES
Employer/Respondent

18IWCC0650

On 3/23/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.95% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5354 STEPHEN P KELLY
ATTORNEY AT LAW LLC
2710 N KNOXVILLE AVE
PEORIA, IL 61604

0075 POWER & CRONIN LTD
JENNIFER MAXWELL
900 COMMERCE DR SUITE 300
OAKBROOK, IL 60523

STATE OF ILLINOIS)
)SS.
COUNTY OF Peoria)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Luz Preciado
Employee/Petitioner

v.

GCA Services
Employer/Respondent

Case # **16** WC **3632**

Consolidated cases: **N/A**

18IWCC0650

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Melinda Rowe-Sullivan**, Arbitrator of the Commission, in the city of **Peoria**, on **February 20, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ 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 _____

18IWCC0650

FINDINGS

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

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

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

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

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

Per the stipulation of the parties, in the year preceding the injury, Petitioner earned **$17,446.52**; the average weekly wage was **$335.51.**

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

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

Respondent shall be given a credit of **$9,114.28** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$9,114.28.**

Respondent shall be given a credit of **$0** in medical bills through its group medical plan for which credit may be allowed under Section 8(j) of the Act.

ORDER

As Petitioner has failed to prove that her current condition of ill-being is causally related to the accident of July 10, 2015, Petitioner's request for prospective medical treatment as recommended by Dr. D'Souza is denied.

Respondent shall pay for medical services **rendered up to September 19, 2016** as provided in Sections 8(a) and 8.2 of the Act. Respondent is to hold Petitioner harmless for any claims for reimbursement from any health insurance provider and shall provide payment information to Petitioner relative to any credit due. Respondent is to pay unpaid balances with regard to said medical expenses **for treatment rendered up to September 19, 2016** directly to Petitioner. Respondent shall pay any unpaid, related medical expenses **for treatment rendered up to September 19, 2016** according to the fee schedule and shall provide documentation with regard to said fee schedule payment calculations to Petitioner.

Respondent shall pay Petitioner temporary total disability benefits of **$223.67**/week for **33 3/7** weeks, commencing **January 29, 2016 through September 19, 2016,** as provided in Section 8(b) of the Act.

Respondent shall be given a credit of **$9,114.28** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$9,114.28.** Respondent is also entitled to a credit in the amount of **$1,637.22** for an overpayment of TTD benefits.

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

3/21/18
Date

ICArbDec19(b)

MAR 23 2018

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(B)

Luz Preciado
Employee/Petitioner

Case # 16 WC 3632

v.

Consolidated cases: N/A

GCA Services
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that she has been employed with Respondent since 2011. She testified that she was employed by Respondent as a housekeeper. She testified that she has been able to perform her job activities for Respondent since 2011 as a housekeeper. She testified that her job duties required her to clean bathrooms, offices and conference rooms. She testified that she was also required to take out the trash and dust.

Petitioner testified that her job duties while working for Respondent required her to be on her feet all day. She testified that her duties also required her lift up trash and dump it into a bigger bag. She testified that other duties she performed for Respondent required her to use ladders and step stools when putting toilet paper and paper towels in the bathrooms.

Petitioner testified that she worked with brooms and dust mops and was required to push a cart while performing her daily work activities for Respondent. She testified that she was able to do these work activities without any difficulty.

Petitioner testified that she did not miss any work prior to July 10, 2015 for any right ankle issues. She testified that she had not sought any medical treatment by any physician for right ankle problems before July 10, 2015. She testified that prior to July 10, 2015, she never saw any type of orthopedic specialist nor underwent any MRIs to her right foot.

Petitioner testified that on July 10, 2015, she was working for Respondent in her normal job duties. She testified that she was exiting an elevator with a bag full of garbage and tripped on an uneven surface. When asked how she tripped and fell, Petitioner responded "and I was kind of swinging back and forth because I was about to fall. And then I finally fell, and said, Oh God I just fell. Well I scream and then I notice it was Jessica and Jose talking in the back, and Jessica told Jose, hey, help her out because she just fell." Petitioner testified that when she got up, both of her legs and back were hurting. She testified that she felt a pain that came from her both of her ankles all the way up to her hips.

Petitioner testified that she reported the injury on July 10, 2015 to her supervisor, Gary. She testified that she first sought treatment for her alleged ankle injury in the fall of 2015 at Heartland Clinic. She testified that she underwent an MRI of the ankle in December of 2015. She testified that she did not treat with Dr. D'Souza until March of 2016. She testified that she stopped working on January 29, 2016

of her own volition after experiencing pain while working. She testified that she wants to proceed with the right ankle surgery as recommended by Dr. D'Souza.

Petitioner testified on cross examination she worked for several months after the alleged accident. She testified on cross examination that she was examined by Dr. Li in November 2015, again on April 26, 2016 and finally on September 19, 2016. She testified on cross examination that she was offered medical treatment at the time of the injury, but that she refused it. Petitioner admitted on cross examination that she did understand some English when she was working, but stated that now that she is not working, "my head is all over the place, I don't know what's going on."

Gary Welker was called as a witness by Respondent at the time of arbitration. Mr. Welker testified that he was Petitioner's supervisor at the Mossville MEC plant on the date of the alleged injury on July 10, 2015. He testified that as the supervisor, he was familiar with Petitioner's job duties. He testified that as part of her housekeeping job duties, Petitioner did not have to use a step stool. He testified that he had an opportunity to talk with Petitioner on a daily basis and that she did not require the use of a translator. He stated that she spoke "broken English" and that he spoke a little bit of Spanish, enough to get through. He testified that he never felt there was a language barrier preventing him from understanding Petitioner.

Mr. Welker testified that on July 10, 2015 he received a call that Petitioner fell, so he immediately came to the area where she was located. He testified that he first witnessed Petitioner and a woman named Alelia walking towards Turnstile 3 in the front of the building. He testified that Petitioner did not appear to have difficulty walking. He testified that he followed them outside and that at that time, Petitioner was sitting outside holding her leg and complaining that her knee hurt. He testified that Petitioner was grabbing her left leg, near the top of the knee area. He testified that Petitioner did not indicate that she was hurting anywhere else on her body. He testified that Petitioner was wanting pain pills. He testified that he asked Petitioner which leg was hurting and that she again indicated the left one and that she refused medical attention, even though he had already called for emergency help.

Mr. Welker testified that he called Chris Gorshe. He testified that at no point did Petitioner tell or indicate to him that she had hurt her right ankle. He testified that Petitioner's body language also told him that her left knee was hurting. He testified that after about a half hour, Petitioner got up and walked back into the building and that he did not notice anything unusual with her right leg or ankle. He testified that he did, however, notice a little limp to the left. He testified that he had a total of 45-60 minutes to observe Petitioner after the alleged incident.

Mr. Welker testified that he called Chris Gorshe, the regional manager, to report the alleged incident per Respondent's policies and procedures. He testified that Petitioner continued to work after the alleged incident. He also testified that Respondent was able to accommodate light duty restrictions. He testified that Petitioner worked until January 29, 2016. He testified that he never told Petitioner that restrictions could not be accommodated. He testified that if Petitioner had returned at any point after January 29, 2016 with restrictions and had asked to come back to work, she would have been accommodated.

Chris Gorshe was called as a witness by Respondent at the time of arbitration. Mr. Gorshe testified that he is currently the Regional Manager for Respondent and that he was also the Regional Manager on July 10, 2015. He testified that one of the sites he was responsible for was that of the Caterpillar MEC plant in Mossville. He testified that his job duties included reporting and recording of alleged work injuries or accidents. He testified that Respondent's Exhibit 4 was the incident report that he filled out as a result of the alleged accident reported by Petitioner on July 10, 2015. He confirmed that the handwriting and signature at the bottom of the page belonged to him and that the exhibit was complete, accurate and kept in the course of business.

Mr. Gorshe testified that came to learn of the incident on July 10, 2015 in the afternoon when he received a call from Gary Welker. He testified that he filled out the form while he was on the phone with Mr. Welker. He testified that Petitioner was present when Mr. Welker called him because he could hear her in the background. He testified that at no point did Petitioner report to him that she had injured her right ankle as a result of the alleged accident.

The Application for Adjustment of Claim was entered into evidence at the time of arbitration as Petitioner's Exhibit 1.

The medical records of Heartland Community Health Clinic were entered into evidence at the time of arbitration as Petitioner's Exhibit 2. The records reflect that Petitioner was seen on September 2, 2016, at which time it was noted that she was not improving and was in the process of planning surgery with someone at Midwest Orthopaedic Center although she wanted to avoid surgery. The assessment was noted to be that of stress fracture of the navicular bone of the right foot; plantar fasciitis of the right foot; moderate ankle sprain, right, sequela; chronic pain of right ankle. Petitioner was prescribed medications at that time. At the time of the September 20, 2016 visit, it was noted that Petitioner was having swelling in her left foot for three months, as well as anxiety and depression. It was noted that Petitioner was stressed about not working, was nervous about having surgery on her right foot and felt anxious almost daily. At the time of the October 14, 2016 visit, it was noted that Petitioner was scheduled for surgery with Orthopedics and that she was wondering what would happen if she did not have surgery. It was noted that Petitioner was doing a little bit better, that she stated that she had been told her fractures were healed and that the tendon continued to bother her. The assessment was noted to be that of stress fracture of navicular bone of the right foot; moderate ankle sprain, right, sequela; leg pain, right. Petitioner was instructed to return to the clinic as needed if her symptoms worsened or she failed to improve. (PX2).

The records of Heartland Community Health Clinic reflect that Petitioner was seen on April 15, 2016, at which time it was noted that she had continued right foot and ankle pain. It was noted that Petitioner was currently in physical therapy but remained in pain and that she felt minimal improvement was being made even though she was wearing the boot as directed. The assessment was noted to be that of stress fracture of navicular bone of the right foot; plantar fasciitis of the right foot; moderate ankle sprain, right, sequela. Petitioner's pain medications were renewed and she was instructed to keep her appointments with physical therapy and Midwest Orthopaedic Center. At the time of the May 17, 2016 visit, it was noted that Petitioner presented complaining of burning right foot pain that had progressively worsened over the past couple of months. It was noted that Petitioner reported a history of ankle fracture and was actively following with Podiatry and Midwest Orthopaedics, that she reported that she was recently fitted for a boot that provided symptomatic relief of her symptoms but that she subsequently developed swelling around her calcaneus resulting in a burning-like sensation and occasional pins and needles. The assessment was noted to be that of neuropathic pain of the right ankle. Petitioner was instructed to follow-up with her primary care physician and Podiatry, to continue Norco as instructed and to continue physical therapy. (PX2).

The records of Heartland Community Health Clinic reflect that Petitioner was seen on May 27, 2016, at which time it was noted that she was seen for continued pain in her right ankle and foot. It was noted that Petitioner went to MOC and told them the boot was hurting her knee, so they told her not to wear it. It was noted that Petitioner presented in flip-flops, that she continued to have pain and swelling and that she admitted that she was not the type of person who could take it easy. It was noted that Petitioner had been prescribed some NSAID cream but it was too expensive for her to purchase, that she was in therapy, that she had moved to aquatic therapy and that she stated it was helping a bit. It was noted that Petitioner had positive POP to medial and lateral ankle ligament with lateral ligaments more painful than medial and that she had positive POP to insertion of the Achilles tendon of the right lower extremity. Petitioner was recommended to undergo an MRI of the right ankle and the assessment was noted to be that of plantar fasciitis of the right foot, chronic pain of the right ankle and moderate right ankle sprain, sequela. (PX2).

The records of Heartland Community Health Clinic reflect that Petitioner was seen on May 31, 2016, at which time it was noted that she was seen for follow-up for right ankle pain. It was noted that Petitioner was recently seen and started on low-dose Gabapentin for neuropathic-like pains associated with her right ankle pain and that she reported minimal improvement, stating that she subsequently self-discontinued the medication. It was noted that Petitioner reported having increased her intake of Naproxen from once daily to twice daily and as a result had been experiencing nausea, intermittent vomiting and cephalalgias. The assessment was noted to be that of chronic pain of the right ankle. Petitioner was instructed to increase the Gabapentin, discontinue the Naproxen, follow-up with Podiatry and Orthopedic Surgery as scheduled and see her primary care physician in four weeks. At the time of the June 9, 2016 visit, it was noted that Petitioner was seen in the illness clinic four weeks ago and was started on Gabapentin but that she reported that the pain was worse after starting it. It was noted that the dose was increased ten days ago and that it made the pain even worse, and that she was taking Norco but ran out. It was noted that Petitioner was also undergoing physical therapy and occupational therapy which helped only a little bit, that she was anxious about her pain and that she wanted to have a long-term plan. It was noted that Petitioner had a history of occupational injury in July 2015, that she had been following with Dr. Mahoney, and that she was previously asked to limit weightbearing on the right side and also to use a boot, but that her pain worsened so she had discontinued use of the boot. It was noted that an MRI of the ankle was ordered and was scheduled for June 23rd. The assessment was noted to be that of right leg pain and essential hypertension. Petitioner's Norco was refilled and it was noted that a discussion was had about the possibility of using a four-wheeled mechanical scooter that she could rest her right leg on, but that Petitioner reported that she did not have the money to purchase it and was unable to be employed at that time. (PX2).

The records of Heartland Community Health Clinic reflect that Petitioner was seen on June 23, 2016, at which time it was noted that she presented with right ankle pain, that the right ankle pain was chronic, that it was aching, 8/10, that it was worse with walking and that she had been using a cane for walking. It was noted that Petitioner had an MRI of her right ankle done in December of 2015, which showed Haglund's syndrome with interstitial partial-thickness tear of the distal Achilles tendon likely an etiology for her retrocalcaneal pain, insufficiency fracture of the navicular with surrounding marrow edema, probable old Shepherd's fracture, mild tenosynovitis of the flexor hallicus longus tendon, chronic sprain or partial-thickness tear of the anterior tibiofibular ligament and chronic sprain of the posterior tibiofibular ligament, partial tear of the incisional fibers of the deep ligament and chronic sprain of the superior medial portion of the spring ligament. It was noted that Petitioner had been taking Gabapentin, Norco and Naproxen with mild relief of her pain and that she also complained of pain in the bilateral knees, ongoing for a long period of time. The assessment was noted to be that of chronic pain of the right ankle. It was noted that Petitioner was following up with Dr. Mahoney who had ordered an MRI of the right ankle and that she was advised to continue to take her Norco and Naproxen as needed for pain relief. At the time of the June 24, 2016 visit, it was noted that Petitioner presented for follow-up and results of the MRI. It was noted that Petitioner presented not in her CAM walker, but in "crocs." The assessment was noted to be that of stress fracture of the navicular bone of the right foot, severe right ankle sprain and Achilles tendinitis of the right lower extremity. Petitioner was prescribed medications and was instructed to wear her CAM walker all day, except to sleep and shower, in and out of the house, and to decrease activity as much as she could. (PX2).

The records of Heartland Community Health Clinic reflect that Petitioner was seen on July 7, 2016, at which time it was noted that she was seen for follow-up of the right foot and ankle. It was noted that Petitioner had seen both an orthopedic doctor and Dr. Mahoney at the clinic and that she was given different directions from both as to wearing a boot and that she had also gone for physical therapy. It was noted that Petitioner recently had another MRI of her right foot, which showed chronic changes involving the anterior tibiofibular ligament, deltoid ligament and spring ligament, chronic appearing, worsening partial-thickness insertional Achilles tendon tear and Haglund's deformity, mild arthritic changes in the tibiotalar joint, unchanged, healed navicular insufficiency fracture with persistent degenerative change and osteonecrosis

between navicular and medial and middle cuneiform bones. It was noted that Petitioner was taking Gabapentin, Norco and Naproxen with mild relief of her pain. It was noted that Petitioner felt anxious daily due to her ankle and ankle pain, that when she got nervous she started itching her skin and that she wondered if there was something that she could take to help her. The assessment was noted to be that of chronic pain of the right ankle and Petitioner was prescribed Fluoxetine. At the time of the August 5, 2016 visit, it was noted that Petitioner presented for follow-up on right foot pain secondary to stress fractures and that she was complaining of swelling to both legs which she believed was exacerbating her pain. The assessment was noted to be that of stress fracture of navicular bone of the right foot, plantar fasciitis of the right foot, chronic pain of the right ankle and right leg pain. Petitioner was prescribed Norco and instructed to continue the CAM walker. (PX2).

The records of Heartland Community Health Clinic reflect that Petitioner was seen on August 8, 2016, at which time it was noted that she was seen for chronic right ankle pain. It was noted that the pain was worse with walking, that she was seeing Dr. Mahoney in Podiatry and that she was scheduled with Midwest Orthopaedics on August 16th. It was noted that Petitioner was wearing a walking boot and taking Norco for pain. It was noted that Petitioner never picked up the Prozac prescribed at the last appointment, that she stated that she could not afford it so she never went and got it and that she planned to pick it up soon. It was noted that Petitioner felt anxious daily and that she was also feeling depressed regarding her ankle. It was noted that Petitioner had bilateral leg swelling and that it was worse after standing for long periods. The assessment was noted to be that of right leg pain, bilateral leg edema, depression with anxiety and essential hypertension. (PX2).

The records of Heartland Community Health Clinic reflect that Petitioner was issued a letter dated January 29, 2016 that indicated that she was to be excused from work for the next eight weeks, that she was to be non-weightbearing on the right foot, that she had a stress fracture in her right foot that had not healed despite current treatments and that she would be referred to an orthopedic surgeon for a cast. (PX2).

The medical records of Midwest Orthopaedic Center were entered into evidence at the time of arbitration as Petitioner's Exhibit 3. The records reflect that Petitioner was seen by Dr. Roberts on February 18, 2016 at the referral of Dr. Abigail Mahoney for an apparent fracture of the right foot. It was noted that Petitioner had had pain in her foot and ankle since July 2015. It was noted that Petitioner reported that she had pain throughout her right foot and ankle, that in the past she had worn a boot and that she was currently using crutches. The assessment was noted to be that of (1) chronic right foot and ankle pain; (2) history of insufficiency fracture with chronic deformity of the navicular bone of the right foot; (3) pes planus deformity; (4) history of ligamentous sprains of the right ankle; (5) chronic plantar fasciitis with a plantar calcaneal spur; (6) questionable osseous impingement within the tibiotalar joint of the right ankle; (7) history of Haglund's syndrome with interstitial partial-thickness tearing of the distal Achilles tendon. It was noted that Petitioner needed to go into an orthopedic boot and that she was also going to have an appointment set up to see Dr. D'Souza given the findings on her previous MRI as well as the chronicity of her discomfort. (PX3).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen by Evan Fleming, physician's assistant, on March 10, 2016, at which time it was noted that she had a history of injury back in July when she was at work as a housekeeper, stepped in the service elevator and nearly fell. It was noted that Petitioner had immediate pain of the ankle, that she had had difficulty ever since and that she had been seen by her family physician and Dr. Mahoney. It was noted that Petitioner was placed in a walking boot at some point during her care, that she complained of pain through the whole ankle but particularly the posterior Anchilles insertion and anterior ankle and that she stated that she had actually been feeling a little bit better since she had been in the new walking boot until the last couple of days when she may have overdone it. It was noted that the findings most responsible for her pain was the Achilles pathology. It was noted that Petitioner was recommended to stay in the walking boot for another few weeks, that she was prescribed a topical anti-inflammatory pain medication and that she was prescribed physical therapy and

home exercises. At the time of the August 25, 2016 visit with Dr. D'Souza, it was noted that since her last visit Petitioner had had increasing pain and was now requesting surgical intervention. Petitioner was recommended to undergo an Achilles tendon repair and FHL augmentation, bursectomy, calcanectomy and partial gastrocnemius recession. Petitioner was recommended to undergo pre-operative clearance. (PX3).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen by Dr. D'Souza on May 10, 2016, at which time it was noted that it seemed like her left knee was giving her the most symptoms, even moreso than the right foot. It was noted that if Petitioner was failing conservative treatment, she may require surgery but that Petitioner indicated that she did not want surgery. It was noted that Petitioner was recommended to come out of the boot and that if she was having issues with the left knee, to make an appointment with one of the knee specialists. It was noted that Petitioner was having some issues with obtaining her medications because of the need for a credit card.

The Interpretive Report for an MRI of the Right Ankle was entered into evidence at the time of arbitration as Petitioner's Exhibit 4. The records reflect that Petitioner underwent an MRI of the right ankle on December 7, 2015, which was interpreted as revealing (1) Haglund's syndrome, with interstitial partial-thickness tear of the distal Achilles tendon, likely an etiology of retrocalcaneal pain; (2) insufficiency fracture of the navicular with surrounding marrow edema; (3) probable old Shepherd's fracture; (4) mild tenosynovitis of the flexor hallicus longus tendon; (5) chronic sprain/partial-thickness tear of the anterior tibiofibular ligament and chronic sprain of the posterior tibiofibular ligament; (6) partial tear of the insertional fibers of the deep deltoid ligament; (7) chronic sprain of the superomedial portion of the spring ligament; (8) chronic plantar fasciitis with moderate plantar calcaneal spur; (9) findings suggestive of osseous impingement within the tibiotalar joint; (10) asymmetric fatty atrophy of the abductor digit minimi, which may represent a cause of heel/lateral foot pain; (11) mild sinus tarsi syndrome. (PX4).

The transcript of the deposition of Dr. D'Souza dated May 12, 2017 was entered into evidence at the time of arbitration as Petitioner's Exhibit 5. Dr. D'Souza testified that he is board-certified in orthopedic surgery and that he specializes in foot and ankle reconstruction. (PX5).

Dr. D'Souza testified that when Petitioner was first seen by Dr. Roberts at his group on February 18, 2016, the history that she provided was that she had pain in her foot and ankle since July of 2015. He testified that the diagnostic impressions of Dr. Roberts as of February 18, 2016 were that of chronic foot and ankle pain, history of an insufficiency fracture and deformity in the navicular bone, pes planus deformity, ligament sprains in the ankle, chronic plantar fasciitis, questionable osseous impingement in the ankle and Haglund's syndrome, as well as a partial-thickness tear of the Achilles tendon. He testified that at that time, Petitioner was referred to him and placed into a walking boot. (PX5).

Dr. D'Souza testified that Petitioner was seen on March 10, 2016 by Evan Fleming, a physician's assistant who worked with him. He testified that Petitioner gave an additional history to physician's assistant Fleming that she had had an injury in July where she was working as a housekeeper, was stepping in the service elevator and nearly fell. He testified that Petitioner related that she had immediate onset of pain in her ankle and that since that time, her pain continued. He testified that the diagnosis of physician's assistant Fleming was that primarily her pathology was due to her Achilles tendon, so she was recommended to be in the walking boot for a few more weeks and to use a topical anti-inflammatory medication. He testified that Petitioner was also given a home program for calf stretching and a script for physical therapy. He testified that Petitioner was then seen on May 10, 2016, which was the first time that he saw Petitioner. He testified that at that time, Petitioner was more concerned with her left knee than her right foot. He testified that her examination showed pain along the posterior portion of her heel and that she had swelling and pain in her left knee. He testified that he discussed with Petitioner that since she was failing conservative treatment, she may require surgery. He testified that he asked her through her translator if this was something that she wanted to do and that she emphatically stated that she did not want surgery. He testified that they were again going to try conservative treatments with the topical medicines and that if

the boot was not helping her, she could come out of that since it was upsetting her left knee. He testified that when one wore a boot on one side it made the leg longer, and that he had patients that complained of hip or knee pain on the other side because of putting more pressure on it. (PX5).

Dr. D'Souza testified that in reviewing the MRI interpretive report of December 7, 2015, the finding of Haglund's syndrome with interstitial partial-thickness tear of the distal Achilles tendon was what Petitioner was subjectively complaining of and that that was what her clinical exam supported. He testified that Petitioner had multiple other issues that were seen on the MRI that were not clinically significant and that he did not put too much importance on those findings. When asked if he had seen any evidence of any fractures in her foot at that time, Dr. D'Souza responded that there was an insufficiency fracture of the navicular, which was one of the bones in the middle of the foot. He testified that he last saw Petitioner on August 25, 2016, at which time he noted that she stated that since the last time she had been seen her pain was getting worse and that she wanted to have surgery. He testified that the examination performed revealed that primarily Petitioner's most painful area was right along the Achilles in the posterior heel and that she had some tenderness along the lateral part of her foot, but that it was not as severe as the Achilles. (PX5).

Dr. D'Souza testified that the recommended surgery would be to clean out and remove the worn-out portion of the Achilles tendon and transfer another tendon from Petitioner's ankle to reinforce the Achilles and to also perform a bursectomy, a calcanectomy and a partial gastrocnemius recession, which was a partial lengthening of the calf muscle. He testified that generally for two weeks after surgery they did not recommend that individuals return to work and that after two weeks, patients could typically return to sit-down duties or any work that they would be able to do while still on crutches or using a scooter. He testified that after six weeks, patients would typically be released from the non-weightbearing restrictions and that for a housekeeper, it would probably be another six weeks before they would be able to return to their job. (PX5).

When asked whether he had an opinion as to whether the work injury contributed to Petitioner's diagnosis, Dr. D'Souza responded that he did not actually have a record of what exactly happened to Petitioner other than being told that she fell or nearly fell but that it would be enough to "create an issue" meaning that there was a relationship between the diagnosis and the brief history that he had obtained from her. When given a hypothetical description of Petitioner's accident, Dr. D'Souza testified that this was the type of mechanism of injury that could have caused the condition that he saw on the MRI and for which he had recommended surgery. (PX5).

On cross examination, Dr. D'Souza denied having reviewed any of the medical records of Dr. Mahoney, Dr. Roy, Dr. Moots or Dr. Sreniawski. He agreed that the only records that he had reviewed were records specifically relating to the treatment Petitioner received at Midwest Orthopaedic Center and the December 2015 MRI. He agreed that at Petitioner's first two visits she was seen by Dr. Roberts and physician's assistant Fleming, and testified that he was not present in the exam room at either visit. (PX5).

On cross examination, Dr. D'Souza agreed that it was fair to say that his understanding of the alleged work accident of July 10, 2015 was based on what Petitioner would have told his colleagues and what they would have written in their office notes. He testified that he did not have personal knowledge of the alleged work accident. He testified that he had no notification in his records that he had reviewed an x-ray of Petitioner's foot taken on September 25, 2015. He agreed that the first time that he actually examined and treated Petitioner was on May 10, 2016. (PX5).

On cross examination, Dr. D'Souza agreed that at the time of his exam on May 10, 2016, he did not note any work status for Petitioner. When asked whether he had knowledge as to whether Petitioner was or was not working at that time, Dr. D'Souza responded that he had no knowledge. He agreed that his note of August 25, 2016 referenced that Petitioner had increased pain at that visit, and testified that he did

not know why she had increased pain at that visit. He agreed that at the August 25, 2016 visit, he did not note at that time Petitioner's work status nor did he make any recommendations for her work status. (PX5).

On cross examination, Dr. D'Souza agreed that Haglund's syndrome was what he was focusing on as part of his treatment of Petitioner because he felt that was what was objectified in his clinical exam and was the cause of her subjective complaints. He testified that Haglund's syndrome was a bone spur that sat on the top of portion of the calcaneus or heel bone and was typically related to inflammation in and around the Achilles tendon which caused irritation of the bone, and that the bone reacted by making more bone which was what turned into the spur. He testified that a bone spur was something that could form in a person's foot or ankle naturally on its own. He agreed that irrespective of any alleged work incident that may or may not have occurred in July of 2015, it could happen that an individual of the same age of Petitioner with a similar body habitus to develop a bone spur as part of the aging process. He testified that bone spurs in the area could become irritated just by normal activities in an overweight patient. He testified that based on Petitioner's height and weight, she would be considered morbidly obese. (PX5).

On cross examination when asked whether it was possible that irrespective of any accident occurring on July 10, 2015 that Petitioner would have needed surgery anyway given the presence of the bone spur and the irritation it was causing, Dr. D'Souza responded that it was not the bone spur that he was recommending surgery for and that, instead, it was because the Achilles tendon was tearing. He denied inquiring of Petitioner on the two examinations that he treated her as to any past injury or history of foot and ankle issues. (PX5).

On redirect, Dr. D'Souza testified that more likely than not the work accident was a contributing factor to what he diagnosed and for which he was recommending surgery. He testified that he had not been provided any evidence on cross examination to change his opinion. He testified that he did not think that Petitioner could climb a ladder from the time that he treated her. He testified that he thought that Petitioner could climb a step stool. He testified that he did not think that Petitioner could balance all of her weight on her foot. He testified that he thought that intermittently Petitioner would be able to carry weights of 30-40 pounds but that if her job required her to do that for hours on end, it would be taking a risk. (PX5).

On further cross examination when asked if it turned out that Petitioner had received medical treatment prior to his seeing her for chronic ankle pain and sprains and whether that would possibly affect his causation opinions, Dr. D'Souza responded that Petitioner having been treated specifically for insertional Achillles tendonitis or Haglund's syndrome prior to the alleged incident would be the only thing that would sway his opinion. He testified that if Petitioner had been treated for an ankle sprain, peroneal tendon tear or mid-foot arthritis, it would have no bearing on the described event causing her current symptoms. (PX5).

On further cross examination when asked if Petitioner's accident on July 10, 2015 occurred as described in the treatment records at Midwest Orthopaedic Center and whether he would have expected Petitioner to feel immediate ankle pain based on the mechanism of injury, Dr. D'Souza responded that his impression was that she sustained a partial tear at the time of the injury and that it would cause pain almost immediately. When asked whether he would expect someone would need to seek treatment immediately for that, Dr. D'Souza responded that he had lots of people that hurt themselves and knew it and waited for a variety of reasons. He testified that at neither of the two visits where he saw Petitioner did she ever describe to him or show him how her ankle twisted or moved while describing the mechanism of injury. (PX5).

The Medical Bills Exhibit was entered into evidence at the time of arbitration as Petitioner's Exhibit 6.

The transcript of the deposition of Dr. Li dated June 29, 2017 was entered into evidence at the time of arbitration as Respondent's Exhibit 1. Dr. Li testified that he is board-certified in orthopedic surgery. He testified that he has a general orthopedics practice with a focus on shoulders, hands and knees, but that he treats both upper and lower extremity problems both operatively and non-operatively. (RX1).

Dr. Li testified that he performed three IMEs of Petitioner on November 9, 2015, April 26, 2016 and September 19, 2016. He testified that at the time of the IME on November 9, 2015, an interpreter by the name of Saul Polido was present. He testified that the history provided by Petitioner on November 9th was that she was a 61-year-old female who worked as a housekeeper for Caterpillar, that she had been doing this for approximately eight years and that she worked about 35 hours per week. He testified that Petitioner had been working full duty since her injury on July 10, 2015, but that the number of hours were less than what she normally worked. He testified that Petitioner reported that on that date, she was either stepping into or out of an elevator that was not level with the floor and that she tripped, stumbled and fell. He testified that Petitioner reported that she injured her right ankle and that he asked her to indicate the mechanism of injury by rotating his own ankle, but that she was unable to tell him. He testified that Petitioner reported that she had persistent ankle pain, that she saw a doctor three days later and that she reported nothing was done for her because the doctor was more worried about her blood pressure and ignored her ankle complaints. He testified that Petitioner had another appointment, that some x-rays were ordered, that she was referred to therapy and that she was put on steroids and pain medications. He testified that Petitioner's current symptoms were lateral and posterior ankle pain and that she denied any previous problems with her right ankle. He testified that Petitioner noted that she had trouble remembering things and oftentimes did not know where she was going. He testified that Petitioner indicated that her pain was usually 7-8/10. He testified that on examination, Petitioner's pain was way out of proportion to what he would expect and that he simply touched her ankle and she would have pain. He testified that Petitioner had a similar degree of swelling in both ankles, that she was very tender laterally and posteriorly and that he did not detect an effusion in her right ankle. He testified that Petitioner complained of severe pain with all movement, that the Achilles tendon was intact and that the Thompson test was negative. He testified that Petitioner was a difficult exam because of her exaggerated pain responses. (RX1).

Dr. Li testified that his diagnosis was that Petitioner had a right ankle sprain or strain, assuming that the x-rays that were taken were negative as they were read to be, and that she had residual dysfunction of the right ankle status post an ankle strain or sprain. He testified that based solely on Petitioner's history which, according to her own admission, was not always reliable, he believed that there was a causal relationship between the alleged injury and her ankle condition. He testified that Petitioner told Dr. Roy on October 2nd that she fell in June, that she told Dr. Moots that she fell in July and that she told him that she fell in July, and that regardless of the dates, the way she fell certainly could have caused an ankle sprain. He testified that by history, Petitioner denied any pre-existing condition. He testified that he thought that all the treatment that Petitioner had had was reasonable, necessary and related to the work injury. He testified that Petitioner indicated to him that she was in therapy for two weeks and that he thought it was reasonable to have her do a total of six weeks of therapy and then a home exercise program. He further testified that he thought that Petitioner could continue limited hours of four hours a day until she finished therapy and that she could then go to eight hours. He testified that it was his opinion that Petitioner had not reached maximum medical improvement, that he thought she would wait until she was finished with therapy and that then she would be at maximum medical improvement. (RX1).

Dr. Li testified that he had opportunity to reevaluate Petitioner on April 26, 2016, at which time an interpreter by the name of Maria Bucio was present. He testified that the updated history from Petitioner was that she had depression, that she currently had an acute episode of depression and felt that it might affect her memory and that she had had depression for many years that came and went. He testified that Petitioner indicated that since the last IME she had had aquatic therapy and physical therapy, that she had had an x-ray and MRI and that she saw an orthopedic surgeon who recommended that she wear a walking

boot. He testified that Petitioner's next appointment was on May 10th, that she last worked on January 19, 2016 and that she could not continue working because of her pain. He testified that Petitioner indicated that she walked with a boot, that she complained of severe pain in her right ankle and foot and that she did not remember much else. He testified that he thought that Petitioner was a poor historian and that he thought she knew she was a poor historian because of her memory lapses which were affected by her episodes of depression. He testified that he did not really have any issues with the language barrier and that he thought that the interpreters usually did a very good job. He testified that he thought that the big problem was Petitioner's memory. (RX1).

Dr. Li testified that at the time of the examination, Petitioner had pain out of proportion when he touched the posterior heel and the anterior aspect of her ankle, as well as the medial and lateral aspects of the ankle. He testified that he could not perform a drawer test because of Petitioner's pain and that she had very limited range of motion before screaming in pain. He testified that anywhere he touched Petitioner she had severe pain, that he could not detect any effusion in the ankle, that the neurovascular exam was intact and that the Thompson's test was negative. He testified that the Thompson test was a test for the integrity of the Achilles tendon. He testified that he found that Petitioner's response was out of proportion and unrelated to the degree of provoking on the examination, that she had pain essentially everywhere that he touched and that he was unable to really examine her before she would scream in pain. He testified that it was a very limited exam and that Petitioner was a very difficult patient to examine, that there was no objective pathology that would explain or even cause all the symptoms and that there would not be a clinical problem that would cause pain everywhere in the foot and ankle. (RX1).

Dr. Li testified that his opinion at that time was that Petitioner had a right foot navicular fracture along with her ankle sprain, that the navicular fracture was consistent with trauma, that the Haglund's deformity described in the MRI was not related to the injury and was a chronic process and that he felt that the old fracture of the lateral tubercle of the talus was related to the injury of July 2015. He testified that the Haglund's deformity was a pre-existing chronic condition, that it was an MRI finding and that it was not necessarily even a clinical condition brought up by Petitioner. He testified that he thought that all of the treatment to date had been reasonable, necessary and related to the work injury. He testified that he felt that Petitioner's navicular stress fracture needed to be healed and that if she did not get good relief of her symptoms in a walking boot, then he would recommend that she go into a cast and be non-weightbearing for 6-8 weeks after which she could weight bear as tolerated. He testified that he felt that since Petitioner was going to be casted for 6-8 weeks, after she came out of the cast it would be a good idea to have her do some physical therapy for 4-6 weeks to regain her range of motion and function. He testified that if Petitioner was going to be in a cast she would be non-weightbearing and could only do sedentary work and that she had not reached maximum medical improvement because she needed treatment for the stress fracture. (RX1).

Dr. Li testified that at the time of the September 19, 2016 IME, he took a history from Petitioner with the assistance of her friend, Ernestina Tamayo. He testified that Petitioner indicated that since she saw him the fracture had felt better, that she did therapy for six weeks but now had pain over the Achilles tendon. He testified that Petitioner indicated that it was her impression that Dr. D'Souza recommended surgery, that she wished to have surgery and that the surgery would be where the Achilles tendon inserted on the bone spur and the calcaneus. He testified that Petitioner stated that this was the only area of concern now, that the pain in the forefoot was gone and that she still used a boot. He testified that the examination performed on that date revealed that Petitioner again demonstrated significant pain response, that with just touching her she would have pain and that she was most tender at the Achilles tendon as well as all over the posterior calcaneus. He testified that Petitioner no longer had pain in the forefoot, but that attempted range of motion passively in her ankle was very painful. He testified that the findings most significant to him were the exaggerated pain response, that it was very positive that Petitioner did not have any pain in the forefoot which was where the stress fracture was, that of some concern was the slight limitation of range

of motion and atrophy and also the positive fact that there was not any more swelling of the right foot as compared to the left. He testified that the similarity in swelling between the two ankles suggested to him that the acute injuries had resolved. (RX1).

Dr. Li testified that he believed that Petitioner suffered a right ankle strain and a navicular stress fracture as a result of the alleged work injury. He testified that Petitioner also had an underlying retrocalcaneal bone spur that was painful and that it was pre-existing, chronic and unrelated to the injury falling in the elevator. He testified that the bone spur in the retrocalcaneal area could be congenital but most likely was degenerative and was not related to any injury, and that it was his opinion that the work injury did not affect the bone spur in any way. He testified that there was no evidence of any acute injury on the MRI suggesting that the calcaneus was injured, so there was no reason to believe that the injury did anything with the bone spur. He testified that he thought that the diagnostic testing, physician visits and therapies were reasonable and necessary treatment for a sprain and navicular fracture, that the conditions had resolved and that further treatment was not necessary. He testified that he saw no reason for any physical limitations or work restrictions as a result of the alleged work injury and that he thought that Petitioner had reached maximum medical improvement for the work injury. (RX1).

Dr. Li testified that clinically, Petitioner had no tears of the Achilles tendon. He testified that the MRI was read as revealing thickening of the Achilles tendon with intrasubstance increased T2 signal just proximal to its calcaneal insertion consistent with an interstitial partial-thickness tear. He testified that this was the type of tear that was degenerative in nature, that the types of tears that were traumatic in nature were complete ruptures and that interstitial tearing was not an indicator of injury. He testified that a surgery to repair the tendons would be not be related to a traumatic injury. (RX1).

On cross examination, Dr. Li testified that it was possible to have a negative Thompson's test and still have a partial tear of the Achilles tendon. When asked whether an MRI would be a better objective test to determine whether there was an Achilles tendon tear in some form versus the Thompson test, Dr. Li responded that if there was a complete rupture the Thompson's test was 100% accurate and that if there was not a complete rupture, then the MRI would be better to assess for any traumatic injury. He testified that the MRI was the test of choice to look at interstitial tears and that the Thompson's test was not going to look at interstitial tears. (RX1).

On cross examination, Dr. Li testified that a partial Achilles tendon tear like an interstitial tear could cause pain sometimes. He testified that as it related to the December 7, 2015 MRI, he believed that he only had the report as opposed to the films. He testified that he did not know of any bone spur that would be related to trauma acutely, but that it was possible for someone to suffer an injury and then years later to develop a bone spur. He testified that in this case, the bone spur was not related to trauma and that Petitioner likely had it for several years. (RX1).

On cross examination, Dr. Li testified that he did not believe that he had any records of any treatment to Petitioner's right foot or ankle before the accident at issue. He testified that Petitioner denied any pre-existing conditions. He agreed that there were no MRIs of Petitioner's right foot prior to this accident. He agreed that he not aware of Petitioner being on any work restrictions or activity modifications for her right foot before the accident, nor was he aware of any surgical recommendation or physical therapy that she had participated in to his knowledge. (RX1).

On cross examination, Dr. Li agreed that he did not review Dr. D'Souza's evidence deposition. He agreed that he had not seen Petitioner since September of 2016. When asked what was his understanding as to the mechanism of Petitioner's injury, Dr. Li responded that she either stepped into an elevator or stepped out of the elevator and tripped, stumbled, fell down and injured her ankle. He testified that he did not know if she rolled or twisted the ankle and that while he tried to get her to show him, Petitioner was unable to do so. When asked to review the intake form completed on November 9, 2015 as to the history

of accident which referenced twisting the ankle on the edge of the elevator, Dr. Li testified that the history that Petitioner was getting on the elevator and twisted her ankle was not referenced in his reports because he asked her and she was not able to tell him. He testified that he did not think Petitioner wrote out that form because if she did, they would not have needed an interpreter. He testified that he thought that the same person filled out the entire form and that it was filled out by someone who was well-versed in English, and that if Petitioner filled it out they would not have required an interpreter. (RX1).

On cross examination when asked whether twisting of the ankle could cause an interstitial or partial Achilles tendon tear, Dr. Li responded that it depended on the way that it was twisted but that it was possible. He testified that it was not the most common or typical mechanism of injury to the Achilles tendon. He testified that it could cause a rupture of the Achilles tendon but did not cause interstitial tearing, and further testified that interstitial tears were, by nature, degenerative tears. He testified that the Haglund's deformity was associated with interstitial tears, but that it did not cause them. (RX1).

On cross examination, Dr. Li agreed that Petitioner suffered an injury to her right foot and ankle. He agreed that his initial diagnosis was that of a strain/sprain which was causally related to the accident and that the navicular fracture and fracture of the lateral tubercle of the talus that he diagnosed were also causally related. He testified that someone could have a preexisting interstitial Achilles tendon tear that was asymptomatic. When asked whether a trauma could cause a preexisting interstitial Achilles tendon tear to become symptomatic, Dr. Li responded that there would have to be some injury to the tendon. He testified that based on the MRI, the interstitial tears were there for years. He agreed that according to Petitioner's history, the tears, if they were present, were asymptomatic. (RX1).

On cross examination, Dr. Li agreed that according to Petitioner's history she had had complaints to her right ankle and right foot since the accident and testified that each time he had seen her, Petitioner still had complaints. He testified that the interstitial partial-thickness tear of the distal Achilles tendon was something that could cause pain, as was the insufficiency fracture of the navicular with surrounding marrow edema as noted on the MRI. He testified that the Shepherd's fracture (lateral tubercle fracture) would definitely cause pain at the time. He testified that he thought that the response to his exam was definitely out of proportion in spite of the MRI findings because it was not the number of things they could find on the MRI, but rather there was also a degree. He testified that none of the issues would cause the pain that Petitioner expressed to him. (RX1).

On cross examination, Dr. Li agreed that as of the November 2015 exam he agreed that Petitioner needed to be on limited work of four hours a day and that the limitation would have been related to the accident. He agreed that all of the medical care and treatment that Petitioner had had up to that point was causally related to the accident. He agreed that at the time of the April 2016 exam, he recommended that Petitioner be non-weightbearing at the time, that it was related to the accident and that if her employer was unable to accommodate those restrictions, she would have needed to be off work during that time. He agreed that the restriction would have been effective on the date of the exam. He agreed that as of that date, all medical care and treatment was causally related and that Petitioner required further care for her injuries related to the accident. He agreed that as of the final visit, he did not feel as though Petitioner required any additional work restrictions and that the non-weightbearing restrictions would have not been applicable once she was done with her therapy. (RX1).

On cross examination, Dr. Li testified that as of the final visit, all of the treatment that had been administered to Petitioner would have been related to her accident. He agreed that as of the final visit, Petitioner was still having complaints over the area of the Achilles tendon and heel bone. When asked what was his opinion as to the cause of the ongoing pain, Dr. Li responded that he thought Petitioner had Achilles tendinosis and that it began many years ago. He agreed that Petitioner had never had any treatment for Achilles tendinosis before the accident to his knowledge. He testified that the surgery being recommended

by Dr. D'Souza was based on symptoms so if Petitioner consented to it, then it was reasonable and necessary. (RX1).

On cross examination, Dr. Li agreed that his practice was not solely dedicated to the foot and ankle. He agreed that he did not have a fellowship focusing on the foot and ankle. (RX1).

On redirect, Dr. Li testified that he would have recommended that Petitioner be non-weightbearing for 6-8 weeks and that she would be in the cast that he recommended. He agreed that once the cast was removed, there would be a timeframe in which Petitioner would be able to work her way back into a light duty scenario. He testified that a total of 7-8 weeks would be light duty and then full duty after that. (RX1).

On redirect, Dr. Li testified that he was confident and comfortable in relying on the radiologist's findings in providing his assessment and subsequent opinions of Petitioner because he was describing findings that were very routine that he would see all the time. He testified that the radiologist was not describing any unusual findings which he would be more interested in looking at himself. (RX1).

On redirect, Dr. Li testified that the reporting of twisting on the intake questionnaire did not change his understanding of the mechanism of injury and his opinions. He testified that he assumed that it was written out by the interpreter with Petitioner's help and that he asked Petitioner to describe the mechanism of injury because of that. He testified that he wanted to understand how Petitioner twisted it, but that she was not able to do so. He testified that whether Petitioner twisted her ankle or just stumbled and tripped, it did not change his opinions as it would relate to the diagnoses and causal relationship that he had testified to. (RX1).

On redirect, Dr. Li testified that if there were a complete rupture of the Achilles tendon, they would have had a positive Thompson's test. He testified that the things that he would want to see to indicate there was an Achilles tendon injury would be bone marrow edema in the calcaneus or inflammation around the Achilles tendon. He agreed that he would do a different surgery than that proposed by Dr. D'Souza, but testified that the one that he would propose would not be related to the alleged work injury that Petitioner described. He testified that every orthopedic surgeon, unless they refused to see foot and ankle cases, saw foot and ankle injuries because it was the second most injured joint in the body. (RX1).

The TTD/PPD/Advance Payment Ledger was entered into evidence at the time of arbitration as Respondent's Exhibit 2. The Medical Payment Ledger was entered into evidence at the time of arbitration as Respondent's Exhibit 3.

The Employee Incident Report was entered into evidence at the time of arbitration as Respondent's Exhibit 4. The report noted that Petitioner was getting in an elevator and tripped hitting her knee, that she was carrying a trash bag trying to get on the elevator, that she tripped and fell, that she reported that she landed on her left side falling on a piece of iron and that she hit her left knee on the iron. (RX4).

The medical records of Heartland Community Health Center (dated July 14, 2015 – October 8, 2015) were entered into evidence at the time of arbitration as Respondent's Exhibit 5.[1] The records reflect that Petitioner was seen on July 14, 2015, at which time it was noted that she was seen for follow-up for diarrhea. It was noted that Petitioner went to the Emergency Department at OSF on July 8, 2015, that tests were done and that nothing acutely was seen. It was noted that Petitioner's issue could have been viral gastroenteritis and that she was feeling fine. At the time of the September 16, 2015 visit, it was noted that Petitioner presented with right ankle pain that started after a fall she suffered in July. It was noted that Petitioner had not sought medical treatment for the ankle previously, that she reported that her right ankle and heel had been hurting a lot and that she reported taking Tylenol up to five pills a day to help. It was

[1] Any highlighting that appears in the exhibit was not made by the Arbitrator.

noted that Petitioner's pain was rated 8/10, needle-type pain or a terrible sensation of skin ripping and that the pain did not radiate. It was noted that Petitioner's pain was made slightly better with Tylenol but was not made worse by anything, that she reported limping when she walked due to the pain, that the pain also came at rest sometimes and that the pain was okay in the morning but got worse as the day went along as she walked on it. It was noted that Petitioner was having some difficulty keeping up as a housekeeper due to the injury. The assessment was noted to be that of right ankle pain and essential hypertension. It was noted that Petitioner's right ankle pain had been ongoing for several months and was likely traumatic in nature and that the differential diagnosis included ankle sprain or strain, Achilles tendonitis and, less likely, fracture of ankle. It was noted that Petitioner was very satisfied with physical therapy as she had gotten good results in the past, that she was advised to continue icing the ankle and that she was to take a short course of Norco for the pain. It was also noted that Petitioner may benefit from trying Ibuprofen in the future for a short time if her current regimen did not work, and that they would get an x-ray of the right ankle to ensure no acute fractures. (RX5).

The records of Heartland Community Health Center reflect that Petitioner was seen on October 2, 2015, at which time it was noted that she was seen for follow-up of right ankle pain. It was noted that Petitioner stated that she fell in June, that after that she had been having on and off ankle pain and that she was seen in July and in September with complaints of ankle pain. It was noted that after being seen in July Petitioner was referred to physical therapy, and that she stated that the physical therapy helped her with the pain. It was noted that on September 16th Petitioner was seen again and was given Norco for pain control, that she stated that Norco helped initially but had stopped helping her and that she stated that she had been taking about eight tablets of Tylenol daily which helped her with her pain but did not last longer. It was noted that Petitioner denied any recent trauma and stated that she had been to the Emergency Room the day before because the pain was out of control. It was noted that Petitioner complained of pain in the right heel which was sometimes at the base of the heel and mostly at the back of the heel, that she stated that the pain was there the whole day and that she denied worsening pain at the end of the day. It was noted that Petitioner had been through physical therapy in the past and that she stated that the physical therapy did help her initially. It was noted that the findings on the x-rays were explained and that the findings were consistent with osteoarthritis. It was noted that Petitioner would continue Tylenol and add scheduled Naproxen, that she was advised not to use more than six Tylenol pills in a day and that she was to be reassessed in two weeks and may benefit from a repeat physical therapy referral. At the time of the October 8, 2015 visit, it was noted that Petitioner wanted her blood pressure rechecked. It was also noted that Petitioner stated that her right ankle pain was 8/10. (RX5).

CONCLUSIONS OF LAW

With respect to disputed issue (C) pertaining to accident, the Arbitrator finds that Petitioner sustained an accident that arose out of and in the course of her employment with Respondent on July 10, 2015.

To obtain compensation under the Illinois Workers' Compensation Act, a claimant must show by a preponderance of the evidence that he has suffered a disabling injury arising out of and in the course of his employment. 820 ILCS 305/2; *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1013 (2011); *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 57 (1989). However, the fact that an injury arose "in the course of" the employment is not sufficient to impose liability, for to be compensable, the injury must also "arise out of" the employment. *Id.* at 58.

The "arising out of" component refers to an origin or cause of the injury that must be in some risk connected with or incident to the employment, so as to create a causal connection between the employment

and the accidental injury. *Id.* There are three categories of risk to which an employee may be exposed: (1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks, which have no particular employment or personal characteristics. *Springfield Urban League v. Illinois Workers' Compensation Comm'n*, 2103 IL App (4th) 120219WC, ¶ 27; *Young v. Illinois Workers' Compensation Comm'n*, 2014 IL App (4th) 130392WC. Injuries resulting from a neutral risk are not generally compensable and do not arise out of the employment unless the employee was exposed to the risk to a greater degree than the general public. *Id.*

The "in the course of" component refers to the time, place and circumstances under which the accident occurred. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483 (1989). If an injury occurs within the time period of employment, at a place where the employee can reasonably be expected to be in the performance of her duties, and while she is performing those duties or doing something incidental thereto, the injuries are deemed to have been received in the course of the employment. *Caterpillar Tractor Co.*, 129 Ill. 2d at 58. "Injuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing his duties, and while a claimant is at work, or within a reasonable time before and after work, are generally deemed to have been received in the course of the employment." *Johnson v. Illinois Workers' Compensation Comm'n*, 2011 IL App (2d) 100418WC, ¶ 21.

In the case at hand, the Arbitrator finds that Petitioner was performing tasks incidental to her employment when her accident occurred on July 10, 2015. Based on the testimony of Petitioner, Mr. Gorshe, Mr. Welker and the accident description as contained on the Employee Incident Report, the Arbitrator concludes that an accident did, in fact, occur on July 10, 2015, despite the fact that the specific body part(s) involved in the accident are in dispute. As such, the Arbitrator finds that Petitioner has met her burden of proof in establishing that she sustained accidental injuries that arose out of and in the course of her employment with Respondent on July 10, 2015.

With respect to disputed issue (F) pertaining to causation, the Arbitrator finds that Petitioner has not met her burden of proving that her current condition of ill-being is causally related to the accident.

In so concluding, the Arbitrator notes that at the time of trial, Petitioner did not testify to a specific mechanism of injury and, in fact, there was no testimony as to how her right foot/ankle was injured other than that she tripped over an uneven surface. While Petitioner testified that individuals by the names of Jessica and Jose were nearby when the accident occurred, the Arbitrator notes that Petitioner did not call them -- or any other witnesses -- to corroborate the accident at the time of arbitration.

Furthermore, the Arbitrator notes that any suggestion that Petitioner twisted her right foot/ankle at the time of the accident is unsupported by the medical records or frankly even Petitioner's testimony in this case. Petitioner did not testify at trial that she twisted her right foot/ankle at the time of the incident on July 10, 2015. In fact, the best description of the mechanism of injury that the Petitioner provided at trial was that she was swinging back and forth because she was about to fall and that she finally fell. In fact, the Employee Incident Report provides a mechanism of injury involving Petitioner's left knee hitting on the iron, rather than her right foot/ankle. (RX4).

The Arbitrator finds that Gary Welker testified credibly that at the time of the incident, Petitioner reported injury to the left knee and leg. He testified that at no time verbally nor through physical gestures did Petitioner indicate that she had hurt her right foot/ankle on July 10, 2015. Furthermore, the evidence reflects that Petitioner refused medical treatment at the scene of the accident and finished working her shift that day. Moreover, the Arbitrator finds it difficult to comprehend that if Petitioner had, in fact, injured her right Achilles tendon on July 10, 2015 that she would have waited two months to seek treatment. The Arbitrator notes that once Petitioner did seek medical treatment, the medical records do not support a

mechanism of injury to the right foot/ankle as a result of the fall. Petitioner made no report of any type of pain or accident involving the right foot/ankle at the July 14, 2015 doctor visit to Heartland Community Health Clinic. (RX5). Furthermore, the medical records from Heartland Community Health Clinic dated September 16, 2015 do not provide any evidence that the alleged "fall" occurred at work, nor do they provide a description of the fall or the alleged mechanism of injury. (*Id.*)

The Arbitrator finds to be significant in this case that Dr. D'Souza admitted that he never actually asked Petitioner to describe to him the mechanism of injury. On direct examination Dr. D'Souza admitted "I don't actually have a record of what exactly happened to her other than being told that she, you know, fell or nearly fell." (PX5). Despite not having a record of what exactly happened, Dr. D'Souza responded affirmatively when asked if there was a relationship between the diagnosis and the history he obtained from Petitioner. (*Id.*). Furthermore, the Arbitrator notes that Petitioner did not testify that her right foot/ankle twisted and her weight shifted at trial as suggested to Dr. D'Souza in the hypothetical that he was given at the time of his deposition. (*Id.*)

The Arbitrator notes that the evidence reflects that Dr. Li physically examined Petitioner more frequently than Dr. D'Souza in this case. (RX1; PX3; PX5). Dr. Li testified credibly as to why the Achilles interstitial tears were degenerative in nature and not caused or aggravated by any alleged trauma. The Arbitrator finds the opinions of Dr. Li to be more credible than those proffered by Dr. D'Souza and, as such, adopts the opinions of Dr. Li and concludes that as a result of the July 10, 2015 accident, Petitioner suffered a right ankle strain and navicular stress fracture; that all of the treatment rendered up to the date of the third IME (*i.e.*, September 19, 2016) was reasonable, necessary and causally related to the right ankle strain and navicular fracture sustained in the accident of July 10, 2015; and that Petitioner was at maximum medical improvement and capable of working full duty as of September 19, 2016. (RX1).

With respect to disputed issue (J) pertaining to necessary medical services, in light of the Arbitrator's aforementioned conclusions and in reliance upon the opinions of Dr. Li, the Arbitrator finds that Petitioner's care and treatment rendered up to September 19, 2016 was reasonable, necessary, and causally related to her work accident of July 10, 2015. As a result thereof, Respondent shall pay the reasonable and necessary medical services rendered up to September 19, 2016, as included in Petitioner's Exhibit 6, as provided in Sections 8(a) and 8.2 of the Act. Respondent is to hold Petitioner harmless for any claims for reimbursement from any health insurance provider and shall provide payment information to Petitioner relative to any credit due. Respondent is to pay unpaid balances with regard to said medical expenses directly to Petitioner. Respondent shall pay any unpaid, related medical expenses according to the fee schedule and shall provide documentation with regard to said fee schedule payment calculations to Petitioner. Respondent is entitled to a credit for all benefits paid under its group health plan under Section 8(j) of the Act.

With respect to disputed issue (K) pertaining to prospective medical treatment, in light of the Arbitrator's finding as to the issue of causation, in light of the Arbitrator's finding that Petitioner has failed to prove that her current condition of ill-being is causally related to the accident of July 10, 2015, Petitioner's request for prospective medical treatment as recommended by Dr. D'Souza is hereby denied.

With respect to disputed issue (L) pertaining to temporary total disability benefits, the Arbitrator notes that Petitioner seeks temporary total disability benefits from January 29, 2016 through February 20, 2018. (AX1).

Based on the totality of evidence, the Arbitrator finds that Petitioner was off work beginning January 29, 2016. Relying on the opinions of Dr. Li, the Arbitrator finds that Petitioner was at maximum medical improvement and capable of full duty work on September 19, 2016. As a result thereof, the Arbitrator awards temporary total disability benefits for the timeframe of January 29, 2016 through September 19, 2016, a total of 33 3/7 weeks. As the parties stipulated at the time of arbitration to the

average weekly wage of $335.51 on the Request for Hearing form (which has a corresponding TTD rate of $223.67), the total amount of temporary total disability benefits awarded is that of $7,477.06. (AX1).

The Payment Ledger reflects that Respondent paid TTD benefits for the timeframe of January 29, 2016 through August 5, 2016 at the rate of $220.00/week; that Respondent paid TTD benefits for the timeframe of August 6, 2016 through September 19, 2016 at the rate of $220.00/week; and that Respondent thereafter on May 15, 2017 also paid an additional TTD advance in the amount of $1,760.00. (RX2). The Payment Ledger further reflects that Respondent paid a total of $9,114.28 in TTD payments and TTD advances. (*Id.*). As a result thereof, the Arbitrator finds that Respondent is entitled to a credit in the amount of $1,637.22 for an overpayment of TTD benefits.

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

April N. Fowler,

Petitioner,

vs. NO: 17 WC 19304

Collinsville Community Unit School District 10,

Respondent.

18IWCC0651

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 27, 2018, is hereby affirmed and adopted.

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

18IWCC0651

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 2 9 2018
o101018
DLG/mw
045

David L. Gore

Stephen Mathis

Deborah Simpson

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

FOWLER, APRIL N
Employee/Petitioner

Case# **17WC019304**

COLLINSVILLE COMMUNITY UNIT SCHOOL DISTRICT 10
Employer/Respondent

18IWCC0651

On 2/27/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.83% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1580 BECKER SCHROADER & CHAPMAN PC
MATTHEW R CHAPMAN
3673 HWY 111 PO BOX 488
GRANITE CITY, IL 62040

0180 EVANS & DIXON LLC
MICHAEL A KARR
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)

April N. Fowler
Employee/Petitioner

Case # 17 WC 19304

v.

Consolidated cases: n/a

Collinsville Community Unit School District 10
Employer/Respondent

18IWCC0651

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Herrin, on January 10, 2018. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

18IWCC0651

FINDINGS

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

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $10,559.80; the average weekly wage was $203.84.

On the date of accident, Petitioner was 36 years of age, single with 2 dependent child(ren).

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

Respondent shall be given a credit of $9,750.56 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $9,750.56.

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 13, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Respondent shall authorize and pay for prospective medical treatment including, but not limited to, the surgery recommended by Dr. Gregory Kranzusch.

Respondent shall pay Petitioner temporary total disability benefits of $203.84 per week for 60 6/7 weeks commencing November 11, 2016, through January 10, 2018, as provided in Section 8(b) of the Act.

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

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

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

William R. Gallagher, Arbitrator
ICArbDec19(b)

February 24, 2018
Date

FEB 27 2018

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained an accidental injury arising out of and in the course of her employment for Respondent on November 10, 2016. According to the Application, Petitioner sustained an injury to her left foot when a "Student jumped and landed on her left foot" (Arbitrator's Exhibit 2). Respondent stipulated that Petitioner sustained a work-related injury on November 10, 2016; however, Respondent disputed liability on the basis of causal relationship (Arbitrator's Exhibit 1).

This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills and temporary total disability benefits as well as prospective medical treatment. In regard to medical bills, Respondent stipulated that it was liable for medical bills for treatment rendered through October 19, 2017, but not thereafter. In regard to temporary total disability benefits, Petitioner claimed she was entitled to temporary total disability benefits of 60 6/7 weeks, commencing November 11, 2016, through January 10, 2018 (date of trial). Respondent stipulated Petitioner was entitled to temporary total disability benefits of 49 6/7 weeks, commencing November 11, 2016, through October 25, 2017, but not thereafter (Arbitrator's Exhibit 1).

As noted herein, Petitioner claimed she was entitled to prospective medical treatment, specifically, exploratory surgery on her left foot and forefoot. Respondent disputed liability for prospective medical treatment on the basis of medical causality as well as the reasonableness and necessity of the surgery.

Petitioner worked for Respondent as a Health Attendant and she worked with first, second and third grade children who had various developmental issues. On November 10, 2016, Petitioner took an autistic child to the playground. The child hid under a piece of playground equipment. As Petitioner was in the process of attempting to get the child to come out, another child jumped off of the piece of playground equipment and landed on Petitioner's left foot. Petitioner testified that her left foot was tilted inward and she experienced an immediate onset of pain when the accident occurred. Petitioner stated she had no problems with her left foot prior to the accident.

Following the accident, Petitioner was seen in the ER of Belleville Memorial Hospital. According to the ER record, Petitioner had complaints of left lateral ankle pain and was unable to bear weight. Petitioner was diagnosed with ankle sprain and directed to follow-up with her family physician, Dr. Lowell Sensintaffer (Petitioner's Exhibit 1).

Dr. Sensintaffer saw Petitioner the following day. At that time, Petitioner advised that she sustained the injury when a student jumped and landed on the lateral aspect of her left foot and ankle. Petitioner was only able to partially bear weight. Dr. Sensintaffer opined Petitioner had sustained an ankle and foot sprain (Petitioner's Exhibit 2).

On November 12, 2016, Petitioner went to St. Elizabeth Urgent Care because of her ongoing left ankle/foot symptoms. Petitioner stated that her primary care doctor had given her a gel splint, but that she wanted a walking boot. Petitioner was then provided with a walking boot (Petitioner's Exhibit 3).

Dr. Sensintaffer again saw Petitioner on November 23, 2016, and Petitioner advised that the boot she was given at Urgent Care had fallen apart. Dr. Sensintaffer noted swelling of the ankle and tenderness of the anterior tibialis tendon. He ordered physical therapy and prescribed a Cam walking boot. He also ordered an MRI scan of Petitioner's left foot and ankle (Petitioner's Exhibit 3).

The MRI was performed on December 1, 2016. The MRI revealed a bony contusion of the lateral malleolus, a grade 1 muscle strain of the extensor digitorum longus tendon, a peroneus brevis longitudinal split tendon tear and an anterior talofibular ligament sprain (Petitioner's Exhibit 5).

Petitioner was subsequently seen by Dr. Sensintaffer on December 5 and 19, 2016, because of her left ankle/foot symptoms. When Dr. Sensintaffer saw Petitioner on January 16, 2017, she advised that her son ran over her foot with hoverboard which caused a worsening of her symptoms. He opined Petitioner had sustained a left ankle and foot sprain and referred Petitioner to Dr. Gregory Kranzusch, a podiatrist (Petitioner's Exhibit 3).

Dr. Kranzusch initially saw Petitioner on January 26, 2017. Petitioner informed Dr. Kranzusch of the work-related accident and complained of left ankle pain at the anteriolateral aspect at its posterior lateral aspect. His diagnosis was synovitis, tenosynovitis of the left ankle and foot, sprain of other ligaments of the left ankle and spontaneous rupture of flexor tendons of the left ankle and foot. Dr. Kranzusch administered an injection to the left foot and prescribed a different brace (Petitioner's Exhibit 6).

When Dr. Kranzusch saw Petitioner on February 9, 2017, she advised that the new brace was not helping her. Dr. Kranzusch suspected that there was a tear of the peroneal tendon and ordered another MRI scan (Petitioner's Exhibit 6).

The MRI was performed on February 17, 2017, and it revealed a hairline fracture of the calcaneus, tenosynovitis without tear of the peroneus longus, contusion and sprains of various lateral ligaments, bone marrow edema/contusion of the lateral malleolus and a mild sprain/contusion of the deltoid ligament (Petitioner's Exhibit 7).

Dr. Kranzusch continued to treat Petitioner from March through May, 2017, but her symptoms did not improve. Because of her ongoing symptoms, Dr. Kranzusch ordered another MRI to evaluate the lateral ankle and calcaneus (Petitioner's Exhibit 6).

Another MRI was performed on May 17, 2017. The MRI revealed healing of the calcaneal fracture, tenosynovitis of the peroneal tendon sheath and prior anterior talofibular and calcaneal fibular ligament tears. When Dr. Kranzusch saw Petitioner on May 25, 2017, he ordered more physical therapy (Petitioner's Exhibits 6 and 8).

When Dr. Kranzusch saw Petitioner on June 20, 2017, Petitioner advised her left ankle symptoms had improved. However, Petitioner also stated that she was having weakness and numbness in her central toes which had become more obvious when her ankle symptoms improved. At that time, Dr. Kranzusch ordered EMG/nerve conduction studies of Petitioner's left foot (Petitioner's Exhibit 6).

The EMG/nerve conduction studies were performed on July 5, 2017. The diagnostic tests were normal (Petitioner's Exhibit 9).

When Dr. Kranzusch saw Petitioner on July 11, 2017, he noted she had pain of the left first metatarsal phalangeal joint (hereinafter referred to as MP joint). Petitioner also had ankle pain/numbness and other symptoms in the second, third and fourth toes. Dr. Kranzusch administered an injection to the MPJ joint (Petitioner's Exhibit 6).

Dr. Kranzusch subsequently saw Petitioner on July 18, 2017, and Petitioner noted that while the left ankle symptoms had improved, she continued to have severe pain of the great toe region which had been present since the accident. Dr. Kranzusch ordered another MRI scan (Petitioner's Exhibit 6).

Another MRI was performed on July 24, 2017. This study revealed marrow edema of the calcaneus without evidence of a fracture, joint effusion of the first MP joint, posterior tibial tenosynovitis, peroneal tenosynovitis and mild Achilles paratenonitis (Petitioner's Exhibit 10).

Petitioner continued to be treated by Dr. Kranzusch and September and October, 2017, for left foot symptoms, primarily in the MP joint. Dr. Kranzusch suspected capsulitis at first MP joint. On October 10, 2017, Dr. Kranzusch administered another injection, but when he saw Petitioner on October 17, 2017, he noted that Petitioner only had some temporary relief (Petitioner's Exhibit 6).

At the direction of Respondent, Petitioner was examined by Dr. Joshua Naduad, an orthopedic surgeon, on October 19, 2017. In connection with his examination of Petitioner, Dr. Naduad reviewed medical records and diagnostic tests provided to him by Respondent. However, Dr. Naduad's report did not state that he had, in fact, reviewed Dr. Kranzusch's treatment records. Dr. Naduad opined Petitioner had sustained a left ankle and foot contusion on November 10, 2016, but that Petitioner's current condition in respect to the forefoot and toes were not related to the accident, but a chronic condition. He opined Petitioner was at MMI and no further medical treatment was indicated (Respondent's Exhibit 2; Deposition Exhibit 2).

Petitioner was subsequently seen by Dr. Kranzusch on October 24, 2017. At that time, Petitioner continued to complain of pain at the first MP joint and that the injections had not helped. Dr. Kranzusch opined Petitioner had capsulitis of the first MP joint. He recommended surgical exploration of the area with possible debridement, resurfacing, and excision as well as an exostectomy with deep peroneal nerve lysis (Petitioner's Exhibit 6).

Dr. Kranzusch was deposed on November 29, 2017, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Kranzusch's testimony was consistent with his medical records and he noted Petitioner did not have a history of any chronic foot problems. Dr. Kranzusch stated that surgical exploration of the first metatarsal phalangeal joint was indicated given the fact that conservative treatment of Petitioner's foot and ankle been attempted, but without success. He stated that he planned on freeing the peroneal nerve and that Petitioner had complaints of pain pertaining to that area since the beginning. He opined that Petitioner's

condition and the need for the surgery were related to the accident (Petitioner's Exhibit 12; pp 22-29).

Dr. Naduad was deposed on December 13, 2017, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Naduad's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Although he did not list Dr. Kranzusch's medical treatment records in his medical report, he testified that he had reviewed them. Dr. Naduad stated Petitioner had sustained an ankle sprain as a result of the accident of November 10, 2016, and not an injury to the forefoot (Respondent's Exhibit 1; pp 16-20).

On cross-examination, Dr. Naduad stated that Petitioner's current condition was consistent with arthritis and not a traumatic condition. While he stated that Petitioner's current symptoms were because of a chronic condition, he could not state when her symptoms first started or when the chronic condition began (Respondent's Exhibit 1; pp 23-24, 29-30).

At trial, Petitioner complained of pain/swelling in the top of her foot going into the big toe. Petitioner stated she has not been able to return to work because of her left foot condition. She does want to proceed with the surgery recommended by Dr. Kranzusch.

Conclusions of Law

In regard to disputed issue (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner's current condition of ill-being is causally related to the accident of November 10, 2016.

In support of this conclusion the Arbitrator notes the following:

There was no dispute that Petitioner sustained an injury to her left foot on November 10, 2016, when a child jumped off of a piece of playground equipment landing on Petitioner's left foot.

Petitioner's testimony that she had no prior injuries or symptoms regarding her left foot was credible and unrebutted.

Petitioner has received an extensive amount of medical treatment and has undergone several MRI scans.

While the injury was initially described as an ankle sprain, Petitioner also had various diagnoses in regard to ligaments and tendons, a fracture of the calcaneus, tenosynovitis, edema, sprain/contusions for which Petitioner has received extensive treatment and numerous diagnostic tests.

The Arbitrator is not persuaded by Dr. Naduad's opinion that Petitioner's ongoing foot symptoms were not related to the accident because of a chronic condition. The Arbitrator notes that Dr. Naduad could not opine as to when Petitioner first started having symptoms or when the chronic condition began.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and that Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 13, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

In regard to disputed issue (K) the Arbitrator makes the following conclusion of law:

Based upon the Arbitrator's conclusion of law in disputed issue (F) the Arbitrator concludes Petitioner is entitled to prospective medical treatment including, but not limited to, the surgery recommended by Dr. Kranzusch.

In regard to disputed issue (L) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner is entitled to temporary total disability benefits of 60 6/7 weeks, commencing November 11, 2016, through January 10, 2018.

In support of this conclusion the Arbitrator notes the following:

Petitioner continues to have left foot symptoms, is in need of additional medical treatment and has been unable to return to work.

William R. Gallagher, Arbitrator

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 Down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ramon Alexis-Santiago,

Petitioner,

vs. NO: 12 WC 2364

Ron's Staffing Services and A. Lava & Sons,

Respondent.

18IWCC0652

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent, Ron's Staffing Services herein, and notice provided to all parties, the Commission, after considering the issues of accident, causal relationship, temporary total disability benefits, medical expenses and permanent disability and being advised of the facts and the law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Conclusions of Law

A. Accident and Causal Relationship

The Commission affirms the Arbitrator's finding Petitioner sustained accidental injuries arising out of and in the course of his employment on December 2, 2011. The Commission notes the only medical record evidencing a different date of accident is the December 19, 2011 Physical Therapy Initial Evaluation, which noted a date of accident of November 25, 2011. All the other medical records evidence a date of accident of December 2, 2011. Petitioner testified he felt immediate right foot pain on December 2, 2011 while pushing/pulling a loaded pallet jack. T. 11-12. The Commission finds Petitioner's testimony is corroborated by the medical

records. The recording of "left" foot on the accident form initially seems to be an error which Petitioner corrected the same day to "right" foot.

The Commission further affirms the Arbitrator's finding of a causal relationship between the injury and Petitioner's right foot condition of ill-being. The Commission notes Dr. Ramirez, Dr. Engel, and Dr. Kane all opined causation. Respondents did not present any evidence contrary to those opinions.

B. Temporary Total Disability

The Commission modifies the Arbitrator's Decision - finding Petitioner failed to prove entitlement to temporary total disability benefits. Based on this finding, the Commission vacates the Arbitrator's award of temporary total disability benefits from December 16, 2011 through July 9, 2012, less one week for performance of light duty work, a total period of 28-4/7 weeks. "[T]he Commission is not bound by the arbitrator's findings and may properly determine the credibility of witnesses, weigh their testimony and assess the weight to be given to the evidence. [citation omitted]." *R.A. Cullinan and Sons v. The Industrial Commission*, 216 Ill. App. 3d 1048, 1054, 575 N.E.2d 1240 (1991).

Petitioner testified he first sought medical treatment on December 15, 2011 at Marque Medicos. T. 13. The medical records of Marque Medicos (PX3) evidence on December 15, 2011, Petitioner was evaluated by Dr. Ramirez who diagnosed plantar fasciitis as well as right foot and ankle pain. Dr. Ramirez released Petitioner to return to work as of December 16, 2011 with restrictions of seated work only with no walking or standing. On December 19, 2011, Dr. Engel of Medicos Pain & Surgical evaluated Petitioner on a referral from Dr. Ramirez. Dr. Engel prescribed medications and continued the same restrictions. On January 4, 2012, Dr. Ramirez re-evaluated Petitioner who reported an attempted return to work with the restrictions but was advised only full duty work was available. PX3.

The medical records evidence Dr. Kane, a podiatrist, evaluated Petitioner on January 9, 2012 on referral from Dr. Ramirez. PX4. Dr. Kane noted the December 2, 2011 accident, and "The patient attempted to work through the pain, but after a week-and-half, he was unable to walk on the right foot without severe pain and reported the injury to his supervisor." Dr. Kane released Petitioner to light duty work without any pushing or pulling. PX4. On January 23, 2012, Dr. Kane recommended sedentary work only with no use of the right foot. On February 6, 2012, Dr. Kane continued to recommend sedentary work only with no use of the right foot and noted Petitioner reported his employer would not offer light duty work. On July 9, 2012, Dr. Kane placed Petitioner at maximum medical improvement and released Petitioner to full duty work, without restrictions. PX4.

Petitioner testified after he initially reported his accident to Mr. Enrique Landeros of Ron's Staffing on December 21, 2011, he was allowed to return to work following a three-day suspension. T. 17-18. Petitioner testified he was either off work or working light duty from

December 16, 2011 through July 9, 2012. T. 19. Petitioner testified he presented his light duty notes from Marque Medicos to Mr. Landeros who only offered light duty work for approximately one week. T. 20. On cross-examination, Petitioner reaffirmed he only worked one week on light duty but could not recall the exact dates of the same. T. 32-33.

Enrique Landeros was called to testify on behalf of Respondent, Ron's Staffing Services. Mr. Landeros testified he is employed with Ron's Staffing Services as the safety manager and has been so for nine years. T. 47. Mr. Landeros explained his duties to include investigating injuries, implementing a light duty return to work program to ensure appropriate accommodations to employees, and liaising with the insurance company. *Id.*

Mr. Landeros was tendered and identified Respondent's Exhibit 4, an employee warning notice prepared by him. T. 48. Mr. Landeros explained, pursuant to the company's policy, Petitioner was suspended for three days due to his failure to report his accident within eight hours of the occurrence, and he was allowed to return to work as of December 28, 2011. T. 49. Respondent's Exhibit 4 is signed by Mr. Landeros, and notation on the document indicates "Employee refused to sign on."

Mr. Landeros testified Ron's Staffing Services has a light duty program, and light duty was offered to Petitioner. T. 49-50. Mr. Landeros explained that an employee with work restrictions is provided a document which advises the so restricted employee that light duty is available. T. 50. The employee then signs the document indicating the acceptance or rejection of the offer of work. *Id.* Mr. Landeros stated he learned of Petitioner's restrictions from the medical records received from Marque Medicos. *Id.*

Thereafter, Mr. Landeros was tendered and identified Respondent's Exhibit 5, Acknowledgment of Restrictions. T. 50-51. Mr. Landeros explained the document memorializes the offer of light duty work. T. 51. Respondent's Exhibit 5 is signed by Mr. Landeros and dated December 21, 2011, and a notation on the document indicates "Employee refused to accept light duty offer" and is dated December 21, 2011. Mr. Landeros testified light duty work consisting of office work was offered to Petitioner which he failed to perform. T. 51. On cross-examination, Mr. Landeros testified Petitioner worked full duty prior to December 21, 2011. T. 54.

"To show entitlement to TTD benefits, claimant must prove not only that he did not work, but that he was unable to work. [citation omitted]." *City of Granite City v. The Industrial Commission*, 279 Ill. App. 3d 1087, 1090, 666 N.E.2d 827 (1996). The medical records evidence Petitioner was released to return to work with restrictions as of December 16, 2011. Dr. Ramirez, Dr. Engel and Dr. Kane maintained those light duty restrictions. On July 9, 2012, Dr. Kane opined Petitioner reached maximum medical improvement and was capable of working full duty without restrictions.

Petitioner testified when he initially reported the accident to Enrique Landeros of Ron's Staffing Services on December 21, 2011, he was allowed to return to work following his three-day suspension. Petitioner testified Mr. Landeros offered light duty work, but Petitioner was unable to recall the exact dates.

In contrast, Mr. Landeros testified he offered Petitioner a light duty job within his restrictions at one of the branch offices of Respondent, Ron's Staffing Services. Mr. Landeros signed RX5 as supervisor and noted Petitioner refused to sign the "Offer of Work Transitions and Recognition of Restrictions."

The Commission finds based on Mr. Landeros' testimony and RX5, Petitioner refused the offer of light duty work tendered by Respondent, Ron's Staffing Services on December 21, 2011. See *City of Granite City v. Industrial Commission*, 279 Ill. App. 3d 1087, 1090, 666 N.E.2d 827 (1996) ("In *Presson v. Industrial Comm'n,* 200 Ill. App. 3d 876, 880-81, 558 N.E.2d 127, 131, 146 Ill. Dec. 164 (1990), the Commission's finding that the period of TTD ended when claimant was offered a light-duty job within his restrictions was upheld."). Mr. Landeros testified prior to December 21, 2011, Petitioner work his full-duty job which is consistent with the history provided by Petitioner to Dr. Kane that he attempted to work through the pain before reporting the injury.

Therefore, the Commission finds Petitioner failed to prove he entitlement to temporary total disability benefits and vacates the Arbitrator's award for same.

C. Medical Expenses

The Commission modifies the Arbitrator's medical expenses award. Section 8(a) of the Illinois Workers' Compensation Act entitles a claimant to recover medical expenses which are reasonable, necessary, and causally related to an accident. *820 ILCS 305/8(a)* (West 2010); *Zarley v. The Industrial Commission*, 84 Ill. 2d 380, 418 N.E.2d 718 (1981). The Arbitrator noted he was unable to award any less than the full amount of medical expenses as no evaluation pursuant to §12 or Utilization Review was undertaken. However, PX6 evidences medical bills from Medicos Pain & Surgical Specialists and Marque Medicos were adjusted to the Medical Fee Schedule. The medical bill from Medicos Pain & Surgical Specialists, Dr. Engel, evidences $945.10 was charged, and the Fee Schedule balance due is $247.73. The medical bill from Marque Medicos Fullerton, Dr. Ramirez, evidences $58,346.00 was charged, and the Fee Schedule balance due is $16,911.15.

The Commission orders Respondents to pay Medicos Pain & Surgical Specialists the Medical Fee Schedule amount of $247.73 and pay Marque Medicos Fullerton the Medical Fee Schedule amount of $16,911.15. The Commission further orders the Respondents to pay the following pursuant to the Medical Fee Schedule: Archer Open MRI for $1,800.00; Specialized Radiology Consult for $47.00; Dr. Kane for $2,565.55; Industrial Pharmacy Management for $1,677.16. PX5. The total of the above medical expenses is $23,248.59.

D. Permanent Disability

The Commission modifies the Arbitrator's Decision - finding Petitioner is permanently disabled to the extent of 5% loss of use of the right foot. Petitioner testified his right foot continues hurting him somewhat. T. 21. He noticed he has pain when he walks for more than two or three hours and when he has been standing for an extended period of two or three hours or longer. T. 21-22. Other than taking Tylenol, sitting down and raising his foot helps alleviate the pain. T. 22.

The medical records evidence on July 9, 2012, Dr. Kane evaluated Petitioner who reported continued mild to moderate pain in his right foot and ankle. On examination, Dr. Kane found Petitioner's right foot and ankle to be normal with some symptoms of mild plantar fasciitis. Petitioner was to continue wearing the prosthetic devices and take prescribed medications as needed. Dr. Kane found Petitioner reached maximum medical improvement and capable of working full duty without restrictions. PX4.

Pursuant to §8.1b, the Commission weighs the following five factors accordingly:

1) AMA Impairment Rating - Neither party obtained an impairment rating, so no weight is assigned to this factor.

2) Occupation of Petitioner - Petitioner was a factory worker at the time of his accident. There was no testimony regarding Petitioner's work situation following his attainment of maximum medical improvement. The Commission assigns no weight to this factor.

3) Age of Petitioner - Petitioner was 32 years of age at the time his accident. Petitioner has a significant work life expectancy which will require him to manage the effects of his injury for a greater period. The Commission finds this factor weighs in favor of increased permanent disability.

4) Petitioner's Future Earning Capacity - There is no evidence of reduced earning capacity contained in the record. The Commission places significant weight on this factor as being indicative of reduced permanent disability.

5) Evidence of Disability/Treating Records - A MRI was performed and Dr. Kane concurred Petitioner suffered a partially torn plantar fascia on the plantar aspect of his right foot. Petitioner underwent treatment including physical therapy, prescribed medications, and use of prosthetic devices. PX3, PX4. Petitioner has mild to moderate pain when he walks or stands more than two to three hours. T. 21-22. On his last visit with Dr. Kane, Petitioner had some symptoms of mild plantar fasciitis. Dr. Kane released Petitioner to return to work full duty and there was no testimony he has treated since that time. The Commission places significant weight on this factor as being indicative of reduced permanent disability.

Based upon the above numerated factors as well as the record taken, the Commission awards Petitioner permanent partial disability benefits of $220.00 per week for the total period of 8.35 weeks, because the injuries sustained caused the loss of use of 5% loss of use of the right foot, as provided by §8(e)9 of the Act. The Commission affirms all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's July 12, 2017 decision is modified for the reasons stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of temporary total disability benefits is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondents shall pay the sum of $23,248.59 for reasonable, necessary and related medical expenses pursuant to §8(a) of the Act, subject to the Medical Fee Schedule pursuant to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondents pay to Petitioner the sum of $220.00 per week for a period of 8.35 weeks, as provided in §8(e)9 of the Act, for the reason that the injuries sustained caused the permanent loss of use of the right foot to the extent of 5%.

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

Bond for the removal of this cause to the Circuit Court by Respondents is hereby fixed at the sum of $25,200.00. 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 2018
LEC/maw
o08/29/18
43

L. Elizabeth Coppoletti

Joshua D. Luskin

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ALEXIS-SANTIAGO, RAMON
Employee/Petitioner

Case# **12WC002364**

RON'S STAFFING SERVICES AND A LAVA & SONS
Employer/Respondent

18IWCC0652

On 7/12/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.12% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1067 ANKIN LAW OFFICE
ANITA DeCARLO
10 N DEARBORN ST SUITE 500
CHICAGO, IL 60602

4944 KOREY RICHARDSON LLC
DANIEL J STOLLER
20 S CLARK ST SUITE 500
CHICAGO, IL 60603

2097 GRANT & FANNING
DANIEL SWANSON
300 S RIVERSIDE PLZ SUITE 2050
CHICAGO, IL 60606

18IWCC0652

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

Ramon Alexis-Santiago
Employee/Petitioner

v.

Ron's Staffing Services and A. Lava & Sons
Employer/Respondent

Case # **12** WC **02364**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian T. Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **9/30/2016**. 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. [x] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] 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 **12/2/2011**, 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 **$18,720.00**; the average weekly wage was **$360.00**.

On the date of accident, Petitioner was **32** years of age, ***single*** with **0** dependent children.

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

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

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

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

ORDER

Respondent shall pay Petitioner **$65,380.81**, which is an amount equal to the outstanding medical bills for the reasonable, necessary, and related medical services rendered to Petitioner, as provided in Section 8(a) and subject to Section 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$240.00**/week for **29-4/7** weeks, commencing **12/16/11** through **7/9/12**, less **1** week for performance of light-duty work (= **28-4/7** weeks), as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$220.00**/week for **16.7** weeks, because the injuries sustained caused a permanent loss of use of the **right foot** to the extent of **10%** thereof, as provided in Section 8(e)11 of the Act.

Respondent shall pay benefits that have accrued since **7/10/12**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

7/12/2017
Date

JUL 12 2017

18IWCC0652

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ramon Alexis-Santiago

v. Case No. 12 WC 02364

Ron's Staffing Services
and A. Lava & Sons

FINDINGS OF FACT:

Petitioner worked on assignment from Ron's Staffing Services, a temporary employment agency as a worker bringing material to people in inspection at A Lava & Sons. (Tr. pg. 9). Petitioner testified that his job consisted of taking bed covers in a pallet jack to be inspected. Specifically, the bed covers were in a box about two and a half feet high and in total weighed approximately 80 pounds. (Tr. pg. 10, 11). Petitioner moved the boxes on a concrete floor about 20 to 30 feet across to be inspected at the facility. (Tr. pg. 11). On December 2, 2011, Petitioner testified, he was pushing the pallet jack with the boxes of bed covers when he suddenly felt pain in his right foot. (Tr. pg. 12). Petitioner testified he did not seek immediate care because he thought it was only temporary pain that would go away after two or three days. (Id.). Petitioner further stated that he informed a woman named Brenda of his injury that day and confirmed she was not his supervisor. (Tr. pg. 13).

On December 15, 2011, Petitioner sought the medical care and attention for his right foot pain from Marque Medicos. (Pet. Ex. 3). Petitioner told the attending physician that he had not informed anyone of his injury hoping the pain would go away. Petitioner stated he informed his manager on December 13, 2011. Petitioner was diagnosed with plantar fasciitis with foot and ankle pain. Petitioner was recommended to begin physical therapy and put on restricted duties that consisted of sitting down work only. (Id.).

On December 19, 2011, Petitioner had a follow-up evaluation with Marque Medicos. (Pet. Ex. 3). Petitioner continued to complain of pain in the right foot. Petitioner stated he hurt his foot at work on November 25, 2011. Petitioner was again diagnosed with right foot plantar fasciitis and released to light duty. (Id.).

On December 19, 2011, Petitioner had an initial pain management consultation with Dr. Andrew J. Engel, M.D., at Medicos Pain and Surgical Specialists, S.C. (Pet. Ex. 3). Petitioner stated that he worked in the maintenance department pulling a cart when he had sudden pain in

the right heel. Petitioner stated to Dr. Engel that he had not told anyone of the pain until his manager on December 13, 2011. Petitioner was diagnosed with foot and ankle pain and recommended to see Dr. Kane, the podiatrist. Petitioner was also recommended to continue physical therapy and to start prescription medication for his injury. Dr. Engel recommended that Petitioner continue with restricted duties at work. (Id.).

On January 9, 2012, Petitioner had an initial evaluation with John F. Kane, D.P.M (Pet. Ex. 4). Petitioner presented with pain and swelling along the plantar aspect of the right foot, particularly along the heel. Dr. Kane noted that Petitioner, while performing his normal work duties, suddenly felt a sharp shooting pain along the plantar aspect of the right foot. Dr. Kane examined the plantar aspect of the right foot and found sharp shooting pain on palpation consistent with a tear of the plantar fascia of the right heel. Dr. Kane recommended Petitioner undergo an MRI of the right foot. Petitioner was put on light duty work without any pushing or pulling. (Id.).

On January 11, 2012, Petitioner had a revaluation at Marque Medicos. (Pet. Ex. 3). The attending physician again noted that the accident occurred on November 25, 2011. Petitioner was diagnosed with a tear of the plantar fascia and was recommended to continue with physical therapy. (Id.).

On January 11, 2012, Petitioner underwent an MRI of the right ankle and heel with Archer Open MRI. (Pet. Ex. 3). The MRI revealed a moderate hypertrophic fibrotic thickening with a series of small intrafascial tears with no significant degenerative plantar fasciitis. (Id.).

On January 23, 2012, Petitioner returned to Dr. Kane's for further treatment for his right foot. (Pet. Ex. 4). Dr. Kane concurred with the MRI that he had a torn plantar fascia on the plantar aspect of the right foot and palpation along the plantar aspect of the right foot with deficit consistent with the tear that was palpable with an index finger. Dr. Kane stated Petitioner should continue with physical therapy including modalities for the right foot over the next two weeks. (Id.).

On February 1, 2012, Petitioner had a follow-up evaluation with Marque Medicos and continued to complain of right foot pain. (Pet. Ex. 3). Petitioner was diagnosed with a tear of the plantar fascia and stated his pain was 1/10 pain. The attending physician recommended Petitioner undergo an injection and shoe inserts for his pain. (Id.).

On February 6, 2012, Petitioner had another evaluation with Dr. Kane for his right foot. (Pet. Ex. 4). Petitioner continued to have symptoms consistent with a partially torn plantar fascia of the right foot with swelling and pain in the area with a margin along the medial and plantar aspect of the right heel. Petitioner stated to Dr. Kane that his employer did not want him at work until he was 100% and, as such, the light-duty return to work was met with denial. Dr. Kane opined Petitioner would benefit from orthopedic prosthetic devices, particularly one to his right heel, to support the area of pain. (Id.).

On February 7, 2012, Petitioner had a follow-up evaluation with Lorena Ramirez, D.C. at Marque Medicos. (Pet. Ex. 3). Petitioner stated he felt better and rated his right foot pain as a

2/10. Petitioner was to continue with physical therapy three weeks and Dr. Kane would decide if Petitioner would need an injection. Petitioner was diagnosed with plantar fasciitis and foot and ankle pain. Dr. Ramirez stated that Petitioner will follow up with Dr. Kane for treatment. (Id.).

On April 9, 2012, Petitioner continued to seek the medical care and attention from Marque Medicos. (Pet. Ex. 3). Petitioner stated his right foot pain was a 2/3 out of 10 in pain. (Id.).

On May 14, 2012, Petitioner had a follow-up evaluation with Marque Medicos and continued to complain of right foot pain. (Pet. Ex. 3). Petitioner was diagnosed with plantar fasciitis of the right foot. The attending physician stated that Petitioner presented with increased function and that he should continue with therapy. (Id.).

On July 9, 2012, Petitioner had a final evaluation with Dr. Kane. (Pet. Ex. 4). Dr. Kane stated that Petitioner was capable of working full duty without restrictions and had reached maximum medical improvement. (Id.).

Petitioner acknowledged that he was required by Ron's Staffing Services to report an accident within 8 hours of its occurrence, as shown in paragraph 1 of a form he signed on June 2, 2011. (Resp. Ex. 3)

Petitioner testified that his right foot continues to hurt and requires him to take Tylenol twice a day. He further testified that he experiences pain when walking or standing for two or three hours. Petitioner testified that he experiences some relief by sitting down or raising his foot.

CONCLUSIONS OF LAW:

In support of his decision with regard to issue (B) "Was there an employee-employer relationship?", the Arbitrator finds the following:

The parties stipulated that Ron's Staffing Services has primary liability in this case. This is a borrowing/loaning situation. A. Lava & Sons has secondary liability. It is clear from the stipulation and the testimony presented that there was an employer/employee relationship with both Respondents and that Ron's Staffing Services has primary liability.

In support of his decision with regard to issue (C) "Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?", the Arbitrator finds the following:

The Arbitrator finds, by a preponderance of the evidence, that Petitioner has proven that on December 2, 2011, he sustained an accident that arose out of and in the course of his employment by Respondent.

Petitioner testified that on December 2, 2011, he worked the night shift.

Petitioner testified that he injured his right foot at work on December 2, 2011, at about 9:00 p.m., and that he reported such injury at the end of his shift to Brenda, who was not his supervisor but was the person in charge that night. Petitioner testified that he hurt his right foot that night when he was pushing a pallet jack with material on it.

On cross-examination, Petitioner testified to the following:

Q: And you also testified that you first reported your accident to Brenda, is that correct?

A: Yes.

Q: What day did you report to Brenda of your accident (sic)?

A: I don't remember. I don't remember exactly what day it was.

Q: Who was Brenda?

A: Brenda was a lady who worked there; and at times, they put her in charge.

Q: Was she your direct supervisor?

A: No. (Tr. 27-28)

On redirect examination, Petitioner testified to the following:

Q: So did you work your full shift from December 2nd to December 3rd of 2011?

A: Yes.

THE ARBITRATOR: I'm sorry, can you read that question and answer back?

(Record read as requested.)

BY MS. DeCARLO:

Q: So do you not recall if you provided notice to Brenda on December 2nd or December 3rd because your shift was over - - passed over midnight?

A: With Brenda, it was just verbal. I spoke with her.

Q: I'm sorry, I forgot to mark this down. What did you say your shift was, the hours?

A: It was second shift. If I remember it right, it was one or two in the afternoon; and we left at 12 or one in the morning.

Q: So your accident happened at 9 p.m. on December 2nd of 2011, is that correct?

A: Yes.

Q: And you spoke with Brenda at some point during the shift, is that correct?

A: Yes, I spoke with her, yes.

Q: And you don't remember if you spoke with her before or after midnight, is that correct?

A: It was after when my foot was really hurting me and I spoke with her.

Q: So that would have been December 3rd of 2011, is that correct?

A: Yes, around that period.

Q: And would you describe the work that you did at A. Lava & Sons for Ron's Staffing as physically demanding?

A: Yeah, definitely pushing and pulling a heavy cart with materials to and from inspection, yes. (Tr. 34-36)

Petitioner testified that because he felt "greater pain" in his right foot, he sought treatment on December 15, 2011 at Marque Medicos. (Pet. Ex. 3) In the HISTORY OF PRESENT ILLNESS section, which is contained in the INITIAL HISTORY AND EXAMINATION report, Lorena Ramirez, D.C., wrote, in pertinent part, the following:

> "The patient states he injured himself while working approximately on 12/02/2011. The patient states he works in the maintenance department, sending/taking supplies to the people working the lines. The patient states he has to walk and pull carts with boxes weighing approximately 80 pounds. The patient states he walks on cement floor. The patient states while he was doing this, he felt sudden right foot pain. The patient states he did not tell anyone because he was hoping the pain would go away; however, it did not. The patient states he informed his manager on 12/13/2011. The patient states that his employer told him to continue to work ... " (Pet. Ex. 3)

In the PHYSICAL THERAPY INITIAL EVALUATION, dated December 19, 2011, Norman O. Lambot, P.T., wrote, in pertinent part, the following: "The patient states that he was hurt at work on 11/25/2011. Please see Dr. Ramirez's report for the complete initial history of this." (Pet. Ex. 3)

The Arbitrator notes that in the Marque Medicos PATIENT REGISTRATION form, Petitioner identifies "12/02/11" as the date of accident. (Pet. Ex. 3)

On December 21, 2011, Petitioner first notified Ron's Staffing of his foot injury when he met with Enrique Landeros. Petitioner testified that the reason he waited 19 days to report his injury to Ron's Staffing was that it was important to inform Ron's Staffing that the pain had become much worse and that he had gone to a doctor.

Petitioner testified that on December 21, 2011, he completed an accident report that was entitled "Declaracion Del Empleado". Such report was written in Spanish. At Arbitration, Petitioner read the report and the interpreter provided the following English translation:

> "At December 2nd at about 9 p.m., I started to feel some pain in the right heel, my right heel. I thought it would be temporary; but as the days went by, I was feeling more pain. Before making a decision to go to the doctor, I commented - - I informed my supervisor of my problem and he told me that I should think about - - to think about what decision I wanted to make and that he would speak with the person in charge of the company to see what she was going to decide." (Pet. Ex. 1)

Petitioner testified that on the same day that he completed the "Declaracion Del Empleado", he changed the (Spanish) word for left (izquierdo) to the (Spanish) word for right (derecho) in reference to his injured foot. He testified that just after he wrote it, he read the document and realized that he had made a mistake.

However, Respondent Ron's Staffing Service presented a copy of the "Declaracion Del Empleado" that had been submitted to them in which no such alteration had been made and argued that Petitioner's claim here was for a left foot injury. (Resp. Ex. 1)

Alejandro Ceballos testified on behalf of Respondent Ron's Staffing Services. He works for A. Lava & Sons. Mr. Ceballos was Petitioner's supervisor on December 2, 2011. On December 21, 2011, after speaking with Petitioner, Mr. Ceballos completed and signed a form entitled "Supervisory Incident Investigation Report." (Resp. Ex. 2) In it, Mr. Ceballos wrote: "No incident occurred. Employee came to me complaining of foot pain. I ask (sic) him if he injured him self (sic) at work. He stated: No." Mr. Ceballos also wrote: "No action or recommendation needed because no incident happened." (Resp. Ex. 2)

The Arbitrator notes that although Mr. Ceballos works for A. Lava & Sons, he completed the "Supervisory Incident Investigation Report," which is a Ron's Staffing Services form. (Resp. Ex. 2)

Mr. Ceballos testified that if a warehouse worker such as Petitioner was having difficulty with his job, that person would talk to his primary supervisor, which, in this case would be Ceballos. Prior to this report, Ceballos testified, Petitioner never spoke to him about problems with his right foot. Ceballos testified that he was not aware of anyone Petitioner may have spoken to about his foot pain due to the warehouse job.

Enrique Landeros testified on behalf of Respondent Ron's Staffing Services. Mr. Landeros has been the Safety Manager for Ron's Staffing Services for 9 years. Mr. Landeros

completed and signed a document entitled "Employee Warning Notice." (Resp. Ex. 4) He testified that this document is usually used to implement disciplinary action for an employee. In this case, Petitioner was suspended for 3 days without pay for failure to report an accident within 8 hours of the occurrence.

Enrique Landeros testified that Respondent's Exhibit 1, which indicate the left foot, and not Petitioner's Exhibit 1, is the document that is within Respondent's records.

On cross-examination, Mr. Landeros testified that prior to December 21, 2011, Petitioner was working full duty. He further testified that on December 21, 2011, he presented a document to Petitioner entitled "Autorizacion Medica y Expendientes Medicos." (Pet. Ex. 2) Mr. Landeros testified that he himself wrote "talon derecho" on the form, which is translated as "right ankle."

The Arbitrator finds that Petitioner simply made a mistake when he wrote *izquierdo* instead of *derecho* on the "Declaracion Del Empleado." After all, he was already treating with Marque Medicos for his right foot and there is no medical evidence that Petitioner injured his left foot.

The Arbitrator finds it interesting that on December 21, 2011, based on the "Supervisory Incident Investigation Report," Ron's Staffing Services claimed that Petitioner never reported an accident - - only foot pain - - but then that same day, they proceeded to suspend him for 3 days without pay for reporting an accident more than 8 hours after its occurrence. (Resp. Ex. 2, Resp. Ex. 4)

Respondent did not call Brenda to testify to rebut Petitioner's testimony.

Based on the foregoing, especially Petitioner's testimony that he reported the accident to Brenda on the night that it occurred, the Arbitrator finds that on December 2, 2011, Petitioner sustained an accident that arose out of and in the course his employment by Respondent.

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

Both the pain management doctor, Dr. Engel, and the podiatrist, Dr. Kane, provided causal connection opinions linking the mechanism of injury with the diagnosis. (Pet. Ex. 3) Petitioner testified to the sudden onset of pain in his right heel while pushing the cart.

Respondent introduced no opinions to the contrary.

Based upon the evidence, the testimony and the medical opinions, the Arbitrator finds that Petitioner's current condition of ill-being of his right foot is causally related to the accident of December 2, 2011.

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

Petitioner followed a conservative course of medical treatment for his medical condition.

Petitioner was released to return to full-duty work within 8 months of his accident.

After reviewing the medical records and bills, the Arbitrator finds that the medical care rendered, which generated the outstanding medical bills from Archer MRI, $1,800.00, Specialized Radiology Consult, $47.00, Medicos Pain and Surgical Specialists, $945.10, Dr. John F. Kane, $2,565.55, and Industrial Pharmacy Management, $1,667.16, was reasonable, necessary and related to the accidental injury of December 2, 2011. The Arbitrator orders Respondent to pay Petitioner an amount equal to a total of these bills, $7,034.81, pursuant to Section 8(a) and subject to Section 8.2 of the Act.

The medical care rendered by Marque Medicos Fullerton appears to be excessive in its duration. However, in the absence of an opinion to that effect by a Utilization Review physician or a Section 12 physician, the Arbitrator has no basis to find that some portion of the treatment was unreasonable and unnecessary. Therefore, the Arbitrator orders Respondent to pay Petitioner an amount equal to the outstanding bill, $58,346.00, pursuant to Section 8(a) and subject to Section 8.2 of the Act.

Petitioner offered, and the Arbitrator admitted into evidence, a Medical Fee Schedule analysis of the outstanding medical bills from Medicos Pain and Surgical Specialists and Marque Medicos Fullerton. (Pet. Ex. 6)

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

Petitioner testified that from December 16, 2011 through July 9, 2012, he was either off work or on light duty. Petitioner further testified that he presented light-duty notes to either A. Lava & Sons or Ron's Staffing Services. Specifically, Petitioner provided these notes to Enrique. Petitioner further testified that Enrique offered him a light-duty job "just for some days, no more." By "some days," he meant for about a week. Petitioner was not paid for the time he did not work.

On cross-examination, Petitioner reiterated that he was offered a light-duty job for about a week. Petitioner did not recall the date on which he was offered the light-duty job. Petitioner testified that he worked the light-duty job for just about a week but did not work light duty after that because Respondent no longer offered him light-duty work.

Enrique Landeros testified that Ron's Staffing Services has a light-duty program. Mr. Landeros further testified that during the life of Petitioner's claim, Petitioner was offered light

duty. Mr. Landeros testified that they normally have employees sign the Acknowledgement of Restrictions form that informs the employee that there is light duty available. The employee then signs and accepts or rejects the light-duty offer. In determining Petitioner's work restrictions, Ron's Staffing Services reviewed the medical records from Marque Medicos.

Mr. Landeros testified with regard to the document entitled "Oferta de Tareas Transicionales y Reconocimiento de Restricciones." (Resp. Ex. 5) He testified that he signed this document that is dated December 21, 2011. Mr. Landeros testified that this is the Acknowledgement of Restrictions form that is used to offer light duty to their employees. He testified that he offered Petitioner a light-duty job in one of the branch offices at Ron's Staffing Services. He testified that such job was within Petitioner's restrictions. Mr. Landeros testified that Petitioner never showed up for light duty. Mr. Landeros did not recall if Petitioner ever gave a reason as to why he failed to work light duty. Mr. Landeros did not recall if, after he offered light-duty work to Petitioner on December 21, 2011, Petitioner ever returned or sought light-duty work.

On cross-examination, Mr. Landeros testified that, from what he could recall, Petitioner's work restrictions on December 21, 2011 allowed him to do sitting work only. Mr. Landeros testified that Petitioner never gave a note to him *personally* that said he is required to do light-duty work. Mr. Landeros agreed with Petitioner's attorney that Petitioner was working full duty prior to December 21, 2011.

The Arbitrator notes that Respondent's Exhibit 5 has numerous blank fields on it. On the bottom of the form, Enrique Landeros wrote: "Employee refused to accept light duty offer 12/21/11." However, the document indicates that Petitioner did not affirmatively reject such offer as there is no checkmark before "No acepto la oferta de TAD," and no signature of Petitioner.

The Arbitrator finds Ramon Alexis-Santiago to be more credible than Enrique Landeros.

During the course of his treatment, Dr. Ramirez, Dr. Engel and Dr. Kane restricted Petitioner to light-duty work. At a July 9, 2012 office visit with Petitioner, Dr. Kane released Petitioner to return to full-duty work.

Therefore, the Arbitrator finds that Petitioner is entitled to TTD benefits from December 16, 2011 through July 9, 2012, less one week of such benefits as Petitioner testified he performed light-duty work for one week.

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

In *Gayelynn Lohman v. Caterpillar, Inc.*, 14 IWCC 0093, the Commission awarded this 45-year-old parts packager 5% loss of use of the right foot and 10% loss of use of the left foot for bilateral plantar fasciitis. Claimant received conservative treatment and was released to return to full-duty work.

In *Peter Toms v. Northwestern Flavors*, 11 IWCC 0384, the Commission awarded this 45-year-old forklift driver 5% loss of use of each foot for bilateral plantar fasciitis. Claimant treated conservatively and underwent extracorporeal shock wave treatment. He also received injections to his heels, and was fitted for orthotics. There is no evidence that claimant was given permanent restrictions.

In *Thomas J. Galassi v. Valspar Corp.*, 07 IWCC 0286, the Commission awarded this 27-year-old batch maker 30% loss of use of the left foot and 15% loss of use of the right foot for bilateral plantar fasciitis. For both feet, claimant received conservative care that consisted of physical therapy, anti-inflammatories, cortisone injections and orthotics. For the left foot, claimant underwent a surgical release of the medial and central bands of the plantar fascia; the physician's diagnosis was chronic foot pain with failed surgical treatment. Claimant was released to return to full-duty work.

Pursuant to Section 8.1b of the Act, for accidental injuries that occur on or after September 1, 2011, the following criteria are to be used in the determination of permanent partial disability:

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

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals Petitioner was employed as a manual laborer/factory worker at the time of the accident and, after a course of conservative care, was released to return to full-duty work. (Pet. Ex. 3) The Arbitrator therefore gives major weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 32 years old at the time of the accident. (Arb. Ex. 1) The Arbitrator finds, *ceteris paribus*, that Petitioner has a longer work-life expectance than a 42, 52, or 62-year-old worker. The Arbitrator therefore gives major weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that the record reveals that no specific evidence was offered to indicate an increase or decrease in Petitioner's future earning capacity. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Dr. Kane's final PROGRESS NOTE for Petitioner:

"This well-developed male returned to the office seeking further treatment regarding symptoms associated with a painful injury that occurred while performing his normal work duties on 12/02/2011. The patient has been recovering nicely from his injuries, but still continues to have some mild-to-moderate pain in the area of his right foot and ankle. The patient is wearing his orthopedic prosthetic devices, particularly while performing his work duties. Examination reveals a healthy normal right foot and ankle in comparison to the previous visit, but the patient continues to present with some symptoms of mild plantar fasciitis. Diagnosis: Plantar fasciitis, torn plantar fascia of the right foot subsequent to a work injury on 12/02/2011. Recommendations: (1) Continue to wear orthopedic prosthetic devices that were provided to him. (2) Continue oral anti-inflammatories as needed. Work Status: The patient is capable of working full duty without restrictions. MMI: 07/09/2011." (Pet. Ex. 3)

The Arbitrator therefore gives major weight to this factor.

Determination of permanent partial disability ("PPD") is not simply a calculation, but is an evaluation of the 5 factors. The Arbitrator has carefully considered all 5 factors. By applying §8.1b and by considering the relevance and weight of all 5 factors, the Arbitrator finds that as a result of the December 2, 2011 accident, Petitioner has sustained a loss of use right foot to the extent of 10%.

Brian T. Cronin

Arbitrator

7-12-2017

Date

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

Matt Studinger,

Petitioner,

vs. NO: 16WC 31520

Pontiac District 90,

Respondent.

18IWCC0653

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 30, 2018 is hereby affirmed and adopted.

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

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

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

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 2018

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

Charles J. DeVriendt

Charles J. DeVriendt

Joshua D. Luskin

Joshua D. Luskin

o091218
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043

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

STUDINGER, MATT
Employee/Petitioner

Case# **16WC031520**

PONTIAC DISTRICT 90
Employer/Respondent

18IWCC0653

On 1/30/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.62% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0000 RUSIN & MACIOROWSKI LTD
MARK COSIMINI
2506 GALEN DR SUITE 108
CHAMPAIGN, IL 61821

STATE OF ILLINOIS)
)SS.
COUNTY OF MC LEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Matt Studinger
Employee/Petitioner

v.

Pontiac District 90
Employer/Respondent

Case # 16 WC 31520

Consolidated cases: n/a

18IWCC0653

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Bloomington , on December 28, 2017. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, January 29, 2016, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $4,320.00; the average weekly wage was $196.36.

On the date of accident, Petitioner was 45 years of age, married with 2 dependent child(ren).

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

Respondent shall be given a credit of $5,203.08 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $5,203.08.

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

ORDER

Respondent shall pay reasonable and necessary medical services from January 29, 2016, through September 23, 2016, as identified in Petitioner's Exhibit 20 as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Based upon the Arbitrator's Conclusions of Law, Petitioner's claim for prospective medical treatment is denied.

Respondent shall pay Petitioner temporary total disability benefits of $196.36 per week for 33 6/7 weeks commencing January 30, 2016, through September 23, 2016, as provided in Section 8(b) of the Act.

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

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

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

William R. Gallagher, Arbitrator
ICArbDec19(b)

January 20, 2018
Date

JAN 30 2018

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment for Respondent on January 29, 2016. According to the Application, "Petitioner slipped on some bleachers twisting his left foot/leg/knee" and sustained injuries to his "left foot/leg/knee" (Arbitrator's Exhibit 2). This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of temporary total disability benefits of 99 4/7 weeks (January 29, 2016, through December 28, 2017) and medical bills as well as prospective medical treatment, specifically, left knee surgery (Arbitrator's Exhibit 1).

Respondent stipulated that Petitioner sustained a work-related accident; however, Respondent disputed liability on the basis of causal relationship. In regard to temporary total disability benefits, Respondent claimed that Petitioner was entitled to temporary total disability benefits of 33 6/7 weeks, (January 30, 2016 through September 23, 2016) (Arbitrator's Exhibit 1).

In regard to Petitioner's average weekly wage, Petitioner claimed he was entitled to an average weekly wage of $441.56. This was based on Petitioner's concurrent employment with another employer. Petitioner's other job was the Pastor of a church for which he received the use of a house, payment of utility bills, insurance, etc. For purposes of the hearing in this case, Petitioner and Respondent agreed to defer any ruling on this issue until a later time and that any award of temporary total disability benefits would be based on Petitioner's average weekly wage for Respondent of $196.36 (Arbitrator's Exhibit 1).

Petitioner began working for Respondent in July, 2015, as an assistant custodian. On January 29, 2016, Petitioner was cleaning bleachers in the gym and his left foot slipped in the space between the foot rest and seat. This caused Petitioner to sustain a twisting injury to his left knee and foot.

Petitioner went to the ER of St. James Medical Center on January 30, 2016. At that time, Petitioner advised that he had injured his left knee/foot on January 29 while at work. Petitioner also stated that prior to the accident he had chronic left knee pain, but that his knee was functional and he was able to work. X-rays of the left knee and foot were taken which were normal. Petitioner was diagnosed with left knee and ankle sprains and sedentary work restrictions were imposed (Petitioner's Exhibit 6).

Petitioner was subsequently seen at OSF on February 2, 2016, by Michelle Masching-Wright, a Physician's Assistant. She opined Petitioner had sustained a left knee strain and ordered an MRI scan. The MRI was performed on February 9, 2016. The radiologist opined that the MRI was within normal limits. Further, the radiologist noted that Petitioner had previously undergone three arthroscopic surgeries on the left knee, the most recent of which was in 2012. He also noted Petitioner had an MRI of the left knee that was performed on October 29, 2015 (Petitioner's Exhibit 2).

PA Masching-Wright subsequently saw Petitioner on February 12, 2016. Petitioner continued to complain of left knee pain. PA Masching-Wright reviewed the MRI of February 9, 2016, and noted it revealed some patella tracking, but was otherwise unremarkable. She referred Petitioner to Dr. Joseph Novotny, an orthopedic surgeon (Petitioner's Exhibit 2).

Dr. Novotny evaluated Petitioner on March 22, 2016. Petitioner informed Dr. Novotny of the work injury that occurred approximately seven weeks prior and that he still has significant left knee symptoms. Dr. Novotny reviewed the MRI of February 9, 2016, and opined it revealed no significant abnormalities; however, he stated he wanted to have it reviewed by a musculoskeletal trained radiologist to see if there was a possibility of some pathology being missed (Petitioner's Exhibit 5).

At Dr. Novotny's direction, the MRI of February 9, 2016, was reviewed by Dr. Xiaotian Austin on April 11, 2016. He opined it was unremarkable (Petitioner's Exhibit 7).

Dr. Novotny saw Petitioner on April 14, 2016, and opined Petitioner had possible plica syndrome. He noted Petitioner had at least three prior arthroscopic surgeries. He opined Petitioner had unspecified internal derangement of the left knee and recommended a trial of a topical gel and, if Petitioner was unresponsive, Visco supplement injections or arthroscopic with debridement of fat pad and plica tissue (Petitioner's Exhibit 5).

At the direction of Respondent, Petitioner was examined by Dr. Joshua Alpert, an orthopedic surgeon, on May 10, 2016. In connection with his examination of Petitioner, Dr. Alpert reviewed medical records provided to him by Respondent, as well as the MRI of February 9, 2016. In regard to the MRI, Dr. Alpert opined it was negative for any significant pathology. Dr. Alpert opined Petitioner had sustained a left knee strain which irritated and exacerbated a pre-existing left knee condition for which Petitioner had soought pain management treatment. He opined Petitioner should have a cortisone injection followed by physical therapy. In regard to the Visco supplement injections and possible arthroscopic surgery suggested by Dr. Novotny, he opined neither of these was appropriate (Petitioner's Exhibit 4).

On June 2, 2016, Petitioner was seen by Dr. Didi Omiyi, an orthopedic surgeon. At that time, Petitioner advised he had sustained a work-related injury on January 29, 2016. Petitioner also advised he previously undergone three arthroscopic surgeries on the left knee, the most recent of which was in 2012. Dr. Omiyi opined Petitioner had sustained a left knee twisting injury and left knee osteoarthritis. He limited Petitioner to sedentary work (Petitioner's Exhibit 8).

When Dr. Omiyi saw Petitioner on July 5, 2016, he administered an injection to the left knee and ordered physical therapy. Dr. Omiyi subsequently saw Petitioner on August 16, 2016. At that time, Petitioner stated that his symptoms had worsened since the injection. Dr. Omiyi recommended Petitioner undergo left knee arthroscopy for both diagnostic and possible treatment of a meniscal tear (Petitioner's Exhibit 8).

Medical records for some of the treatment Petitioner received for his left knee condition prior to the work-related injury were received into evidence at trial. These records did not include reports of any of the three arthroscopic surgeries that were performed. The earliest prior medical record was for treatment Petitioner received at St. Mary's Hospital on December 10, 2014. The record noted Petitioner had arthroscopic procedures performed on his left knee in 1995, 2005 and 2012. Petitioner complained of burning and sharp pain that had been present for a couple of years. Petitioner received Synvisc injections on December 10, 2014, December 15, 2014, and January 5, 2015. Petitioner was periodically seen and treated there through October 6, 2015, and was diagnosed with chronic left knee pain (Petitioner's Exhibit 14).

From August 14, 2015, through November 5, 2015, Petitioner was treated by Dr. Jeffrey Lowe, an orthopedic surgeon. When seen by Dr. Lowe on August 14, 2015, Petitioner stated that he had chronic left knee pain and had undergone three arthroscopic surgeries. At that time, Petitioner stated that "...he can feel like the knee wants to give out on him at times." Dr. Lowe diagnosed Petitioner with chronic left knee pain and administered an injection (Petitioner's Exhibit 13).

While receiving physical therapy on September 28, 2015, the physical therapy record of that date noted Petitioner had left knee pain symptoms. These symptoms were worsened when Petitioner was going up/down stairs, walking down inclined surfaces, squatting, bending down and when he was on his feet for long periods of time (Respondent's Exhibit 6).

Dr. Lowe continued to treat Petitioner through November 5, 2015. When he saw Petitioner on October 27, 2015, Petitioner continued to complain of chronic left knee pain and Dr. Lowe ordered an MRI scan which was performed on October 29, 2015. When Dr. Lowe saw Petitioner on November 5, 2015, he noted that the MRI revealed chondromalacia of the patella. Dr. Lowe recommended further conservative treatment including injections and physical therapy (Petitioner's Exhibit 13). Petitioner did not seek any further medical treatment until after the accident.

At the direction of Respondent, Dr. Alpert reviewed medical records for treatment Petitioner had received subsequent to his prior examination of May 10, 2016. In a supplemental report dated September 23, 2016, Dr. Alpert opined Petitioner had sustained a left knee strain as a result of the accident of January 29, 2016, but that it had resolved. He stated any current symptoms Petitioner were due to the osteoarthritic changes in his left knee, that Petitioner was at MMI and that there was no objective evidence to support a left knee arthroscopic procedure (Respondent's Exhibit 3; Deposition Exhibit 3).

Dr. Omiyi was deposed on September 7, 2017, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Omiyi's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. Dr. Omiyi testified that Petitioner had a torn meniscus and that Petitioner should undergo arthroscopic surgery to evaluate and possibly treat. In regard to the negative MRI studies, Dr. Omiyi stated that MRI studies are 80% accurate, but that this degree of accuracy could be lower because of Petitioner's prior left knee surgeries (Petitioner's Exhibit 1; pp 16-18).

On cross-examination, Dr. Omiyi agreed he had no knowledge as to how recent Petitioner sought medical treatment or what Petitioner's symptoms were prior to the accident. Further, Dr. Omiyi did not personally review the post accident MRI, only the radiologist's report regarding same (Petitioner's Exhibit 1; pp 19-21).

At the direction of Respondent, Dr. Alpert reviewed additional medical records, including those which predated the accident and prepared a supplemental report dated November 8, 2017. Dr. Alpert opined Petitioner had a long history of left knee pain for which he sought treatment as recently as November 5, 2015, approximately two and one-half months prior to the accident. He noted that the MRI obtained after the accident did not reveal any significant objective evidence of any new pathology which would cause Petitioner's left knee pain. He stated he disagreed with Dr. Omiyi's opinion that the work injury caused any injury or pathology to Petitioner's left knee (Respondent's Exhibit 3; Deposition Exhibit 4).

Dr. Alpert was deposed on November 10, 2017, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Alpert's testimony was consistent with his medical reports and he reaffirmed the opinions contained therein. He testified that there were no objective findings of injury attributable to the accident; Petitioner was at MMI and no further medical treatment was indicated. He also noted that when he examined Petitioner, Petitioner had informed him that he had not seen a pain management specialist for approximately one year prior to the accident of January 29, 2016, but that when he reviewed the medical records Petitioner was, in fact, treated for his left knee condition on November 5, 2015 (Respondent's Exhibit 3; pp 15-21).

At trial, Petitioner testified he has not been able to return to work for Respondent as the date of accident because of his left knee condition. Petitioner stated he is unable to stand for long periods of time. Petitioner was able to continue to work as a Pastor of this church; however, he stated he spends most of his time seated when he conducts Sunday church services.

Petitioner testified that while he had a long history of chronic left knee pain which required medical treatment, the treatment he sought was limited to pain management. Petitioner stated he did not have any functional loss of use of his left knee until after the accident of January 29, 2016. Petitioner wants to proceed with the arthroscopic surgery recommended by Dr. Omiyi.

Conclusions of Law

In regard to disputed issue (F) Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner's current condition of ill-being in regard to his left knee is not related to the accident of January 29, 2016.

In support of this conclusion the Arbitrator notes the following:

There was no dispute that Petitioner sustained a work-related twisting type injury to his left knee on January 29, 2016.

Petitioner had a significant left knee condition that pre-existed the accident of January 29, 2016, which required three arthroscopic surgeries and ongoing medical treatment as recently as two and one-half months prior to the accident.

Petitioner's testimony was that the treatment he sought shortly before the accident of January 29, 2016, was for pain management only and that he had no functional issues with his left knee and was able to work. However, the medical record of August 14, 2015, noted that Petitioner felt like his left knee was going to give out on him at times. Further, the physical therapy record of September 28, 2015, stated that Petitioner's left knee symptoms worsened when going up/down stairs, walking down inclined surfaces, squatting, bending and when Petitioner was on his feet for long periods of time. The preceding indicates that Petitioner was, in fact, experiencing some functional loss of use of his left knee prior to the accident of January 29, 2016.

Petitioner's primary treating physician, Dr. Omiyi, had no knowledge as to when Petitioner had sought medical treatment or what Petitioner's left knee symptoms were shortly before the accident of January 29, 2016. Further, Dr. Omiyi never reviewed any of the medical records regarding Petitioner's prior medical treatment.

Respondent's Section 12 examiner, Dr. Alpert, reviewed Petitioner's medical records for treatment Petitioner received both prior and subsequent to the accident of January 29, 2016.

Based upon the preceding, the Arbitrator finds the opinion of Dr. Alpert to be more persuasive than that of Dr. Omiyi.

In regard to disputed issue (G) the Arbitrator makes the following conclusion of law:

Based upon the stipulation entered into by counsel for Petitioner and Respondent, the Arbitrator concludes that, for purposes of this hearing, Petitioner's average weekly wage was $196.36.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that all of the medical treatment provided to Petitioner from January 29, 2016, through September 23, 2016, was reasonable and necessary and that Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services provided to Petitioner from January 29, 2016, through September 23, 2016, as identified in Petitioner's Exhibit 20, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

In support of this conclusion the Arbitrator notes the following:

Dr. Alpert opined in his supplemental medical report of September 23, 2016, Petitioner was at MMI and no further medical treatment was indicated.

In regard to disputed issue (K) the Arbitrator makes the following conclusion of law:

Based upon the Arbitrator's conclusion of law in disputed issue (F), the Arbitrator concludes Petitioner is not entitled to prospective medical treatment.

In regard to disputed issue (L) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner is entitled to temporary total disability benefits of 33 6/7 weeks commencing January 30, 2016, through September 23, 2016.

In support of this conclusion the Arbitrator notes the following:

Dr. Alpert opined in a supplemental report of September 23, 2016, that Petitioner was at MMI and no further medical treatment was indicated.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WALTER KOZIOL,

Petitioner,

vs.

NO: 10 WC 22138

TEMPEL STEEL,

Respondent.

18IWCC0654

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical, 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.

The Commission corrects the clerical error on page 2 of the Decision of the Arbitrator. The Arbitrator awarded Petitioner $564.39 per week for 205 weeks, as the injury caused 100% loss of use of the left hand, as provided in Section 8(e) of the Act. As the amputation rate is equal to 60% of the average weekly wage (AWW), the Commission modifies the PPD rate to $507.95, representing 60% of the AWW of 846.59.

Next, the Commission agrees with the Arbitrator's award of 20% loss of use of the person-as-a-whole for his loss of occupation. However, the Commission finds that this award shall also compensate Petitioner for his mental and emotional injuries sustained as the result of the traumatic amputation of his left hand. Accordingly, the Commission awards Petitioner 20% loss of use of the person-as-a-whole for his loss of occupation and for his mental and emotional injuries resulting from the work accident.

Finally, Petitioner's attorney raised the issue of Attorney David Martay's Fee Petition in

his Statement of Exceptions and during oral argument. Since Arbitrator Bocanegra did not conduct a hearing regarding the issue of fees, the issue was not properly before the Commission. This issue will be set for hearing before Commissioner Michael J. Brennan at a later date and notices will be sent to the parties.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 14, 2018 is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $564.39 per week for a period of 87-1/7 weeks, June 6, 2010 through February 5, 2012, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent shall be given a credit of $44,385.28 for temporary total disability benefits previously paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary partial disability benefits totaling $836.20 for the period of February 6, 2012 through February 19, 2012 and February 27, 2012 through March 11, 2012, as provided in Section 8(a) of the Act. Respondent shall be given a credit of $836.20 for temporary partial disability benefits previously paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $507.95 per week for a period of 205 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 100% loss of use of the left hand. Respondent is entitled to a credit of $104,129.75 for permanent partial disability benefits previously paid for the statutory loss.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $507.95 per week for a period of 100 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the 20% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $2,550.00 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 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 $58,200.00. 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 2018

Michael J. Brennan

MJB/tdm
O: 10/23/18
052

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

KOZIOL, WALTER
Employee/Petitioner

Case# **10WC022138**

16WC001043

TEMPEL STEEL
Employer/Respondent

18IWCC0654

On 2/14/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.78% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0320 LANNON LANNON & BARR LTD
MICHAEL S ROLENC
200 N LASALL ST SUITE 2820
CHICAGO, IL 60601

2461 NYHAN BAMBRICK KINZIE & LOWRY
DONALD R EGAN
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

Walter Koziol
Employee/Petitioner

v.

Tempel Steel
Employer/Respondent

Case # **10 WC 22138**

Consolidated cases: **16 WC 1043**

18IWCC0654

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maria Bocanegra,** Arbitrator of the Commission, in the city of **Chicago,** on **9/20/2017 and 10/16/2017.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

18IWCC0654

CORRECTED FINDINGS

On **6-5-2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$44,022.68**; the average weekly wage was **$846.59.**

On the date of accident, Petitioner was **55** years of age, ***married*** with **1** dependent children.

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

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

Respondent shall be given a credit of **$44,385.28** for TTD, **$836.20** for TPD, **$0** for maintenance, and **$104,129.7** for statutory amputation, for a total credit of **$149,351.23.**

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

CORRECTED ORDER

Respondent shall pay Petitioner temporary partial disability benefits totaling **$836.20** for the period **2/6/12** through **2/19/12** ar **2/27/12** through **3/11/12**, as provided in Section 8(a) of the Act. Respondent shall be given a credit of **$836.20** for tempora partial disability benefits previously paid.

Respondent shall pay Petitioner temporary total disability benefits of **$564.39/week** for **87-1/7**th weeks, commencing 6/6/1 through **2/5/12**, as provided in Section 8(b) of the Act. Respondent shall be given a credit of **$44,385.28** for temporary tot disability benefits previously paid.

Respondent shall pay to Petitioner reasonable and necessary medical services of **$2,550.00**, as provided in Section 8(a) of tl Act.

As to ***10 WC 22138***, Respondent shall pay Petitioner permanent partial disability benefits of **$564.39/week** for **205** weel because the injuries sustained caused the **100%** loss of the left hand, as provided in Section 8(e) of the Act. Respondent sh be given a credit of **$104,129.75** for permanent partial disability benefits previously paid for the statutory loss.

As to ***10 WC 22138***, Respondent shall pay Petitioner permanent partial disability benefits of **$507.95/week** for **100** weel because the injuries sustained caused the loss of occupation to the extent of **20%** loss of the **person as a whole**, as provided 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 revie in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE IF the Commission reviews this award, interest at the rate set forth on the *Notice of Decision o Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either n change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

2-16-2018
Date

CORRECTED FINDINGS OF FACT

Petitioner testified he was hired by the Respondent in 1984 as a press operator. In June 2010, Petitioner's job title was that of a die setter. Petitioner testified on June 5, 2010, he had finished working on machine number 213 when the group leader sent him to machine number 211. While working on machine number 211, a part became stuck inside the machine so Petitioner turned off the machine and attempted to retrieve the jammed part. As he was pulling on the part to extricate it from the machine, the machine went on and the gate dropped down on Petitioner's left hand, jamming it inside the machine. Petitioner testified he yelled for co-workers to come and help him but, apparently, everyone thought he was joking so no one came over. After approximately 40 minutes, with Petitioner feeling weak, he used his left knee and right hand to open the gate and pull his hand out.

Petitioner testified he then started running for help and passed out. He testified he was taken to St. Francis Hospital in Evanston where he underwent a left wrist disarticulation (amputation) by Dr. Klaud Miller. Px1. After he was discharged from the hospital, Petitioner continued under the care of Dr. Miller until July 8, 2010. Px2.

Petitioner testified Dr. Miller referred him to Dr. Kuiken of the Rehabilitation Institute of Chicago so that he could be fitted for a prosthetic. The RIC records also reflect that Petitioner was advised he would need a skin graft. Petitioner's medications were also changed. Px7.

Petitioner testified he was referred to Dr. Enrique Gonzalez, a psychologist. Px9. Petitioner saw Dr. Gonzalez from August 7, 2010 through February 14, 2013 and discussed the pain he was experiencing in his left arm, the problems he was having sleeping, his anxiety and suicidal thoughts. Dr. Gonzalez diagnosed Petitioner with adjustment disorder with anxiety and depressed mood. He recommended cognitive behavioral therapy and antidepressant and antianxiety medication if he did not respond.

Petitioner testified he came under the care of Dr. Charles Carroll who he initially saw on August 11, 2010. Px4. Dr. Carroll examined Petitioner and recommended occupational therapy. He also opined that Petitioner may need two additional operations
On August 19, 2010, Petitioner was seen by Dr. Robert Reff, a psychiatrist, at the referral of Dr. Gonzalez. Petitione testified that he had 33 sessions through November 28, 2012 with Dr. Reff. Px10.

Petitioner testified that over the course of 2010 and 2011, he continued treating with Dr. Carroll, Dr. Kuiken, Dr. Gonzalez and Dr. Reff.

Petitioner testified that Dr. Carroll performed additional surgeries on his left arm on August 26, 2010 (debridement), on August 31, 2010 (debridement), on September 28, 2010 (revision amputation and neurectomy) and December 29, 2011 (resection of the median and radial nerves, ulnar neuromas and revision amputation).

In 2011, Petitioner was examined at the request of Respondent with Dr. Alexander Obolsky. Rx2. Dr. Obolsky found Petitioner to be malingering his reported symptoms of mental ill being and that Petitioner did not develop any condition of mental ill-being as a result of the work accident.

Petitioner testified that throughout 2010 and 2011, he continued noticing pain with his left limb. Throughout this period, Petitioner also testified he was having trouble sleeping and was depressed. Petitioner testified he was fitted for a prosthesis and brought it with him to court. He testified he rarely wears the prosthesis because it bothers his forearm and the area around his stump. He also testified that he wears a fitted sleeve over his forearm when he works.

Petitioner testified that in July 2011, he was notified by his former attorney, David Martay, that there was work available for him. He testified that he was told he would be able to volunteer in a nursing home. Petitioner testified he went to the nursing home along with Rhonda, the workers' compensation coordinator from Tempel. He also testified that an individual named Sonya was there. He testified that when he got there, there were people screaming and crying and emotionally, he was unable to handle it. He told them he would be unable to work there but he would be willing to return to work anywhere else.

Petitioner was subsequently notified of a position at Resurrection Hospital which he was able to perform. Petitioner testified he was sitting by a table and talking to people who were arriving in the hospital and directing them to different waiting areas. He also testified he was volunteering in the physical therapy department for a while. He was paid by the Respondent while he was volunteering at Resurrection Hospital.

Petitioner subsequently was advised that he could return to work for the Respondent. He testified he returned sometime in February 2012. When Petitioner returned to work, he was given a different job which involved pulling parts from one box and checking them for defects. If the part was not defective, he would place it in another box. If it was defective, he would throw it onto the scrapheap. Petitioner testified he used his right arm for this job and handled 4,000 parts per day. He performed this job on a full-time basis up until May 8, 2014.

Date of Accident May 8, 2014

On May 8, 2014, Petitioner testified he was performing his job and was told by a group leader to stop. He was told they have a "hot job" that needed to be done. Petitioner testified he went to a different area of the plant and using a stick, he would put several parts onto the stick and lift them out of a box. He would then have to separate the bad ones from the good ones and then he would throw the parts into another box. Petitioner demonstrated this by using his right arm in an underhanded motion. Petitioner testified that in front of him and near the box where he was throwing these parts were several skids. Petitioner testified that as he let go of the parts that were on the stick, he felt a sudden pain in his right shoulder and then he fell sideways onto the skid hitting his right shoulder and head on the skid.

Petitioner was sent immediately to Physicians Immediate Care where he gave a history of what happened to him. The records reflect that Petitioner's pain was worse with movement. Petitioner was diagnosed with a shoulder sprain and advised to return to restricted work. Px11. Petitioner followed up with the clinic on May 13, 2014 advising he was still having pain in his right shoulder and unable to lay on the right side of his bed. He was referred for an MRI and physical therapy. Petitioner returned on May 21, 2014 advising he was still having pain in his right shoulder. He was getting little relief from the physical therapy. He stated the pain radiates down his right arm. On May 27, 2014, Petitioner underwent a right shoulder MRI at Lincoln Imaging Center. The MRI revealed glenohumeral joint arthritis with possible underlying fibrillation/partial maceration of the labrum. He was also diagnosed with a possible biceps tendon tear, arthritis and degenerative joint disease in the AC joint.

On June 5, 2014, Petitioner came under the care of Dr. Roger Chams of Illinois Bone & Joint Institute. Petitioner informed Dr. Chams of the injury of May 8, 2014. Dr. Chams reviewed the MRI and opined that it was of poor quality so he ordered a repeat MRI. He also administered a Kenalog injection to Petitioner's right shoulder. Px12. Petitioner underwent the right shoulder MRI on June 12, 2014 at 3T Imaging. The MRI revealed a partial thickness tear of the rotator cuff and a full thickness tear of the long head of the biceps tendon. There was also an associated tear involving the superior, posterior-superior and anterior labrum. Petitioner returned to Dr. Chams on June 24, 2014 and was scheduled for surgery.

Petitioner underwent a right shoulder arthroscopy with debridement of the labrum and glenohumeral joint, a subacromial decompression, distal clavicle resection and Mumford procedure as well as rotator cuff repair on September 12, 2014 at Northwest Memorial Hospital. Px12.
Petitioner continued his post-op treatment with Dr. Chams. Dr. Chams ordered physical therapy for Petitioner which Petitioner began on September 29, 2014 at Accelerated Rehabilitation. Petitioner testified that his last visit with Dr. Chams was on July 23, 2015. At that time, Petitioner was still complaining of deltoid, biceps and triceps pain. Dr. Chams administered a third Kenalog injection and released Petitioner with permanent restrictions of no overhead lifting with his right arm and no lifting greater than 5 pounds. He further opined that Petitioner may need possible arthroscopic surgery in the future if his shoulder/arm conditions do not improve.

Petitioner testified that in 2016, he started noticing some additional problems and pain with his left arm so he returned to Dr. Carroll on May 27, 2016. Dr. Carroll noted that Petitioner was having variable cramping and pain along with cold sensitivity. He also noted that Petitioner's function had decreased. Dr. Carroll recommended a selected reinnervation of the median ulnar and radial nerve. Px4. Petitioner returned to Dr. Carroll on June 17, 2016 with the same complaints. Dr. Carroll recommended the aforementioned surgery and referred Petitioner to Dr. Gregory Dumanian. Petitioner saw Dr. Dumanian on July 20, 2016. Dr. Dumanian offered two options: a neuroma excision in burying in muscle. The other option was targeted innervation and nerve transfers after a neuroma excision. In a subsequent visit on August 24, 2016, Petitioner was advised by Dr. Dumanian that he would no be a good candidate for the randomized study that was previously recommended. He opined Petitioner would be an excellent case for the prosthetic control arm of the study. This is a procedure that would be done with Dr. Carroll. Petitioner then saw Dr. Carroll on September 23, 2016. With Petitioner voicing the same complaints, Dr. Carroll recommended the surgery again.

Petitioner testified he had a subsequent fall at home injuring his left elbow. He underwent surgery to the left elbow and he testified that the doctor had to move the nerves in his left forearm and by doing that, he actually reduced some of the pain that he was previously experiencing. Petitioner testified that due to the decreased pain, he elected not to undergo the surgical procedure recommended by Dr. Carroll. Petitioner testified, however, that if the pain in his left forearm should revert to where it was before he fell, he would consider undergoing the surgery if Dr. Carroll was stil recommending it.

Petitioner testified that he currently has different types of pain in his left forearm. He testified the stump is sensitive. He also testified that he does have pain in the left forearm but it is not as severe or as sharp as it was before he fell. He testified that at work, the left forearm gets cold so he runs it under warm water. He also massages it to bring warmth to the forearm. He testified that he wakes up from his sleep because of the pain in his left forearm. He testified that sometimes when he rubs his forearm on the bed, he gets pain which causes him to wake up.

Petitioner testified that regarding his right shoulder, he has pain but not every day. He testified his current job involves checking gauges and if they have expired, then he has to replace them. He testified that this job requires hi to brush rust off different parts and that he has to use his right arm in a repetitive motion. He does this throughout tl day and this will cause pain in the right shoulder.

Petitioner testified that his current job which involves working with the gauges is not the job that he was doing whe he returned to work following his first accident. Petitioner further testified that he is making $21.42 an hour and tha he intends to continue working there until retirement. On cross-examination, Petitioner testified he has not been given any reason by anyone at work that he would be fired. Also on cross-examination, Petitioner testified that he saw a Dr. Obolsky in 2011 at the request of the Respondent. He also testified to seeing a Dr. Vender and Dr. Wolin

CONCLUSIONS OF LAW

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. At trial, causal connection was disputed as to both claims.

a. Date of Accident – June 5, 2010 – 10 WC 22138

Based on Petitioner's testimony and all of the medical records offered into evidence, the Arbitrator finds that Petitioner's current condition of ill-being involving his left arm is causally related to the accident of June 5, 2010. Here, there is no doubt Petitioner's work accident resulted in a traumatic amputation of the left hand. Due to ongoing pain and problems, Petitioner underwent (4) additional subsequent surgical procedures. Most recently, a December 5, 2016 medical report authored by Dr. Charles Carroll references a proposed reconstructive procedure which he and Dr. Dumainan believed was medically necessary for Petitioner. Dr. Carroll based this opinion on Petitioner's persistent neuroma pain of his median and ulnar nerve which was the direct result of the amputation on June 5, 2010. Dr. Carroll opined that Petitioner has ongoing residual pain in those nerves proximally where they were resected and buried in muscle. The pain limits his function and the use of the prosthesis as the cup attachment irritates the neuromas. The proposed surgery would resect the neuromas in routing the pain generating sensory fibers into a motor nerve, which would decrease the nerve pain and allow for better function of the prosthesis. Dr. Carroll further opined that he agreed with Respondent's IME doctor, Dr. Vender, regarding the one surgical procedure so he offered Petitioner this option so he could have a better life and work capability by using the prosthesis. The Arbitrator relies on this evidence in support of the conclusion that Petitioner's current condition of ill-being as it relates to the left hand amputation is ongoing and in fact causally related to his undisputed work accident of June 5, 2010.

The Arbitrator further finds that Petitioner's mental health condition is causally related to his June 5, 2010 work accident as a psychological sequelae of the traumatic hand injury Petitioner witnessed and experienced. Mental health records introduced into evidence diagnosed Petitioner was PTSD, depression and anxiety for which he underwent extensive mental health psychological and psychiatric care with Drs. Gonzalez and Reff. In reviewing the opinion of Dr. Obolsky, the Arbitrator notes that Dr. Obolsky found Petitioner to be malingering his reported symptoms of mental ill being and that Petitioner did not develop any condition of mental ill-being as a result of the work accident. The Arbitrator has carefully considered the entire record as well as the opinions of Drs. Gonzalez, Reff and Obolsky and the Arbitrator finds that Petitioner's treating doctors' opinions are entitled to more weight. Drs. Gonzalez and Reff documented Petitioner's flashbacks of the occurrence, ongoing depression, anxiety and general low self-esteem and morale following the traumatic work accident. There is no evidence Petitioner exhibited any of these conditions, diagnoses or symptoms at any time prior to the work accident. While Dr. Obolsky found Petitioner to be allegedly malingering his symptoms, the doctor did not explain what symptoms were being malingered, what test(s), if any, tended to demonstrate malingering and to what degree, if any, Petitioner was malingering. For example, the doctor noted Petitioner reported somatic symptoms and symptoms about the stomach and heart. However, the doctor did not account for Petitioner's unrelated health conditions, if any, and whether those were being considered in the overall assessment. The Arbitrator also notes that Dr. Obolsky's evaluation was in May and June of 2011 whereas the report was not completed until five months later, November 2011. By that time, Petitioner was already volunteering at Resurrection Hospital which contradicts his belief that Petitioner was malingering for financial gain.

In summary, the Arbitrator finds Dr. Obolsky's opinions are entitled to lesser weight than those of Drs. Gonzalez and Reff and that Petitioner's condition of mental health ill-being is causally related to his undisputed work accident of June 5, 2010.

b. Date of Accident – May 8, 2014 – 16 WC 1043

Based on Petitioner's testimony and all of the medical records offered into evidence, the Arbitrator finds that Petitioner's current condition of ill-being involving his right shoulder is causally related to the accident of May 8, 2014. Petitioner's unrebutted and credible testimony was that he injured his right shoulder when he went to toss a piece of material to the side. The Arbitrator finds this mechanism of injury to be a single acute traumatic event and unrelated to Petitioner's June 5, 2010 work accident as either a sequelae or repetitive/over-use traumatic injury. The Arbitrator finds that Petitioner's right shoulder was otherwise in a state of good health immediately prior to the May 8, 2014 work accident even in the face of Petitioner's ongoing left hand amputation injuries. In support of finding Petitioner's right shoulder causally related to the May 2014 work accident, the Arbitrator relies on the medical opinions of Drs. Chams and Wolin, both of whom referred to the shoulder condition as having resulted from a work accident. Further, Dr. Wolin opined that the right shoulder was in fact causally related to the work accident. The Arbitrator adopts the opinions and findings of both doctors as they relate to causation. These medical opinions were not challenged or contradicted in the record. Thus, the Arbitrator finds that Petitioner's current condition of ill-being involving his right shoulder is causally related to the accident of May 8, 2014.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. At trial, liability for the unpaid medical charges of Dr. Gonzalez for the June 5, 2010 work accident were disputed. Ax1. Medical bills were not at issue in the second claim. Ax2. Having found in favor of Petitioner on the issue of causal connection in 10 WC 22138, the Arbitrator further concludes that Petitioner has proven that the medical and psychological services provided to him were both reasonable and necessary and that Respondent has no yet paid all appropriate charges for same. The record shows that there were 14 visits with Dr. Gonzalez which were not paid for by Respondent. These were not paid pursuant to Dr. Obolsky's opinion that Petitioner required no further mental health treatment. Those 14 visits all occurred after the examination with Dr. Obolsky. The total unpaid bill is $2,550.00.

The Arbitrator has reviewed the office notes of Dr. Gonzalez between October 18, 2012 and February 14, 2013. Those records are replete with complaints voiced by Petitioner which would be reasonable and expected following an injury of this nature. There is nothing in the records of Dr. Gonzalez which would suggest that Petitioner is exaggerating his complaints for any untoward purpose such as financial gain. The Arbitrator also notes that Petitioner testified he had never been under the care of a psychiatrist or a psychologist prior to this injury. The Arbitrator adopts the findings and opinions of Dr. Gonzalez and discounts those of Dr. Obolsky. The Arbitrator finds that Respondent is liable for payment of the medical bill of Dr. Gonzalez in the amount of $2,550.00 as the services Dr. Gonzalez provided were reasonable and necessary for Petitioner following his injury and that Respondent shall be liable for same, subject to Sections 8(a) and 8.2.

ISSUE (K) What temporary benefits are in dispute?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. At trial, temporary total disability benefits for the June 5, 2010 work accident were disputed. Ax1. Such benefits were not at issue in the second claim. Ax2. The disputed period of TTD is from July 22, 2011 through

September 18, 2011. Respondent suspended TTD benefits based upon Petitioner allegedly failing to appear for work offered via CJE Senior Life for work offered. Rx1. The Arbitrator has reviewed all evidence, including Petitioner's testimony, and finds Petitioner is entitled to TTD for this time period. First, the medical records indicate that Petitioner was encouraged by the case manager to volunteer, in an effort to help cope with the emotional and mental trauma sustained following the work accident. The medical records clearly suggest that this was volunteer work contemplated in the context of Petitioner's ongoing mental health treatment. This was not presented as a bonafide job offer, detailing the wages to be earned, the work to be performed and the hours expected to work. The Arbitrator notes the specific medical records in support thereof:

On May 4, 2011, Petitioner returned to Dr. Gonzalez for psychological follow up. The doctor explained the possibility of patient ***volunteering*** for four hours a day at a local church or hospital. The doctor explained that it was the recommendation made by Dr. Kuiken and that he agreed with the idea which would get him out of the house in order to decrease isolation as well as improve his mood and self-esteem. (Emphasis added).

On May 11, 2011, Dr. Gonzalez noted that Petitioner's nurse case manager had arranged for Petitioner to do some ***volunteer*** work at resurrection hospital and that he would be receiving an application for that in the mail. (Emphasis added).

On June 1, 2011, Petitioner returned to Dr. Gonzalez for psychological follow up. The doctor noted that Petitioner brought with him to the appointment a letter from Resurrection Hospital stating that he was scheduled to attend orientation for ***volunteer*** services on August 16, 2011. Petitioner expressed frustration because of the delay in the scheduling of this orientation. (Emphasis added).

On June 29, 2011, Petitioner returned to Dr. Gonzalez for psychological follow up. The doctor noted Petitioner appeared upset due to having received a letter from his nurse case manager requesting that he attend an orientation meeting to ***volunteer*** at an adult day services center. (Emphasis added).

On July 6, 2011, Petitioner returned to Dr. Gonzalez for psychological follow up. Petitioner indicated he had recently attended a meeting at the adult day services and stated that the experience left him feeling overwhelmed. According to Petitioner, this would be further postponed until he was evaluated by Dr. Carroll on July 11.

On July 11, 2011, Dr. Charles Carroll indicated that Petitioner could return to work with no use of the left hand [sic]. Px3. On July 22, 2011, Petitioner followed up with Dr. Gonzalez for psychological follow up. Petitioner expressed anger in reaction to an overnight letter he received instruction him to attend a meeting at an adult aide services center to begin volunteering in today's time which conflicted with his appointment with Dr. Gonzalez on July 22.

On August 3, 2011, Dr. Reff wrote a letter indicating that Petitioners level of psychological recovery remain fragile. It was the doctor's opinion that in the best interest of Petitioners psychological and psychiatric health as well as the best interest of his overall recovery that he be permitted to volunteer at Resurrection Hospital and not be required to volunteer at a nursing home. The doctor expressed concern regarding the atmosphere in the nursing home as well as transportation issues getting to the nursing home.

On August 3, 2011, Petitioner returned to Dr. Gonzalez for psychological follow up. The doctor wrote a letter allowing Petitioner to volunteer at Resurrection Hospital and not at the nursing home as previously instructed. The doctor indicated his agreement with Dr. Reff regarding volunteering since this process had adversely affected Petitioner's progress.

On August 17, 2011, Patricia returned to Dr. Gonzalez for psychological follow up. Petitioner reported that he attended his orientation meeting at Resurrection Hospital.

On August 26, 2011, Petitioner returned to Dr. Gonzalez for psychological follow up. Petitioner reported that he had attended his second interview at resurrection hospital with the possibility of me getting volunteering in the next two weeks. The doctor recommended an evaluation for neuropathic pain and ongoing therapy. As of September 14, 2011, Petitioner reported that he was still awaiting a volunteer schedule with resurrection hospital. On September 21, 2011, Petitioner return it to Dr. Gonzalez for psychological follow up. He reported that he had attended his first day at the volunteer program and that he will know his schedule next Monday.

As evidenced by the above medical documentation, there is no doubt Petitioner was never given a light duty offer of employment but rather was arranged for volunteer work. Petitioner had a scheduling conflict with the July 22nd orientation date and given the short notice to attend volunteer orientation, the Arbitrator finds Petitioner's reasons wholly reasonable. Petitioner's unrebutted testimony was that he did eventually appear at the nursing home with Rhonda and Sonya. He testified that Rhonda was the work comp coordinator for Respondent. He testified that when he got to the nursing home and saw the people crying and hollering, he was emotionally unable to handle it. He said it brought back memories of his injury from June 2010. He testified that he would agree to other work but that he could not work in the nursing home.

The Arbitrator's conclusions are further supported by the fact that Petitioner was never paid for any of the volunteer work he eventually went on to complete, thereby further showing that this was volunteer work and not a true job offer. Because the Arbitrator assigns no weight to the alleged job offer(s) noted in Rx1, the Arbitrator need not consider the remainder of the contents of the letter. The Arbitrator finds that Petitioner is entitled to temporary total disability benefits for the period of July 22, 2011through September 18, 2011.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. At trial, the nature and extent of Petitioner's injuries for both claims were disputed. Ax1, Ax2.

a. Date of Accident – June 5, 2010 – 10 WC 22138

As a result of the June 5, 2010 accident, Petitioner sustained a traumatic amputation of his left hand for which the Respondent paid 100% loss of the entire non-dominant left hand. In addition, Petitioner testified to mental and emotional issues with necessitated treatment with a psychologist and a psychiatrist. In reviewing the June 19, 2017 medical report of Dr. Carroll, he opined that Petitioner's work status was unchanged. When looking back to the September 20, 2016 office note of Dr. Carroll, Petitioner's work status was no use of the left extremity. The records show that, at most, doctors were able to recommend that that left arm be used as a functional assist. Further, records demonstrate that the injury resulted in an amputation, impaired motion and sensation, impaired sleep, restricted work a job change and psychological injury.

Petitioner testified that following this injury, he returned to work in a different job for the Respondent. The new job involved primarily use of his right hand and arm. While no significant loss in income was established, it is apparent that Petitioner's injury resulted in a job change for him. Petitioner's previous job was as an established press operator since 1984 for Respondent. As to ***10 WC 22138***, the Arbitrator finds that Petitioner has sustained a **loss of occupation** and is awarded **20%** pursuant to Section 8(d)2.

b. Date of Accident – May 8, 2014 – 16 WC 1043

As a result of the May 8, 2014 accident, Petitioner underwent a right shoulder arthroscopy with debridement of the labrum and glenohumeral joint, a subacromial decompression, a distal clavicle resection and Mumford procedure as well as a rotator cuff repair. Following the surgery, Petitioner underwent two cortisone injections into his right shoulder. Dr. Chams released Petitioner to return to work with permanent restrictions of no overhead lifting with his right arm and no lifting greater than 5 pounds. Dr. Chams further opined Petitioner may need possible arthroscopic surgery in the future if his shoulder/arm conditions do not improve.

Petitioner received two post-op cortisone injections to his right shoulder as he was continuing to complain of deltoid, biceps and tricipital pain as of his July 23, 2015 visit with Dr. Chams. He was also complaining of pain with any repetitive use. He advised Dr. Chams that most of his pain was at the bicipital groove.

In the final progress note of July 23, 2015, Dr. Chams noted positive tenderness to palpation of the right bursa but the left bursa finding was negative. There was positive impingement I on the right but negative on the left. The Speed's test was positive on the right but negative on the left. Elevation on the right was 3+ to 4/5, adduction was 3+ to 4/5 and external rotation was 4/5 whereas on the left, all were 5. As of Petitioner's last visit on July 20, 2015 at Athletico, there were still deficits noted in various range of motion measurements. For the purposes of this section, the Arbitrator finds Petitioner reached MMI on July 23, 2015.

The Arbitrator also notes in the April 5, 2016 report of Respondent's Section 12 examiner, Dr. Wolin, there was significant loss of range of motion on the right shoulder as compared to the left shoulder. In the muscle strength category, Dr. Wolin noted significant findings in the right shoulder as compared to the left. Dr. Wolin also noted positive albeit moderate findings on the Yergason's and Hawkins-Kennedy test on the right whereas both were negative on the left.

Pursuant to Section 8.1(b) of the Act, the following factors are to be considered in determining the level of permanent disability for accidental injuries occurring on or after September 1, 2011:

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

With regard to Subsection (i) of Section 8.1b(b), the Arbitrator notes that there was a 9% extremity impairment which translated to a 5% whole person impairment rating. The Arbitrator notes that impairment does not equate to permanent partial disability under the Workers' Compensation Act. Dr. Wolin's diagnosis was that of osteoarthritis shoulder and he noted if there are multiple diagnoses, the most impairing one is used. In this respect, the doctor chose the correct diagnosis. Dr. Wolin arrived at a quick-dash score of 65.9 but did not include a copy of the Q-Dash with his impairment report so that the Arbitrator may review his findings. Dr. Wolin did not specifically include loss of range of motion or any other measurements that would establish the nature and extent of the impairment pursuant to Section 8.1(b). Dr. Wolin did not consider a grade modifier for clinical studies even though the surgical report could have been used in this way. The Arbitrator, therefore, gives little weight to this factor.

With regard to Subsection (ii) of Section 8.1b(b) of the Act, the occupation of the employee, the Arbitrator notes that the record reveals Petitioner was initially employed as a press operator and that as a result of the 2014

accident, he was given permanent restrictions which had him working as a gauge inspector. Petitioner continues to work in this accommodated capacity as a gauge inspector. The Arbitrator therefore, gives greater weight to this factor.

With regard to Subsection (iii) of Section 8.1b(b) of the Act, the Arbitrator notes that Petitioner was 58 years old at the time of the 2014 accident. His age indicates that he may feel the effects of his shoulder injury to a greater degree compared to a younger worker. His age also suggests that he may be nearing the end of his work life expectancy. Given the aforementioned, the Arbitrator give greater weight to this factor.

With regard to Subsection (iv) of Section 8.1b(b) of the Act, Petitioner's future earnings capacity, the Arbitrator notes that Petitioner testified he was earning the same as he was at the time of the accident. There is no evidence in record to suggest any loss of future earnings or possible loss of future earnings. The Arbitrator gives no weight to this factor.

With regard to Subsection (v) of Section 8.1b(b) of the Act, the evidence of disability corroborated by the treating medical records, the Arbitrator notes that in the final visit with Dr. Chams on July 23, 2015, Dr. Chams noted Petitioner's symptoms and clinical findings persisted as did limitations during his orthopedic examination. This was confirmed in the Section 12 report of Dr. Wolin. Dr. Chams also noted Petitioner may need a future surgery. The Arbitrator, therefore, gives greater weight to this factor.

Based upon the foregoing, as to ***16 WC 1043***, the Arbitrator finds that Petitioner sustained a **15%** loss of th man as a whole pursuant to **Section 8(d)2** of the Act as a result of the right shoulder injury.

ISSUE (O) Martay Fee / Attorney Fee Dispute

Prior to Petitioner's testimony on September 20, 2017, Petitioner's attorney made an oral Motion to Dismi the Petition for Attorney's Fees filed on March 19, 2015 by Petitioner's former attorney, David W. Martay. This fe petition was filed on Case 10 WC 22138 only and was entered and continued to disposition by this Arbitrator on Jun 2, 2015. Px15. Petitioner's attorney stated on the record that he notified attorney Martay of today's hearing. Wi Martay having failed to appear, attorney Rolenc made an oral motion to dismiss Martay's fee petition. Attorn Rolenc also stated that the fee petition filed by Martay was a generic fee petition and did not itemize the time ar work performed on the file. Attorney Rolenc also offered into evidence Petitioner's Exhibit #14 which was a fax se to attorney Martay on September 8, 2017 advising him of today's trial date.

Subsequent to closing of proofs, Attorney Martay on September 26, 2017, filed a motion to re-open proc regarding his Fee Petition. By agreement of Petitioner's counsel, Respondent's counsel and Martay, proofs were r opened and the matter was set for hearing on October 16, 2017. Attorney Martay along with Attorney Rolenc a Attorney Egan were all present.

Martay offered his itemized Fee Petition into evidence with Rolenc stating that he had just received tl itemized Fee Petition that morning. In support of his Fee Petition, Martay argued that he had spent countless hours representing Petitioner, had received an offer of $40,000.00 and the balance of the Statutory Loss of the amputat left hand and had conversations with Petitioner regarding his second injury which Martay characterized as being overcompensation/repetitive trauma injury. It should be noted that Martay did not file an Application for Adjustm of Claim on Petitioner's second injury and, as such, did not have an Attorney Representation Agreement on file wh would have allowed him to represent Petitioner.

18IWCC0654

Rolenc argued that the settlement offer was unsolicited and that there was no indication that there were an settlement negotiations between Martay and William Lowry, Respondent's attorney at the time the offer was made This was not refuted by Martay. Rolenc also argued that the statutory loss of the left hand was paid weekly. Rolen also argued that Martay informed him he did not have any medical records when he began representing Petitioner i January 2015 as Martay had incurred no costs in the handling of this matter. It was Rolenc who filed the secon case for Petitioner's injury of May 8, 2014 which this Arbitrator, in the companion case, has found to be the result o direct trauma and not repetitive trauma. Petitioner's first accident in no way contributed to his second injury as ther was no overuse of Petitioner's right arm involved.

Having considered the arguments made by each attorney, the Arbitrator finds that Martay's fee petition wa properly filed and continued to disposition. However, because 2010 case has not fully come to disposition in that thi award is subject to further review, any award of attorney's fees by the Arbitrator is premature. However, th Arbitrator notes the arguments made and takes the matter under advisement should the Arbitrator need to enter ar award for fees at disposition of the 2010 case.

Signature of Arbitrator

2-16-2018
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WALTER KOZIOL,

Petitioner,

vs.

NO: 16 WC 1043

TEMPEL STEEL,

Respondent.

18IWCC0655

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection and permanent partial disability (PPD) 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 14, 2018 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $38,200.00. 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.

18IWCC0655

DATED: OCT 30 2018

MJB/tdm
O: 10/23/18
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

KOZIOL, WALTER
Employee/Petitioner

Case# **16WC001043**

10WC022138

TEMPEL STEEL
Employer/Respondent

18IWCC0655

On 2/14/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.78% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0320 LANNON LANNON & BARR LTD
MICHAEL S ROLENC
200 N LASALLE ST SUITE 2820
CHICAGO, IL 60601

2461 NYHAN BAMBRICK KINZIE & LOWRY
DONALD R EGAN
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

Walter Koziol
Employee/Petitioner

v.

Tempel Steel
Employer/Respondent

Case # **16 WC 1043**

Consolidated cases: **10 WC 22138**

18IWCC0655

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maria Bocanegra,** Arbitrator of the Commission, in the city of **Chicago,** on **9/20/2017 and 10/16/2017.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

CORRECTED FINDINGS

On **5-8-2014**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, a Employee –Employer relationship *did* exist between Petitioner and Respondent.

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

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

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

In the year preceding the injury, Petitioner earned **$44,307.90**; the average weekly wage was **$852.08.**

On the date of accident, Petitioner was **58** 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 **$27,428.70** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$27,428.70.**

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

CORRECTED ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$568.05**/week for **48-2/7** weeks, commencing **5/28/14**, through **1/25/15** and **1/29/15** through **5/3/15**, as provided in Section 8(b) of the Act. Respondent shall be given a credit of **$27,428.70** for temporary total disability benefits previously paid.

As to ***16 WC 1043***, Respondent shall pay Petitioner permanent partial disability benefits of **$507.95**/week for **75** weeks, because the right shoulder injuries sustained caused the **15%** loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

2-16-2018
Date

FEB 14 2018

CORRECTED FINDINGS OF FACT

Petitioner testified he was hired by the Respondent in 1984 as a press operator. In June 2010, Petitioner's job title was that of a die setter. Petitioner testified on June 5, 2010, he had finished working on machine number 213 when the group leader sent him to machine number 211. While working on machine number 211, a part became stuck inside the machine so Petitioner turned off the machine and attempted to retrieve the jammed part. As he was pulling on the part to extricate it from the machine, the machine went on and the gate dropped down on Petitioner's left hand, jamming it inside the machine. Petitioner testified he yelled for co-workers to come and help him but, apparently, everyone thought he was joking so no one came over. After approximately 40 minutes, with Petitioner feeling weak, he used his left knee and right hand to open the gate and pull his hand out.

Petitioner testified he then started running for help and passed out. He testified he was taken to St. Francis Hospital in Evanston where he underwent a left wrist disarticulation (amputation) by Dr. Klaud Miller. Px1. After he was discharged from the hospital, Petitioner continued under the care of Dr. Miller until July 8, 2010. Px2.

Petitioner testified Dr. Miller referred him to Dr. Kuiken of the Rehabilitation Institute of Chicago so that he could be fitted for a prosthetic. The RIC records also reflect that Petitioner was advised he would need a skin graft. Petitioner's medications were also changed. Px7.

Petitioner testified he was referred to Dr. Enrique Gonzalez, a psychologist. Px9. Petitioner saw Dr. Gonzalez from August 7, 2010 through February 14, 2013 and discussed the pain he was experiencing in his left arm, the problems he was having sleeping, his anxiety and suicidal thoughts. Dr. Gonzalez diagnosed Petitioner with adjustment disorder with anxiety and depressed mood. He recommended cognitive behavioral therapy and antidepressant and antianxiety medication if he did not respond.

Petitioner testified he came under the care of Dr. Charles Carroll who he initially saw on August 11, 2010. Px4. Dr. Carroll examined Petitioner and recommended occupational therapy. He also opined that Petitioner may need two additional operations
On August 19, 2010, Petitioner was seen by Dr. Robert Reff, a psychiatrist, at the referral of Dr. Gonzalez. Petitioner testified that he had 33 sessions through November 28, 2012 with Dr. Reff. Px10.

Petitioner testified that over the course of 2010 and 2011, he continued treating with Dr. Carroll, Dr. Kuiken, Dr. Gonzalez and Dr. Reff.

Petitioner testified that Dr. Carroll performed additional surgeries on his left arm on August 26, 2010 (debridement), on August 31, 2010 (debridement), on September 28, 2010 (revision amputation and neurectomy) and December 29, 2011 (resection of the median and radial nerves, ulnar neuromas and revision amputation).

In 2011, Petitioner was examined at the request of Respondent with Dr. Alexander Obolsky. Rx2. Dr. Obolsky found Petitioner to be malingering his reported symptoms of mental ill being and that Petitioner did not develop any condition of mental ill-being as a result of the work accident.

Petitioner testified that throughout 2010 and 2011, he continued noticing pain with his left limb. Throughout this period, Petitioner also testified he was having trouble sleeping and was depressed. Petitioner testified he

was fitted for a prosthesis and brought it with him to court. He testified he rarely wears the prosthesis because it bothers his forearm and the area around his stump. He also testified that he wears a fitted sleeve over his forearm when he works.

Petitioner testified that in July 2011, he was notified by his former attorney, David Martay, that there was work available for him. He testified that he was told he would be able to volunteer in a nursing home. Petitioner testified he went to the nursing home along with Rhonda, the workers' compensation coordinator from Tempel. He also testified that an individual named Sonya was there. He testified that when he got there, there were people screaming and crying and emotionally, he was unable to handle it. He told them he would be unable to work there but he would be willing to return to work anywhere else.

Petitioner was subsequently notified of a position at Resurrection Hospital which he was able to perform. Petitioner testified he was sitting by a table and talking to people who were arriving in the hospital and directing them to different waiting areas. He also testified he was volunteering in the physical therapy department for a while. He was paid by the Respondent while he was volunteering at Resurrection Hospital.

Petitioner subsequently was advised that he could return to work for the Respondent. He testified he returned sometime in February 2012. When Petitioner returned to work, he was given a different job which involved pulling parts from one box and checking them for defects. If the part was not defective, he would place it in another box. If it was defective, he would throw it onto the scrapheap. Petitioner testified he used his right arm for this job and handled 4,000 parts per day. He performed this job on a full-time basis up until May 8, 2014.

Date of Accident May 8, 2014

On May 8, 2014, Petitioner testified he was performing his job and was told by a group leader to stop. He was told they have a "hot job" that needed to be done. Petitioner testified he went to a different area of the plant and using a stick, he would put several parts onto the stick and lift them out of a box. He would then have to separate the bad ones from the good ones and then he would throw the parts into another box. Petitioner demonstrated this by using his right arm in an underhanded motion. Petitioner testified that in front of him and near the box where he was throwing these parts were several skids. Petitioner testified that as he let go of the parts that were on the stick, he felt a sudden pain in his right shoulder and then he fell sideways onto the skid hitting his right shoulder and head on the skid.

Petitioner was sent immediately to Physicians Immediate Care where he gave a history of what happened to him. The records reflect that Petitioner's pain was worse with movement. Petitioner was diagnosed with a shoulder sprain and advised to return to restricted work. Px11. Petitioner followed up with the clinic on May 13, 2014 advising he was still having pain in his right shoulder and unable to lay on the right side of his bed. He was referred for an MRI and physical therapy. Petitioner returned on May 21, 2014 advising he was still having pain in his right shoulder. He was getting little relief from the physical therapy. He stated the pain radiates down his right arm. On May 27, 2014, Petitioner underwent a right shoulder MRI at Lincoln Imaging Center. The MRI revealed glenohumeral joint arthritis with possible underlying fibrillation/partial maceration of the labrum. He was also diagnosed with a possible biceps tendon tear, arthritis and degenerative joint disease in the AC joint.

On June 5, 2014, Petitioner came under the care of Dr. Roger Chams of Illinois Bone & Joint Institute. Petitioner informed Dr. Chams of the injury of May 8, 2014. Dr. Chams reviewed the MRI and opined that it was of poor quality so he ordered a repeat MRI. He also administered a Kenalog injection to Petitioner's right shoulder. Px12. Petitioner underwent the right shoulder MRI on June 12, 2014 at 3T Imaging. The MRI

revealed a partial thickness tear of the rotator cuff and a full thickness tear of the long head of the biceps tendon. There was also an associated tear involving the superior, posterior-superior and anterior labrum. Petitioner returned to Dr. Chams on June 24, 2014 and was scheduled for surgery.

Petitioner underwent a right shoulder arthroscopy with debridement of the labrum and glenohumeral joint, a subacromial decompression, distal clavicle resection and Mumford procedure as well as rotator cuff repair on September 12, 2014 at Northwest Memorial Hospital. Px12.
Petitioner continued his post-op treatment with Dr. Chams. Dr. Chams ordered physical therapy for Petitioner which Petitioner began on September 29, 2014 at Accelerated Rehabilitation. Petitioner testified that his last visit with Dr. Chams was on July 23, 2015. At that time, Petitioner was still complaining of deltoid, biceps and triceps pain. Dr. Chams administered a third Kenalog injection and released Petitioner with permanent restrictions of no overhead lifting with his right arm and no lifting greater than 5 pounds. He further opined that Petitioner may need possible arthroscopic surgery in the future if his shoulder/arm conditions do not improve.

Petitioner testified that in 2016, he started noticing some additional problems and pain with his left arm so he returned to Dr. Carroll on May 27, 2016. Dr. Carroll noted that Petitioner was having variable cramping and pain along with cold sensitivity. He also noted that Petitioner's function had decreased. Dr. Carroll recommended a selected reinnervation of the median ulnar and radial nerve. Px4. Petitioner returned to Dr. Carroll on June 17, 2016 with the same complaints. Dr. Carroll recommended the aforementioned surgery and referred Petitioner to Dr. Gregory Dumanian. Petitioner saw Dr. Dumanian on July 20, 2016. Dr. Dumanian offered two options: a neuroma excision in burying in muscle. The other option was targeted innervation and nerve transfers after a neuroma excision. In a subsequent visit on August 24, 2016, Petitioner was advised by Dr. Dumanian that he would not be a good candidate for the randomized study that was previously recommended. He opined Petitioner would be an excellent case for the prosthetic control arm of the study. This is a procedure that would be done with Dr. Carroll. Petitioner then saw Dr. Carroll on September 23, 2016. With Petitioner voicing the same complaints, Dr. Carroll recommended the surgery again.

Petitioner testified he had a subsequent fall at home injuring his left elbow. He underwent surgery to the left elbow and he testified that the doctor had to move the nerves in his left forearm and by doing that, he actually reduced some of the pain that he was previously experiencing. Petitioner testified that due to the decreased pain, he elected not to undergo the surgical procedure recommended by Dr. Carroll. Petitioner testified, however, that if the pain in his left forearm should revert to where it was before he fell, he would consider undergoing the surgery if Dr. Carroll was still recommending it.

Petitioner testified that he currently has different types of pain in his left forearm. He testified the stump is sensitive. He also testified that he does have pain in the left forearm but it is not as severe or as sharp as it was before he fell. He testified that at work, the left forearm gets cold so he runs it under warm water. He also massages it to bring warmth to the forearm. He testified that he wakes up from his sleep because of the pain in his left forearm. He testified that sometimes when he rubs his forearm on the bed, he gets pain which causes him to wake up.

Petitioner testified that regarding his right shoulder, he has pain but not every day. He testified his current job involves checking gauges and if they have expired, then he has to replace them. He testified that this job requires him to brush rust off different parts and that he has to use his right arm in a repetitive motion. He does this throughout the day and this will cause pain in the right shoulder.

Petitioner testified that his current job which involves working with the gauges is not the job that he was doing when he returned to work following his first accident. Petitioner further testified that he is making $21.42 an hour and that he intends to continue working there until retirement. On cross-examination, Petitioner testified he has not been given any reason by anyone at work that he would be fired. Also on cross-examination, Petitioner testified that he saw a Dr. Obolsky in 2011 at the request of the Respondent. He also testified to seeing a Dr. Vender and Dr. Wolin.

CONCLUSIONS OF LAW

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. At trial, causal connection was disputed as to both claims.

a. Date of Accident – June 5, 2010 – 10 WC 22138

Based on Petitioner's testimony and all of the medical records offered into evidence, the Arbitrator finds that Petitioner's current condition of ill-being involving his left arm is causally related to the accident of June 5, 2010. Here, there is no doubt Petitioner's work accident resulted in a traumatic amputation of the left hand. Due to ongoing pain and problems, Petitioner underwent (4) additional subsequent surgical procedures. Most recently, a December 5, 2016 medical report authored by Dr. Charles Carroll references a proposed reconstructive procedure which he and Dr. Dumainan believed was medically necessary for Petitioner. Dr. Carroll based this opinion on Petitioner's persistent neuroma pain of his median and ulnar nerve which was the direct result of the amputation on June 5, 2010. Dr. Carroll opined that Petitioner has ongoing residual pain in those nerves proximally where they were resected and buried in muscle. The pain limits his function and the use of the prosthesis as the cup attachment irritates the neuromas. The proposed surgery would resect the neuromas in routing the pain generating sensory fibers into a motor nerve, which would decrease the nerve pain and allow for better function of the prosthesis. Dr. Carroll further opined that he agreed with Respondent's IME doctor, Dr. Vender, regarding the one surgical procedure so he offered Petitioner this option so he could have a better life and work capability by using the prosthesis. The Arbitrator relies on this evidence in support of the conclusion that Petitioner's current condition of ill-being as it relates to the left hand amputation is ongoing and in fact causally related to his undisputed work accident of June 5, 2010.

The Arbitrator further finds that Petitioner's mental health condition is causally related to his June 5, 2010 work accident as a psychological sequelae of the traumatic hand injury Petitioner witnessed and experienced. Mental health records introduced into evidence diagnosed Petitioner was PTSD, depression and anxiety for which he underwent extensive mental health psychological and psychiatric care with Drs. Gonzalez and Reff. In reviewing the opinion of Dr. Obolsky, the Arbitrator notes that Dr. Obolsky found Petitioner to be malingering his reported symptoms of mental ill being and that Petitioner did not develop any condition of mental ill-being as a result of the work accident. The Arbitrator has carefully considered the entire record as well as the opinions of Drs. Gonzalez, Reff and Obolsky and the Arbitrator finds that Petitioner's treating doctors' opinions are entitled to more weight. Drs. Gonzalez and Reff documented Petitioner's flashbacks of the occurrence, ongoing depression, anxiety and general low self-esteem and morale following the traumatic work accident. There is no evidence Petitioner exhibited any of these conditions, diagnoses or symptoms at any time prior to the work accident. While Dr. Obolsky found Petitioner to be allegedly malingering his symptoms, the doctor did not explain what symptoms were being malingered, what test(s), if any, tended to demonstrate malingering and to what degree, if any, Petitioner was malingering. For example, the doctor noted Petitioner

reported somatic symptoms and symptoms about the stomach and heart. However, the doctor did not account for Petitioner's unrelated health conditions, if any, and whether those were being considered in the overall assessment. The Arbitrator also notes that Dr. Obolsky's evaluation was in May and June of 2011 whereas the report was not completed until five months later, November 2011. By that time, Petitioner was already volunteering at Resurrection Hospital which contradicts his belief that Petitioner was malingering for financial gain.

In summary, the Arbitrator finds Dr. Obolsky's opinions are entitled to lesser weight than those of Drs. Gonzalez and Reff and that Petitioner's condition of mental health ill-being is causally related to his undisputed work accident of June 5, 2010.

b. Date of Accident – May 8, 2014 – 16 WC 1043

Based on Petitioner's testimony and all of the medical records offered into evidence, the Arbitrator finds that Petitioner's current condition of ill-being involving his right shoulder is causally related to the accident of May 8, 2014. Petitioner's unrebutted and credible testimony was that he injured his right shoulder when he went to toss a piece of material to the side. The Arbitrator finds this mechanism of injury to be a single acute traumatic event and unrelated to Petitioner's June 5, 2010 work accident as either a sequelae or repetitive/over-use traumatic injury. The Arbitrator finds that Petitioner's right shoulder was otherwise in a state of good health immediately prior to the May 8, 2014 work accident even in the face of Petitioner's ongoing left hand amputation injuries. In support of finding Petitioner's right shoulder causally related to the May 2014 work accident, the Arbitrator relies on the medical opinions of Drs. Chams and Wolin, both of whom referred to the shoulder condition as having resulted from a work accident. Further, Dr. Wolin opined that the right shoulder was in fact causally related to the work accident. The Arbitrator adopts the opinions and findings of both doctors as they relate to causation. These medical opinions were not challenged or contradicted in the record. Thus, the Arbitrator finds that Petitioner's current condition of ill-being involving his right shoulder is causally related to the accident of May 8, 2014.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. At trial, liability for the unpaid medical charges of Dr. Gonzalez for the June 5, 2010 work accident were disputed. Ax1. Medical bills were not at issue in the second claim. Ax2. Having found in favor of Petitioner on the issue of causal connection in 10 WC 22138, the Arbitrator further concludes that Petitioner has proven that the medical and psychological services provided to him were both reasonable and necessary and that Respondent has not yet paid all appropriate charges for same. The record shows that there were 14 visits with Dr. Gonzalez which were not paid for by Respondent. These were not paid pursuant to Dr. Obolsky's opinion that Petitioner required no further mental health treatment. Those 14 visits all occurred after the examination with Dr. Obolsky. The total unpaid bill is $2,550.00.

The Arbitrator has reviewed the office notes of Dr. Gonzalez between October 18, 2012 and February 14, 2013. Those records are replete with complaints voiced by Petitioner which would be reasonable and expected following an injury of this nature. There is nothing in the records of Dr. Gonzalez which would suggest that Petitioner is exaggerating his complaints for any untoward purpose such as financial gain. The Arbitrator also notes that Petitioner testified he had never been under the care of a psychiatrist or a psychologist prior to this injury. The Arbitrator adopts the findings and opinions of Dr. Gonzalez and discounts those of Dr. Obolsky. The Arbitrator finds that Respondent is liable for payment of the medical bill of Dr. Gonzalez in the

amount of $2,550.00 as the services Dr. Gonzalez provided were reasonable and necessary for Petitioner following his injury and that Respondent shall be liable for same, subject to Sections 8(a) and 8.2.

ISSUE (K) What temporary benefits are in dispute?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. At trial, temporary total disability benefits for the June 5, 2010 work accident were disputed. Ax1. Such benefits were not at issue in the second claim. Ax2. The disputed period of TTD is from July 22, 2011 through September 18, 2011. Respondent suspended TTD benefits based upon Petitioner allegedly failing to appear for work offered via CJE Senior Life for work offered. Rx1. The Arbitrator has reviewed all evidence, including Petitioner's testimony, and finds Petitioner is entitled to TTD for this time period. First, the medical records indicate that Petitioner was encouraged by the case manager to volunteer, in an effort to help cope with the emotional and mental trauma sustained following the work accident. The medical records clearly suggest that this was volunteer work contemplated in the context of Petitioner's ongoing mental health treatment. This was not presented as a bonafide job offer, detailing the wages to be earned, the work to be performed and the hours expected to work. The Arbitrator notes the specific medical records in support thereof:

On May 4, 2011, Petitioner returned to Dr. Gonzalez for psychological follow up. The doctor explained the possibility of patient ***volunteering*** for four hours a day at a local church or hospital. The doctor explained that it was the recommendation made by Dr. Kuiken and that he agreed with the idea which would get him out of the house in order to decrease isolation as well as improve his mood and self-esteem. (Emphasis added).

On May 11, 2011, Dr. Gonzalez noted that Petitioner's nurse case manager had arranged for Petitioner to do some ***volunteer*** work at resurrection hospital and that he would be receiving an application for that in the mail. (Emphasis added).

On June 1, 2011, Petitioner returned to Dr. Gonzalez for psychological follow up. The doctor noted that Petitioner brought with him to the appointment a letter from Resurrection Hospital stating that he was scheduled to attend orientation for ***volunteer*** services on August 16, 2011. Petitioner expressed frustration because of the delay in the scheduling of this orientation. (Emphasis added).

On June 29, 2011, Petitioner returned to Dr. Gonzalez for psychological follow up. The doctor noted Petitioner appeared upset due to having received a letter from his nurse case manager requesting that he attend an orientation meeting to ***volunteer*** at an adult day services center. (Emphasis added).

On July 6, 2011, Petitioner returned to Dr. Gonzalez for psychological follow up. Petitioner indicated he had recently attended a meeting at the adult day services and stated that the experience left him feeling overwhelmed. According to Petitioner, this would be further postponed until he was evaluated by Dr. Carroll on July 11.

On July 11, 2011, Dr. Charles Carroll indicated that Petitioner could return to work with no use of the left hand [sic]. Px3. On July 22, 2011, Petitioner followed up with Dr. Gonzalez for psychological follow up. Petitioner expressed anger in reaction to an overnight letter he received instruction him to attend a meeting at an adult aide services center to begin volunteering in today's time which conflicted with his appointment with Dr. Gonzalez on July 22.

On August 3, 2011, Dr. Reff wrote a letter indicating that Petitioners level of psychological recovery remain fragile. It was the doctor's opinion that in the best interest of Petitioners psychological and psychiatric

health as well as the best interest of his overall recovery that he be permitted to volunteer at Resurrection Hospital and not be required to volunteer at a nursing home. The doctor expressed concern regarding the atmosphere in the nursing home as well as transportation issues getting to the nursing home.

On August 3, 2011, Petitioner returned to Dr. Gonzalez for psychological follow up. The doctor wrote a letter allowing Petitioner to volunteer at Resurrection Hospital and not at the nursing home as previously instructed. The doctor indicated his agreement with Dr. Reff regarding volunteering since this process had adversely affected Petitioner's progress.

On August 17, 2011, Patricia returned to Dr. Gonzalez for psychological follow up. Petitioner reported that he attended his orientation meeting at Resurrection Hospital.

On August 26, 2011, Petitioner returned to Dr. Gonzalez for psychological follow up. Petitioner reported that he had attended his second interview at resurrection hospital with the possibility of me getting volunteering in the next two weeks. The doctor recommended an evaluation for neuropathic pain and ongoing therapy. As of September 14, 2011, Petitioner reported that he was still awaiting a volunteer schedule with resurrection hospital. On September 21, 2011, Petitioner return it to Dr. Gonzalez for psychological follow up. He reported that he had attended his first day at the volunteer program and that he will know his schedule next Monday.

As evidenced by the above medical documentation, there is no doubt Petitioner was never given a light duty offer of employment but rather was arranged for volunteer work. Petitioner had a scheduling conflict with the July 22nd orientation date and given the short notice to attend volunteer orientation, the Arbitrator finds Petitioner's reasons wholly reasonable. Petitioner's unrebutted testimony was that he did eventually appear at the nursing home with Rhonda and Sonya. He testified that Rhonda was the work comp coordinator for Respondent. He testified that when he got to the nursing home and saw the people crying and hollering, he was emotionally unable to handle it. He said it brought back memories of his injury from June 2010. He testified that he would agree to other work but that he could not work in the nursing home.

The Arbitrator's conclusions are further supported by the fact that Petitioner was never paid for any of the volunteer work he eventually went on to complete, thereby further showing that this was volunteer work and not a true job offer. Because the Arbitrator assigns no weight to the alleged job offer(s) noted in Rx1, the Arbitrator need not consider the remainder of the contents of the letter. The Arbitrator finds that Petitioner is entitled to temporary total disability benefits for the period of July 22, 2011through September 18, 2011.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. At trial, the nature and extent of Petitioner's injuries for both claims were disputed. Ax1, Ax2.

a. Date of Accident – June 5, 2010 – 10 WC 22138

As a result of the June 5, 2010 accident, Petitioner sustained a traumatic amputation of his left hand for which the Respondent paid 100% loss of the entire non-dominant left hand. In addition, Petitioner testified to mental and emotional issues with necessitated treatment with a psychologist and a psychiatrist. In reviewing the June 19, 2017 medical report of Dr. Carroll, he opined that Petitioner's work status was unchanged. When looking back to the September 20, 2016 office note of Dr. Carroll, Petitioner's work status was no use of the left extremity. The records show that, at most, doctors were able to recommend that that left arm be used as a

functional assist. Further, records demonstrate that the injury resulted in an amputation, impaired motion and sensation, impaired sleep, restricted work, a job change and psychological injury.

Petitioner testified that following this injury, he returned to work in a different job for the Respondent. The new job involved primarily use of his right hand and arm. While no significant loss in income was established, it is apparent that Petitioner's injury resulted in a job change for him. Petitioner's previous job was as an established press operator since 1984 for Respondent. As to ***10 WC 22138***, the Arbitrator finds that Petitioner has sustained a **loss of occupation** and is awarded **20%** pursuant to Section **8(d)2**.

b. Date of Accident – May 8, 2014 – 16 WC 1043

As a result of the May 8, 2014 accident, Petitioner underwent a right shoulder arthroscopy with debridement of the labrum and glenohumeral joint, a subacromial decompression, a distal clavicle resection and Mumford procedure as well as a rotator cuff repair. Following the surgery, Petitioner underwent two cortisone injections into his right shoulder. Dr. Chams released Petitioner to return to work with permanent restrictions of no overhead lifting with his right arm and no lifting greater than 5 pounds. Dr. Chams further opined Petitioner may need possible arthroscopic surgery in the future if his shoulder/arm conditions do not improve.

Petitioner received two post-op cortisone injections to his right shoulder as he was continuing to complain of deltoid, biceps and tricipital pain as of his July 23, 2015 visit with Dr. Chams. He was also complaining of pain with any repetitive use. He advised Dr. Chams that most of his pain was at the bicipital groove.

In the final progress note of July 23, 2015, Dr. Chams noted positive tenderness to palpation of the right bursa but the left bursa finding was negative. There was positive impingement I on the right but negative on the left. The Speed's test was positive on the right but negative on the left. Elevation on the right was 3+ to 4/5, adduction was 3+ to 4/5 and external rotation was 4/5 whereas on the left, all were 5. As of Petitioner's last visit on July 20, 2015 at Athletico, there were still deficits noted in various range of motion measurements. For the purposes of this section, the Arbitrator finds Petitioner reached MMI on July 23, 2015.

The Arbitrator also notes in the April 5, 2016 report of Respondent's Section 12 examiner, Dr. Wolin, there was significant loss of range of motion on the right shoulder as compared to the left shoulder. In the muscle strength category, Dr. Wolin noted significant findings in the right shoulder as compared to the left. Dr. Wolin also noted positive albeit moderate findings on the Yergason's and Hawkins-Kennedy test on the right whereas both were negative on the left.

Pursuant to Section 8.1(b) of the Act, the following factors are to be considered in determining the level of permanent disability for accidental injuries occurring on or after September 1, 2011:

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

With regard to Subsection (i) of Section 8.1b(b), the Arbitrator notes that there was a 9% extremity impairment which translated to a 5% whole person impairment rating. The Arbitrator notes that impairment does not equate to permanent partial disability under the Workers' Compensation Act. Dr. Wolin's diagnosis was that of osteoarthritis shoulder and he noted if there are multiple diagnoses, the most impairing one is used. In this respect, the doctor chose the correct diagnosis. Dr. Wolin arrived at a quick-dash score of 65.9 but did not include a copy of the Q-Dash with his impairment report so that the Arbitrator may review his findings. Dr. Wolin did not specifically include loss of range of motion or any other measurements that would establish the nature and extent of the impairment pursuant to Section 8.1(b). Dr. Wolin did not consider a grade modifier for clinical studies even though the surgical report could have been used in this way. The Arbitrator, therefore, gives little weight to this factor.

With regard to Subsection (ii) of Section 8.1b(b) of the Act, the occupation of the employee, the Arbitrator notes that the record reveals Petitioner was initially employed as a press operator and that as a result of the 2014 accident, he was given permanent restrictions which had him working as a gauge inspector. Petitioner continues to work in this accommodated capacity as a gauge inspector. The Arbitrator therefore, gives greater weight to this factor.

With regard to Subsection (iii) of Section 8.1b(b) of the Act, the Arbitrator notes that Petitioner was 58 years old at the time of the 2014 accident. His age indicates that he may feel the effects of his shoulder injury to a greater degree compared to a younger worker. His age also suggests that he may be nearing the end of his work life expectancy. Given the aforementioned, the Arbitrator give greater weight to this factor.

With regard to Subsection (iv) of Section 8.1b(b) of the Act, Petitioner's future earnings capacity, the Arbitrator notes that Petitioner testified he was earning the same as he was at the time of the accident. There is no evidence in record to suggest any loss of future earnings or possible loss of future earnings. The Arbitrator gives no weight to this factor.

With regard to Subsection (v) of Section 8.1b(b) of the Act, the evidence of disability corroborated by the treating medical records, the Arbitrator notes that in the final visit with Dr. Chams on July 23, 2015, Dr. Chams noted Petitioner's symptoms and clinical findings persisted as did limitations during his orthopedic examination. This was confirmed in the Section 12 report of Dr. Wolin. Dr. Chams also noted Petitioner may need a future surgery. The Arbitrator, therefore, gives greater weight to this factor.

Based upon the foregoing, as to ***16 WC 1043***, the Arbitrator finds that Petitioner sustained a **15%** loss of the man as a whole pursuant to **Section 8(d)2** of the Act as a result of the right shoulder injury.

ISSUE (O) Martay Fee / Attorney Fee Dispute

Prior to Petitioner's testimony on September 20, 2017, Petitioner's attorney made an oral Motion to Dismiss the Petition for Attorney's Fees filed on March 19, 2015 by Petitioner's former attorney, David W. Martay. This fee petition was filed on Case 10 WC 22138 only and was entered and continued to disposition by this Arbitrator on June 2, 2015. Px15. Petitioner's attorney stated on the record that he notified attorney Martay of today's hearing. With Martay having failed to appear, attorney Rolenc made an oral motion to dismiss Martay's fee petition. Attorney Rolenc also stated that the fee petition filed by Martay was a generic fee petition and did not itemize the time and work performed on the file. Attorney Rolenc also offered into evidence Petitioner's Exhibit #14 which was a fax sent to attorney Martay on September 8, 2017 advising him of today's trial date.

Subsequent to closing of proofs, Attorney Martay on September 26, 2017, filed a motion to re-open proofs regarding his Fee Petition. By agreement of Petitioner's counsel, Respondent's counsel and Martay, proofs were re-opened and the matter was set for hearing on October 16, 2017. Attorney Martay along with Attorney Rolenc and Attorney Egan were all present.

Martay offered his itemized Fee Petition into evidence with Rolenc stating that he had just received this itemized Fee Petition that morning. In support of his Fee Petition, Martay argued that he had spent countless hours in representing Petitioner, had received an offer of $40,000.00 and the balance of the Statutory Loss of the amputated left hand and had conversations with Petitioner regarding his second injury which Martay characterized as being an overcompensation/repetitive trauma injury. It should be noted that Martay did not file an Application for Adjustment of Claim on Petitioner's second injury and, as such, did not have an Attorney Representation Agreement on file which would have allowed him to represent Petitioner.

Rolenc argued that the settlement offer was unsolicited and that there was no indication that there were any settlement negotiations between Martay and William Lowry, Respondent's attorney at the time the offer was made. This was not refuted by Martay. Rolenc also argued that the statutory loss of the left hand was paid weekly. Rolenc also argued that Martay informed him he did not have any medical records when he began representing Petitioner in January 2015 as Martay had incurred no costs in the handling of this matter. It was Rolenc who filed the second case for Petitioner's injury of May 8, 2014 which this Arbitrator, in the companion case, has found to be the result of direct trauma and not repetitive trauma. Petitioner's first accident in no way contributed to his second injury as there was no overuse of Petitioner's right arm involved.

Having considered the arguments made by each attorney, the Arbitrator finds that Martay's fee petition was properly filed and continued to disposition. However, because 2010 case has not fully come to disposition in that this award is subject to further review, any award of attorney's fees by the Arbitrator is premature. However, the Arbitrator notes the arguments made and takes the matter under advisement should the Arbitrator need to enter an award for fees at disposition of the 2010 case.

Signature of Arbitrator

2-16-2018
Date

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

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BELSASAR SUASNAVART,

Petitioner,

vs. NO: 16 WC 34348

KWAK BROTHERS DECORATING,

Respondent.

18IWCC0656

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical, prospective medical, and temporary total disability (TTD), and being advised of the facts and applicable 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).

At hearing, the parties made an oral motion to supplement the record with a complete copy of Petitioner's exhibit 4, Dr. Eric Belin's July 18, 2017 evidence deposition transcript. After reviewing the record, the Commission hereby grants said motion and amends Petitioner's exhibit 4 to include a complete copy of Dr. Belin's evidence deposition transcript. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 14, 2017 is hereby affirmed and adopted.

18IWCC0656

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 $1,300.00. 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 30 2018

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

MJB/tdm
O: 10/23/18
052

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

SUSANAVERT, BELSASAR
Employee/Petitioner

Case# **16WC034348**

KWAK BROTHERS PAINTING INC
Employer/Respondent

18IWCC0656

On 12/14/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.46% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5272 GORDON LAW OFFICES LTD
RICHARD GORDON
211 W WACKER DR SUITE 500
CHICAGO, IL 60606

0863 ANCEL GLINK
BRITT ISALY
140 S DEARBORN ST 6TH FL
CHICAGO, IL 60603

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
19(b)

BELSASAR SUASNAVERT
Employee/Petitioner

v.

KWAK BROTHERS PAINTING, INC.
Employer/Respondent

Case # 16 WC 34348

Consolidated cases: ___

18IWCC0656

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Wheaton**, on **October 24, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **11/14/16**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$31,684.64**; the average weekly wage was **$609.32**.

On the date of accident, Petitioner was **37** 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 **$13,605.16** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$13,605.16**.

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 $406.21/week for 31-2/7 weeks, commencing 11/5/16 through 6/11/17, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner maintenance benefits of $406.21/week for 5-1/7 weeks, commencing 9/19/17 through 10/24/17, as provided in Section 8(a) of the Act.

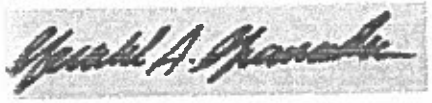
Respondent shall be given a credit for any temporary total disability or maintenance benefits that have been paid to date.

Respondent shall authorize and pay for, subject to the Fee Schedule, the prospective medical care as recommended by Dr. Belin and Dr. Raab, including the proposed surgery for Petitioner's back and right knee.

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

12/12/17
Date

DEC 14 2017

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FINDINGS OF FACT

This case involves a Petitioner alleging injuries sustained while working for the Respondent on November 4, 2016. Respondent disputes Petitioner's claims and the issues in dispute are: 1) causation, 2) TTD and 3) prospective medical care. Petitioner testified via a Spanish translator.

Petitioner testified that on November 4, 2016, he was injured while working for Respondent. At the time, he was working in Lisle outside a house on a ladder. He put a ladder up on the side of the house to make sure the roof was dry, as days before, it had rained. While coming down the ladder, the ladder slid out along with him on it. He testified he was around 18' to 20' above the ground when it fell. He fell onto the ladder, landing on concrete - hurting his left wrist and his back. Also, both knees hurt when he fell.

Prior to this November 4, 2016 accident, the Petitioner testified that he had had no problems with his knees and had never sought medical treatment with a doctor for his knees. He also never had had back pain and had never seen a doctor for his back. And he had never felt left wrist pain and had never sought treatment for his left wrist.

Following his accident of November 4, 2016, he went to the hospital the same day. He drove his own car to the hospital and Alan Kwak, the Respondent's owner, told him to go to the hospital. Mr. Kwak did not see him fall but was there at the time. The Petitioner went to Edward Hospital in Naperville, where he complained of left wrist, back and right knee pain. Petitioner testified that his back was in unbearable pain. He also thought that he had broken his left wrist because it was so swollen. With his right knee, he had difficulty walking. His back and his left wrist were the first and second most painful at the hospital.

On November 11, 2016, he saw Dr. Williams for his left wrist. He was prescribed surgery for his left wrist and prescribed off work.

For his back, he saw Dr. Eric J. Belin, who gave him a physical examination showing that he could not move forward or backward very well. Dr. Belin prescribed an MRI of his back, which was performed on November 23, 2016. He saw Dr. Belin again on November 26, 2016, where he was prescribed a TSLO brace due to low back pain he had while sitting and standing.

On November 28, 2016, he saw Dr. Williams who again said he needed surgery on his left wrist and prescribed him off work.

On December 1, 2016, he underwent left wrist surgery by Dr. Williams. The medical records show he underwent a procedure of an open reduction and internal fixation of a nascent intra-articular malunion of the left distal radius with posterior interosseous nerve neurectomy. (See Px. 3, p. 19)

On December 27, 2016, he saw Dr. Belin, who prescribed that after six weeks of wearing his TSLO back brace, that he should wear it another two weeks and then get physical therapy. On January 13, 2017, he started physical therapy and noticed continuous regular pain and clicking in his right leg.

On January 18, 2017, while following up with Dr. Williams for his left wrist, he complained of having problems with the plate that had been installed surgically in his left hand.

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On January 27, 2017, while following up with Dr. Belin, he reported that the physical therapy was creating worsening pain in his back. The pain in his right knee had also worsened since he fell off the ladder. Dr. Belin referred him to Dr. Raab for his knee pain. Dr. Belin put him back into his back brace and took him off therapy.

On February 3, 2017, while still being prescribed off work, he had an MRI of his right knee. The MRI revealed a torn meniscus in his right knee.

On February 6, 2017, he met with Dr. Raab regarding the MRI of his right knee, telling Dr. Raab that he had fallen from the ladder. Dr. Raab prescribed him an arthroscopic surgery to repair the right knee meniscus. The Petitioner testified that as of the date of the hearing, he has not yet had the right knee surgery because insurance does not want to cover it. He now notices, about his right knee, that it is painful to walk and it clicks.

On February 17, 2017, Dr. Williams saw him again for follow-up on his left wrist surgery and that his wrist was still painful. On April 6, 2017, he underwent a second surgery on the left wrist, this time to remove the plate in his left wrist.

On February 24, 2017, he saw Dr. Belin for fixing the brace and Dr. Belin talked about back surgery for the first time. Meanwhile, Dr. Belin prescribed aqua therapy, which he started.

By April 24, 2017, he reported five out of ten pain in his back; but that aqua therapy had given him some relief. On May 8, 2017, he had another MRI of his back and by May 10, 2017, Dr. Belin was prescribing a posterior spinal fusion and instrumentation of the T-11 through L-1. A CT Scan of his spine was also prescribed, which was performed on May 18, 2017. Again, the Petitioner testified that he has not yet had this back surgery operation because insurance won't pay for it.

On June 12, 2017, Dr. Belin prescribed that he could return to work with a 15 lb. lifting restriction. According to Arbitrator's Exhibit #1, the Petitioner returned to work from June 12, 2017 through September 18, 2017. When he returned to work on June 12, 2017, he did not paint the outside of houses but he still climbed ladders, even though he is afraid. He works on indoor projects for the Respondent. He does not go higher than 4' to 5'.

On September 27, 2017, he had another CT Scan of his lumbar spine.

The last time he worked was September 18, 2017. Petitioner testified that since September 19, 2017, Respondent had informed Petitioner that he had no work for Petitioner within Petitioner's restrictions. Petitioner further testified that he had not received TTD payments from Respondent since September 19, 2017.

As Petitioner goes about his daily activities, he notices pain in his back when he sits. When he lays down for bed, he has to go slow; it takes him 15 minutes to lay down and he can't get up quickly due to pain in his back. It feels like something is pulling on his back so he can't rest well. He also cannot participate in basketball or running or going to the gym to exercise - all activities he performed before the accident. With his knee, he cannot run, play basketball, or play with his son. The Petitioner testified that he wants the back and the right knee surgeries.

Dr. Belin testified via evidence deposition on July 18, 2017. (PX. 4) Dr. Belin is a board certified orthopedic surgeon with a dual fellowship in pediatric spine and adult spine. Dr. Belin testified that as of February 24, 2017, he was concerned that "continuing conservative management [was] not working" and spoke to Petitioner "about operative interventions," which included an internal brace procedure or "instrumentation and fusion of the spine." (Px. 4, p. 32-33). Dr. Belin additionally testified that on May 10, 2017, he suggested to Petitioner that Petitioner consider surgical intervention with a "T12 to L1 posterior spinal instrumentation with the fusion." (Px. 4, p. 39). Dr. Belin did not believe Petitioner exhibited any symptom magnification and noted that he released the Petitioner to return to work light duty at the Petitioner's request. With regard to the Petitioner's knee condition, Dr. Belin noted that the Petitioner complained of right knee pain on November 14, 2016. Dr. Belin further opined that there is a correlation with Petitioner's knee condition to the injury and noted that the Petitioner sustained multiple injuries to his wrist and back in addition to his knee.

Dr. Michael J. Grear testified as a board certified orthopedic surgeon, licensed in the State of Illinois. (See Rx. 2, Dr. Grear depo. CV, Depo. Ex. 1) Dr. Grear examined the Petitioner on May 19, 2017 at Respondent's request. Dr. Grear noted Petitioner exhibited symptom magnification during his examination of Petitioner's back. For example, Petitioner would grimace and have complaints of discomfort when Dr. Grear touched Petitioner's neck, around his shoulders, in his buttocks, or midline of Petitioner's spine. Petitioner would complain when Dr. Grear lifted Petitioner's leg while Petitioner was in the lying position. Petitioner would complain of pain while trying to remove his shirt, but had no problems with bending forward. Based on his exam, Dr. Grear diagnosed Petitioner with a healed compression fracture at T12, healed intra-articular distal radial fracture of the left wrist and patellar tendinitis of the right knee. Dr. Grear further opined that the Petitioner's work injury contributed to the compression fracture and the radial fracture of the wrist. Dr. Grear did not believe the right knee was causally related to the work injury because the Petitioner's knee symptoms did not appear until three months after the accident and the MRI was unremarkable with no evidence of any significant pathologic changes. On examination, the Petitioner's knee was extremely normal with some tenderness, all of which were the result of normal wear and tear. There was no evidence that of posttraumatic injury relating to the tear found in Petitioner's knee. Dr. Grear also did not believe that the spinal fusion surgery recommended by Dr. Belin is necessary because Petitioner had stable posterior elements, no radicular complaints and only minor subjective complaints. Dr. Grear did agree that a fusion like the one proposed by Dr. Belin would be proper in the event of the failure of conservative treatment.

CONCLUSIONS OF LAW

1. With regard to the issue of causation, the Arbitrator finds that the Petitioner has met his burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's credible testimony and the medical evidence. On this issue, Respondent disputes Petitioner's claims based on the opinions of their IME, Dr. Grear. Dr. Grear specifically opined that he did not believe Petitioner's right knee condition was related to the undisputed work accident because he believed Petitioner's knee symptoms did not appear until three months after the November 4, 2016 accident date. However, in contradiction to Dr. Grear's understanding of the facts, the Petitioner credibly testified and the medical evidence shows that Petitioner did mention his complaints of knee pain as documented by Dr. Belin on November 14, 2016. Dr. Grear also addresses Petitioner's back condition as having resolved to the point that back surgery would not be necessary since his spinal condition following his transverse spinal fracture appears to have stabilized, and attributes some of Petitioner's continuing complaints exhibited during his physical examination to symptom magnification. However, Petitioner's continued complaints of back pain

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following his non-disputed accident have been consistent and well-documented by his treating medical providers. Petitioner has been cooperative in his treatment with all of his medical providers and there was no evidence presented to indicate that his current symptoms were due to any intervening or pre-existing cause. The Arbitrator further notes that the Petitioner's decision to ask to be returned to work despite his continued complaints of back pain and Dr. Belin's opinions both undermine Dr. Grear's symptom magnification characterization. Given all the facts above, the Arbitrator finds more persuasive the opinions of Dr. Belin regarding the issue of causation. Accordingly, the Arbitrator concludes that the Petitioner's current condition of ill-being in both his back and his right knee is causally related to his undisputed November 4, 2016 work accident.

2. Based on the Arbitrator's conclusions with regard to the issue of causation, the Arbitrator further finds that the prospective medical treatment recommended by Dr. Belin and Dr. Raab is both reasonable and necessary in alleviating Petitioner's work related conditions in his right knee and back. This includes the recommendation for surgery to Petitioner's back as indicated by Dr. Belin and surgery for Petitioner's right knee as indicated by Dr. Raab. Accordingly, the Arbitrator orders Respondent to authorize and pay for said medical treatment, subject to the Fee Schedule.

3. With regard to the issue of TTD, the Arbitrator finds that the Petitioner was temporarily and totally disabled from November 5, 2016 through June 11, 2017 as per the agreement of the parties. (See Arb.Exh.1) Furthermore, the Arbitrator finds the Petitioner is entitled to maintenance from September 19, 2017 through October 24, 2017 as he was given work restrictions during that time period which the Respondent could not accommodate. Accordingly, the Arbitrator awards TTD and maintenance for the aforementioned time periods and the Respondent shall receive a credit for any TTD and/or maintenance it has paid thus far.

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

WILLIAM TUCKER,

Petitioner,

vs. NO: 15 WC 20219

GLOBAL BRASS,

Respondent.

18IWCC0657

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability benefits (TTD), permanent partial disability benefits (PPD), and evidentiary and credit issues, and being advised of the facts and applicable law, reverses the Decision of the Arbitrator and finds that Petitioner sustained an accident that arose out of and in the course of his employment with Respondent on June 8, 2015. The Commission finds that Petitioner's lumbar spine condition was causally related to the accident. The Commission also finds that Petitioner is entitled to all reasonable and necessary medical expenses related to the June 8, 2015 accident. The Commission further finds that Petitioner is entitled to TTD benefits from June 9, 2015 through October 20, 2015. The Commission awards Petitioner three-percent (3%) loss of use of the person as a whole.

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission makes the following findings:

1) Petitioner testified that he was 63-years-old and was presently not employed. He last worked for Respondent in mid-June 2017. He was officially terminated on July 31, 2017. (T.12). Petitioner had worked for Respondent for 12 years; for the last six years, Petitioner worked in the metal control department. (T.12-13). Petitioner worked approximately five days a week, eight hours a day. (T.13).

2) Petitioner stated that he had reviewed Petitioner's Exhibit 1 and he believed it accurately reflected his job duties for Respondent. (T.14). Petitioner's Exhibit 1 indicated the physical demand level for a metal control operator; the analysis was dated October 7, 2014. The job analysis stated that the work involved preparing incoming metal for casting and was considered heavy duty. Bending, stooping, pushing, and pulling was required up to one-third of the time at a low pace rate; low pace was defined as "Frequent pause to wait for equipment to rest, no difficulty maintaining pace." Lifting metal scrap up to 20 pounds was required on a frequent basis, or one-third to two-thirds of the time, at a low pace rate. Lifting from 21 to 100 pounds was required up to one-third of the time at a low pace rate. (PX1).

3) Petitioner testified that on June 8, 2015 he was at work, and at approximately 3:15 AM: "I was assigned to the back scale. I was sending buckets up to the casting floor. Part of that job is to grab flags after they're dropped from the casting floor and take them to the back scale to send up more buckets." (T.15). The flags varied in weight – from one to three pounds. (T.16). Petitioner testified that about once a week, he was assigned to the weigh line job where he was required to pick up flags three to four times a day. (T.16-17). Petitioner testified that he would pick up to 100 flags during that workday. (T.16; T.20-21). At this point in the testimony, Respondent objected on the basis that this was not a repetitive trauma claim. Petitioner's attorney responded: "It actually is a repetitive trauma claim, Your Honor, and the evidence – the only evidence of causation is that of Dr. Shelton which supports the repetitive trauma claim." (T.18). The objection was overruled, and Petitioner continued his testimony.

4) Petitioner stated that the flags were dropped from the casting floor through a 12-inch metal tube into a bucket on the floor, and he had to pick them up. Sometimes the flags would be stacked, and Petitioner would then pick up two or three at a time. (T.20). Petitioner stated that the bucket itself was 14 or 16 inches. "The bottom of it might have been, say, six inches off the floor." (T.20). To pick up the flags, Petitioner was required to bend at the waist. (T.20-21).

5) Petitioner testified as to his injury on June 8, 2015: "I bent over to pick up flags, my back popped, instant pain, my left leg went a little numb down into my foot and it took me a little bit to try to stand back up, but it hurt very bad." (T.21). Petitioner confirmed that he

was picking up "either one or a group of flags on that one incident" when he heard his back pop; he did have a flag in his hand when his back popped. (T.21; T.33). Petitioner stated that he had been picking up flags for a while that day before the accident. (T.22). Petitioner reported his injury to his supervisor on June 8, 2015. (T.22).

6) The foreman called the paramedics and the fire department who examined Petitioner; Petitioner went to the emergency department of Alton Memorial Hospital on June 8, 2015. (T.22; PX4). The history recorded on this date indicated that Petitioner began having complaints of low back pain after bending over to lift a heavy object. Petitioner also reported numbness to his left buttocks. There was no numbness or tingling radiating down Petitioner's legs. Petitioner had positive left perilumbar tenderness to palpation; straight leg test was negative bilaterally. Petitioner was diagnosed with back pain and the doctor prescribed Dilaudid and Zofran. (PX4).

7) On June 8, 2015, Petitioner visited Premise Health with complaints of low back pain with numbness in the left buttock. Specifically, the medical record stated that Petitioner "bent over to pick up flag out of box and felt 'pop' in lower back with some pain." A little further into the medical record, it was noted that "The metal flags tube dropped down, and he bent over, picked up two flags, weighing approximately 3 lbs. each, and felt a pop in his lower back." Petitioner denied any previous back injury or surgery. (T.14; PX3). Petitioner further testified that he had never received medical treatment to his low back, and he never missed work for low back problems. (T.14-15). Examination revealed tenderness at the left lumbar paraspinal area with spasm; straight leg raise was negative. Petitioner was diagnosed with a lumbar strain and given muscle relaxant. Petitioner was taken off work; he remained off work through June 15, 2015. (PX3; PX6).

8) Petitioner also called his primary doctor, Dr. Gregory Genova, on June 8, 2015. (T.23; PX5). Dr. Genova ordered an MRI of the lumbar spine, which Petitioner completed on that same date at St. Luke's Hospital. The impression indicated degenerative disc and joint disease. Specifically, at L3-4, there was moderate spinal canal stenosis with mild bilateral foraminal narrowing. At L4-5, there was mild spinal canal stenosis with mild bilateral foraminal narrowing. (T.23-24; PX5).

9) Petitioner reviewed the results of the MRI with Dr. Genova on June 9, 2015; it appears that this was Petitioner's first visit with him. Dr. Genova noted that Petitioner felt a pop in his lower back after "[h]e bent over at work to pick up a metal flag." Dr. Genova indicated that the MRI revealed spinal stenosis, facet arthritis, degenerative disc disease, and foraminal narrowing; there was no disc herniation. There was also a fissure at one of the levels. Dr. Genova's medical examination indicated pain in the lower back especially in the left sacro-iliac joint; Petitioner reported pain with extension, bending forward, left lateral flexion and twisting; straight leg raise test bilaterally was negative. Petitioner was diagnosed with acute low back pain. Dr. Genova prescribed medication. (PX6).

10) Dr. Genova referred Petitioner to Dr. Chad Shelton and Dr. David Kennedy. (T.24-25; PX6). On June 16, 2015, Dr. Genova noted that Petitioner was scheduled to see Dr. Kennedy in mid-July and that Petitioner was walking with a walker. Dr. Genova recommended that Petitioner remain off work. (PX6).

11) Petitioner consulted with Dr. Kennedy, of Neurological Surgery, on July 21, 2015. (T.25; PX7). Dr. Kennedy noted the mechanism of injury: "He was reaching down to pick something up at work and while bending felt a popping sensation with immediate onset of pain in the left lower lumbar area with intermittent radiation into the buttocks and groin area." Dr. Kennedy stated that Petitioner had not had any prior problems with his lumbar spine. Physical examination demonstrated reduced range of motion of the lumbar spine by 50%, focal tenderness and pain in the left paraspinous area with palpation, and straight leg raise test was negative bilaterally. Dr. Kennedy also reviewed the June 8, 2015 MRI of the lumbar spine and noted moderate stenosis at L4-5 with mild bilateral foraminal encroachment; there were similar findings at L3-4. (PX7).

12) Petitioner was diagnosed with a lumbar strain with associated focal tenderness. Dr. Kennedy recommended trigger point injections followed by physical therapy. (T.25; PX7). Dr. Kennedy gave Petitioner the following restrictions: no lifting more than 15 pounds, no bending, twisting, or stooping, and Petitioner should be allowed to stand and stretch every 15-30 minutes, as well as alternate walking, sitting, and standing intermittently. (T.25-26; PX7). Petitioner testified that Respondent could not accommodate his restrictions. (T.26). Dr. Kennedy attributed Petitioner's symptoms and need for treatment directly to the June 8, 2015 injury. (PX7).

13) On August 21, 2015, Petitioner had his first appointment with board-certified anesthesiologist and pain doctor, Dr. Shelton, of Physicians Pain Services. (T.26; PX8; PX10, pg. 6). Dr. Shelton's evidence deposition was taken on February 9, 2017; he testified consistent with his medical records. (PX10). Dr. Shelton noted that Petitioner's pain began after he had bent over to pick up an object. Petitioner reported pain that radiated into his left thigh and leg; he experienced numbness, tingling, and weakness. Dr. Shelton reviewed the June 8, 2015 MRI. Examination revealed negative straight leg raise on the left, bilateral lumbar paraspinous tenderness, and increased pain with extension. Dr. Shelton diagnosed Petitioner with displacement of the lumbar intervertebral disc without myelopathy, spinal stenosis of the lumbar region, and thoracic or lumbosacral neuritis or radiculitis. (PX8).

14) Dr. Shelton administered an L3-4 interlaminar epidural steroid injection on August 21, 2015. Petitioner returned to Dr. Shelton on August 27, 2015 and reported an initial 100% improvement. Dr. Shelton recommended that Petitioner proceed with physical therapy. Petitioner was taken off work. (PX8). Petitioner completed his physical therapy at SSM Physical Therapy from September 2, 2015 through September 24, 2015. (T.27; PX8; PX9). Dr. Shelton testified that the treatment he provided to Petitioner was reasonable and necessary to cure and relieve the effects of his June 8, 2015 work injury. (PX10, pg. 28).

15) At his deposition, Petitioner's attorney presented Dr. Shelton with a hypothetical regarding the mechanism of injury and the repetitive nature of bending over and picking up flags. (PX10, pg. 18). Petitioner's attorney then asked:

> Q: While working at his job for Global Brass on or about June 8, 2015, Mr. Tucker bent over to pick up a flag out of a box, and felt a pop in his low back, and he stood up, and he had an immediate increase in low back pain. Assuming these facts to be true, Doctor, do you have an opinion, within a reasonable degree of medical certainty, whether Mr. Tucker's June 8, 2015 accident bears a causal relationship to the condition you diagnosed in Mr. Tucker . . .
>
> A: The activities certainly was the cause of the onset of the symptoms that occurred in conjunction. (PX10, pgs. 18-19).

16) During cross-examination, Dr. Shelton agreed that he did not know the weight of the object that Petitioner picked up when he injured himself, he did not know the frequency in which Petitioner had to pick up objects at work, and he did not know whether Petitioner was required to do repetitive bending at work. (PX10, pg. 31). "It's not relevant to my discussion with the patient." (PX10, pg. 31).

17) By October 16, 2015, Petitioner reported some occasional soreness, but stated that he was doing much better and wanted to return to work. (T.27; PX8). Dr. Shelton wrote, "[H]e feels he is able to return to work with full function as he does not report any radiating leg pain, numbness or weakness at this point. Dr. Shelton allowed Petitioner to return to work full duty on October 21, 2015. (PX8). The October 27, 2015 discharge note from SSM Physical Therapy stated that Petitioner reported no difficulty with activities of daily living or gait, and that Petitioner had not had any pain or stiffness in the past few weeks.

18) Petitioner was eventually discharged from Premise Health on October 20, 2015; he was released to full duty work commencing October 21, 2015. (PX3). Dr. Genova also released Petitioner to full duty work on October 21, 2015. (PX6).

19) Petitioner returned to his regular duties with respondent on October 21, 2015. (T.28). As of the date of arbitration, Petitioner stated,

> I still have a little numbness coming and going in the left leg in my foot every now and then. My back will hurt every once in a while. If I sit too long it will hurt for a while. If I stand and walk around it goes away but if I sit back down it will hurt again. (T.29).

20) Petitioner takes ibuprofen as needed – about once or twice a month. (T.29-30). Petitioner is no longer as active as he was prior to the June 8, 2015 injury; he no longer bowls and biking hurts his back. (T.30; T.32).

21) During cross-examination, Petitioner testified that at the time of his injury he also worked as a caregiver for one person. "She could walk, she couldn't lift, she was stooped over." Petitioner would assist "with her bills, do dishes, help her get dressed, take her to the doctors . . ." He continued to be her caregiver after the accident, but with limitations. (T.32). By limitations, Petitioner explained, "I did not walk up and down any stairs except to get in the house which was only three steps. I did not lift anything heavy." (T.36).

22) Respondent called Angela King as a witness; she was Petitioner's shift supervisor in June 2015. (T.40-41). Ms. King testified as to the flags. (T.41-42). She stated that Petitioner was not required to pick them up as part of his job duties. (T.42-43). Ms. King explained that Petitioner did not like to stay on the tractor all the time, "he likes to get up and move around, so then he would help out and go retrieve them." (T.43).

23) Ms. King testified that she was not at work on June 8, 2015. (T.43).

> [T]hey were talking about Mr. Tucker's incident and I was kind of puzzled, what incident, because I knew nothing about the injury at that, you know, point in time and they said that he had went to a supervisor saying he had a back injury from the flags, picking up the flags, but I asked when and I said, well, he was in my office and had asked for ibuprofen or Tylenol because his back was hurting him from a roofing job. (T.43).

24) Ms. King first testified that she learned of Petitioner's injury around the beginning of July 2015. (T.44). The conversation she testified about happened some time in the first week of June 2015. (T.47-48; T.51). Petitioner denied doing any roofing work in June 2015; he did do some roofing work in November 2015 after he had returned to work from the accident. (T.54-55).

25) Respondent's Exhibit 2 contained prior medical records from Dr. Genova. During a routine follow-up visit for Petitioner's blood pressure, on June 25, 2012, the medical record noted that Petitioner had back pain; there were no further details. (RX2).

The Commission is not bound by the Arbitrator's findings. Our Supreme Court has long held that it is the Commission's province "to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *City of Springfield v. Indus. Comm'n*, 291 Ill. App. 3d 734, 740 (4th Dist. 1997) (citing *Kirkwood v. Indus. Comm'n*, 84 Ill. 2d 14, 20 (1981)). Interpretation of medical testimony

is particularly within the province of the Commission. *A. O. Smith Corp. v. Indus. Comm'n*, 51 Ill. 2d 533, 536-37 (1972).

The Commission disagrees with the Arbitrator's finding that Petitioner failed to prove that he sustained an accident that arose out of and in the course of his employment with Respondent on June 8, 2015. The Arbitrator based her Decision on the fact that Petitioner occasionally needed to bend to retrieve flags and that it seemed to be a sporadic assignment; she further noted that per Angela King's testimony, Petitioner was not required to pick up flags, but could do it if he chose to do so.

By his brief, Petitioner argues that the question was not whether Petitioner was required to pick up flags every day ("on a sporadic basis"), but whether Petitioner's 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; this was our Supreme Court's holding in *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 203 (2003).

Here, the evidence supports that Petitioner sustained a work-related accident on June 8, 2015. Petitioner testified that on June 8, 2015, he was at work, and at approximately 3:15 AM: "I was assigned to the back scale. I was sending buckets up to the casting floor. Part of that job is to grab flags after they're dropped from the casting floor and take them to the back scale to send up more buckets." (T.15). Petitioner testified that about once a week, he was assigned to the weigh line job where he was required to pick up flags three to four times a day. (T.16-17). Petitioner testified that he would pick up to 100 flags during the course of that workday. (T.16; T.20-21). Respondent offered no evidence to demonstrate that the act of bending and picking up flags was not connected with, or incidental to, the employment. There was also no evidence that Petitioner was prohibited from such act.

The Commission therefore finds that Petitioner sustained a work-related accident on June 8, 2015, when he bent over and picked up flags at the job site; this act was not only incidental to the employment but was to Respondent's own ultimate benefit as well. The Arbitrator's Decision relative to the issue of Accident is hereby reversed.

The Arbitrator had addressed the issues of accident and causal connection jointly in her Decision. In her discussion of Petitioner's repetitive trauma theory, the Arbitrator found no evidence through testimony or the medical records to support this theory; the Commission agrees. The Commission finds that by Petitioner's testimony and the medical records, Petitioner injured his back after he bent over, picked up flags from the ground, and he felt his back pop. (T.20). Petitioner testified that he was assigned to pick up flags about once a week; when he had to pick up flags, he would pick up to 100 flags during the course of that workday. (T.16-17; T.20-21). Other than this testimony, there is no evidence demonstrating that Petitioner's low back condition developed gradually over a period of time as a result of performing repetitive work for Respondent. Petitioner in fact denied any previous back injury or treatment, and there is no evidence of complaints or symptoms to Petitioner's low back immediately prior to June 8, 2015. (T.14; PX3).

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The Commission finds instead that Petitioner sustained a specific injury to his low back on June 8, 2015, as detailed above. Both of Petitioner's doctors, Dr. Kennedy, of Neurological Surgery, and Dr. Shelton, of Physicians Pain Services, also noted that Petitioner had injured his low back after he reached down to pick something up at work and he felt a popping sensation and pain in his lumbar spine and down his left buttocks. Although Petitioner had indicated that Dr. Shelton's opinion supported a claim of repetitive trauma, Dr. Shelton's opinion was actually based on Petitioner's act of bending over to pick up a flag and his immediate onset of low back symptoms; this is a specific injury.

The Commission further notes that the Arbitrator's Decision to deny Petitioner's claim was based on evidence that was either speculative or suspect in nature. The Arbitrator found odd that Petitioner had notified his supervisor of his injury, but then went to lunch. By his Brief, Petitioner explained that the accident occurred at 3:15 AM; Petitioner was present in the emergency room at 4:36 AM. "With travel time considered, Petitioner's 'lunch' must have consisted of little more than a stop at a vending machine." (Petitioner's Brief, pg. 15).

The Arbitrator also noted Ms. King's testimony that Petitioner had sought Tylenol or Ibuprofen for his back because of a roofing job shortly before the accident date. The Arbitrator stated that Petitioner first denied doing any roofing jobs in June 2015, because he did not have any equipment to do roofing. Petitioner then stated that he had completed a roofing job in November 2015. Petitioner argued that the first time Respondent ever raised the allegation that Petitioner injured himself outside of work was during Ms. King's testimony that Petitioner had injured his back at a roofing job shortly before the accident date. The Commission finds that the medical records are consistent with Petitioner's testimony and that of his treating doctors, and there is no indication that Petitioner injured himself during a roofing job other than Ms. King's sole testimony.

Additionally, the Arbitrator did not find Petitioner credible because he testified to working as a caregiver for a disabled individual while actively treating with Dr. Shelton. Petitioner's unrebutted testimony was that he continued to be the woman's caregiver after the accident, but with limitations. (T.32). By limitations, Petitioner explained, "I did not walk up and down any stairs except to get in the house which was only three steps. I did not lift anything heavy." (T.36).

The Commissions finds that any issues of credibility were sufficiently rebutted by Petitioner's testimony, and by the evidence in the record.

The Commission further finds that Petitioner's current condition of ill-being is causally related to the accident; a chain-of-events analysis supports causal connection for Petitioner's injury. In addition to having no evidence of previous medical treatment related to his low back, Petitioner never missed work for low back problems. (T.14-15). Following Petitioner's accident, he sought immediate treatment for low back pain and complaints of numbness to his left buttocks. He was treated at the emergency room of Alton Memorial Hospital, given medication, and taken off work. (T.22; PX4). As Petitioner's back complaints worsened, he began using a walker, he

underwent physical therapy, and received an epidural steroid injection at L3-4. (PX3; PX6). Petitioner's physicians reviewed the June 8, 2015 MRI of the lumbar spine and noted stenosis and foraminal encroachment at L3-4 and L4-5. Dr. Kennedy and Dr. Shelton attributed Petitioner's symptoms to the June 8, 2015 accident. (PX7; PX8; PX10, pg. 19). Dr. Shelton diagnosed Petitioner with displacement of the lumbar intervertebral disc without myelopathy, spinal stenosis of the lumbar region, and thoracic or lumbosacral neuritis or radiculitis. (PX8).

Based on the evidence in its entirety, the Commission finds Petitioner credible, and that the record supports Petitioner's position that he sustained an accident arising out of and in the course of his employment on June 8, 2015, and that his low back condition was causally related to this work-related injury.

As such, the Commission awards all reasonable and necessary medical expenses as evidenced by the billing records contained in Petitioner's Exhibit 11, totaling $15,192.04. Respondent offered no evidence to rebut the reasonableness and necessity of the bills, and made no argument on this issue. Responded simply claimed that since Petitioner failed to establish accident and causal connection, Petitioner was not entitled to medical benefits. Having found that Petitioner established accident and causal connection, the Commission finds that Petitioner is entitled to an award of all reasonable and necessary medical expenses incurred as a result of the June 8, 2015 accident.

The medical bills submitted by Petitioner correspond to and are supported by the medical records in evidence. Further, Dr. Shelton testified that the treatment he provided to Petitioner was reasonable and necessary to cure and relieve the effects of his June 8, 2015 work injury. (PX10, pg. 28). Dr. Kennedy also attributed Petitioner's need for treatment to the June 8, 2015 accident. (PX7). There is no evidence to rebut Dr. Shelton or Dr. Kennedy's opinions, and no evidence in general to rebut the reasonableness and necessity of the medical benefits received by Petitioner.

The Commission further awards TTD benefits to Petitioner. The Arbitrator considered this issue moot on the basis of finding no accident or causal connection. Respondent made no argument on this issue, again stating that since Petitioner failed to establish accident and causal connection.

Per the Request for Hearing form, Petitioner requested TTD from June 9, 2015 through October 20, 2015. Having found that Petitioner established accident and causal connection, the Commission awards TTD benefits from June 9, 2015 through October 20, 2015. The medical records indicate that Petitioner was taken off work commencing June 9, 2015; Dr. Kennedy had given Petitioner work restrictions in July 2015, but according to Petitioner, Respondent could not accommodate his restrictions. (T.25-26; PX7). Petitioner remained off work until October 20, 2015; Dr. Shelton allowed Petitioner to return to work full duty on October 21, 2015. (PX8).

As to the nature and extent of Petitioner's injury, the Arbitrator did not consider the five factors under Section 8.1(b) of the Act as she considered the issue of nature and extent moot. Respondent also considered the issue moot and disputed any liability toward PPD benefits on the

basis that Petitioner failed to prove accident and causal connection. Having found accident and causal connection in this claim, and taking into consideration the following five factors listed under Section 8.1(b) of the Act, the Commission awards Petitioner three-percent (3%) loss of use of the person as a whole:

(i) Impairment Rating: The Commission gives no weight to this factor as neither party offered any evidence or opinion relative to impairment.

(ii) Occupation of Injured Employee: The Commission gives some weight to this factor as Petitioner was released to work full duty, and he returned to work for Respondent from October 21, 2015 through July 31, 2017; Petitioner was terminated by Respondent. As of the date of arbitration, he was not employed.

(iii) Petitioner's Age: Petitioner was 61 years old on the accident date; the Commission gives no weight to this factor as there is no evidence in the record that Petitioner's age had any effect on the level of permanent partial disability.

(iv) Petitioner's Future Earning Capacity: There is no evidence in the record as to reduced earning capacity. Therefore, the Commission gives no weight to this factor.

(v) Evidence of Disability: The Commission gives this factor significant weight as evidence of disability was corroborated by the medical records. As a result of Petitioner's injury, he was diagnosed with displacement of the lumbar intervertebral disc without myelopathy, spinal stenosis of the lumbar region, and thoracic or lumbosacral neuritis or radiculitis; the June 8, 2015 MRI of the lumbar spine demonstrated stenosis and foraminal encroachment at L3-4 and L4-5. Petitioner began using a walker, he underwent physical therapy, and received an epidural steroid injection at L3-4.

Following his treatment, Petitioner was released full duty by his doctors on October 21, 2015. The October 27, 2015 discharge note from SSM Physical Therapy stated that Petitioner reported no difficulty with activities of daily living or gait, and that Petitioner had not had any pain or stiffness in the past few weeks.

As of the date of arbitration, Petitioner still experienced some numbness in his left leg that traveled into his foot; his back would hurt every once in a while, and sitting for a long period of time would cause him pain. Petitioner took ibuprofen as needed – about once or twice a month. He further testified that he was no longer as active as he was prior to the June 8, 2015 injury; he no longer bowled and biking hurts his back.

In light of the foregoing factors, with no single enumerated factor being the sole determinant of disability, the Commission awards three-percent (3%) loss of use of the person as a whole for Petitioner's low back condition.

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IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on November 13, 2017, is hereby reversed for the reasons stated above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $958.01 per week for a period of 19 1/7 weeks, from June 9, 2015 through October 20, 2015, that being the period of temporary total incapacity for work under Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given a credit of $2,335.59 for TTD previously paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner all reasonable and necessary medical expenses as detailed in Petitioner's Exhibit 11 totaling $15,192.04 pursuant to Sections 8(a) & 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit for all amounts paid under its group health plan under Section 8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $735.37 per week for a period of 15 weeks, as provided in Section 8(d)2 of the Act, for the reason that the injuries sustained caused three-percent (3%) loss of use of the person as a whole.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all other amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury including a credit of $4,282.42 for non-occupational indemnity disability benefits previously paid.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $38,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

OCT 30 2018

DATED:
MJB/pm
O: 10-16-18
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TUCKER, WILLIAM
Employee/Petitioner

Case# **15WC020219**

GLOBAL BRASS
Employer/Respondent

18IWCC0657

On 11/13/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.30% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4620 ADWB LLC
JOHN WINTERSCHEIDT
51 EXECUTIVE PLAZA COURT
MARYVILLE, IL 62082

0299 KEEFE & DePAULI PC
MICHAEL KEEFE
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

William Tucker
Employee/Petitioner

v.

Global Brass
Employer/Respondent

Case # 15 WC 20219

Consolidated cases: N/A

18IWCC0657

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Melinda Rowe-Sullivan**, Arbitrator of the Commission, in the city of **Collinsville**, on **September 25, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **June 8, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$75,725.04**; the average weekly wage was **$1,437.02**.

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

Respondent shall be given a credit of **$2,335.59** for TTD, **$0** for TPD, **$0** for maintenance, and **$4,282.42** for nonoccupational indemnity disability benefits, for a total credit of **$6,618.01**.

ORDER

Petitioner failed to prove that he sustained an accident that arose out of and in the course of his employment with Respondent, and that his current condition of ill-being is casually related to his alleged accident. All benefits are denied; the remaining issues are moot and the Arbitrator makes no conclusions as to those issues.

Respondent shall be given a credit of **$2,335.59** for TTD, **$0** for TPD, **$0** for maintenance, and **$4,282.42** for nonoccupational indemnity disability benefits, for a total credit of **$6,618.01**.

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

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

Melinda M. Rose-Gillman

Signature of Arbitrator

11/8/17

Date

ICArbDec p. 2

NOV 13 2017

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

William Tucker
Employee/Petitioner

Case # **15** WC **20219**

v.

Consolidated cases: N/A

Global Brass
Employer/Respondent

18IWCC0657

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that he is currently 63 and is not currently employed. He testified that he was last employed by Respondent, that he last worked in mid-June and that he was terminated on July 31st. He testified that he was employed by Respondent for 12 years. He testified that when he was first hired in he worked on the casting floor, that he was laid off and that when he came back again, he worked in metal control where he worked for six years. He testified that his job in metal control was full-time.

After reviewing the physical demands set forth in Petitioner's Exhibit 1, Petitioner testified that the job description accurately reflected his job duties in the metal control department. He testified that his job required bending and stooping at the waist up to 1/3 of the time and that his job required lifting 0-20 pounds 1/3-2/3 of the time on the job. He testified that prior to June of 2015, he had sustained no injuries to his low back nor had he received any medical treatment for his low back. He testified that prior to June of 2015, he had not missed any work for low back problems. He denied having any prior worker's compensation claims before the accident at issue.

Petitioner testified that on June 8, 2015, he was assigned to the back scale and was sending buckets up to the casting floor. He testified that part of the job was to grab flags after they were dropped from the casting floor and to take them back to the scale to send up more buckets. He testified that this was on the weigh line. He testified that the flags were metal pieces that were about 2 inches wide and varied in length. He testified that the flags varied in weight anywhere from 1-3 pounds. He testified that he worked once a week on average on the weigh line job.

Petitioner testified that when he was required to pick up flags on the weigh line job, he would be picking up flags 3-4 times per day. He testified that when he was required to pick up flags, the number of flags that he was required to pick up during the course of his work varied up to 100. He testified that the flags were dropped from the casting floor into a metal bucket on the floor. He testified that when he bent over and picked up flags, he might pick up 2-3 at a time. He testified that the bucket height off the floor was that of approximately 14-16 inches and that the bottom of the bucket was about 6 inches off the floor. He testified that he was required to bend at the waist and that he would bend at waist up to 100 times during the course of a work day.

Petitioner testified that on June 8th, he was picking up flags and that his back popped. He testified that he felt instant pain and that his left leg went numb down into his foot. He testified that it hurt to stand back up. He testified that he was picking up either one or a group of flags when he felt his back pop. He

testified that he reported the accident to his supervisor immediately. He testified that he was taken to Alton Memorial Hospital and that he told the hospital personnel about the accident. He testified that he was given pain medications and was told to follow-up with the worker's compensation doctor. He testified that he returned to Respondent's medical department and reported the accident that morning. He testified that he was then sent home.

He testified that he called his family doctor, Dr. Genova, that day. He testified that Dr. Genova ordered an MRI and that he underwent the test on the date of the accident. He testified that he saw Dr. Genova the day after the accident, that he prescribed medications and that he referred him to Dr. Kennedy. He testified that Dr. Genova also referred him to see a pain management physician, Dr. Shelton. He testified that he continued to see Dr. Genova while he tried to get in to see Drs. Kennedy and Shelton. He testified that Dr. Genova kept him off work.

Petitioner testified that he saw Dr. Kennedy about the accident on July 21, 2015 and that he recommended an injection and physical therapy. He testified that he also placed him under work restrictions but that Respondent did not offer work within those restrictions. He testified that he saw Dr. Shelton on August 21, 2015 and that he gave him an injection and pain medications. He testified that he was also referred to physical therapy. He testified that the injection helped the pain in his back.

Petitioner testified that he underwent physical therapy at SSM Physical therapy for 12 weeks and that he continued to see Dr. Shelton while he underwent therapy. He testified that he last saw Dr. Shelton on October 16, 2016 and that he asked him to allow him to return to work. He testified that he was not placed under any permanent restrictions and that he returned to work on October 21, 2015 and did the same job that he held previously.

As to his current complaints, Petitioner testified that he has a little numbness that comes and goes in his left foot. He testified that his back will hurt every once in a while if he sits too long and that if he stands and walks around, it goes away. He testified that he only takes medications when he needs it and that he takes Ibuprofen. He testified that he also has Dilaudid, Tramadol and a muscle relaxer that he was prescribed. He testified that he takes medications maybe 1-2 times per month. When asked if there was anything that he cannot do now that he used to do before the accident, Petitioner responded that he no longer bowls. He testified that he tries to ride his bike, but that it bothers his back. He testified that he is not as active as he used to be.

On cross examination, Petitioner agreed that he provided his primary care physician with a history of what occurred while at work on June 8, 2015. He testified that he had no reason to doubt the history in the medical records for Drs. Genova, Kennedy and Shelton.

On cross examination when asked if he had worked for anyone other than Respondent around June of 2015, Petitioner responded that he was a caregiver for an individual. He testified that he helped her with her bills, did her dishes, helped her get dressed and took her to the doctor. He testified that the individual that he was taking care of could walk but could not lift and was stooped over. He testified that he continued to be her caregiver for a period of time after the June incident with limitations. He agreed that he continued to be paid by the State of Illinois after this accident occurred.

On cross examination, Petitioner testified that his hobbies around the time of the accident were that of playing golf. He testified that when he stood up after picking up the flag his back popped. He testified that he had a flag in his hand. He testified that the pain was very severe and that when he stood up and his back popped, it brought him back down to his knees. When asked if he went to the infirmary, Petitioner responded that he walked directly to the foreman's office. He testified that it took him a few minutes to get there because he was walking very slowly. He testified that Mark Langley witnessed the event.

On cross examination, Petitioner agreed that the picking up of the flags was something that he would do once per week when he was assigned to that job.

On redirect, Petitioner testified that the individual for whom he was a caregiver was disabled. He testified that he continued to take care of her with limitations which included not walking up and down any stairs except to enter the house, that he did not lift anything heavy and that he helped her dress if needed, but that he did not give her a bath. He testified that he would also help her with her bills. He testified that the caring that he did for this individual occurred during the period that he was treating with Dr. Shelton.

On further cross examination, Petitioner agreed that was paid by the State of Illinois for the period of time for which he was claiming disability in this case.

On further redirect, Petitioner testified that he was paid by the hour by the State of Illinois and that he did not work as many hours while he was treating and recovering with Dr. Shelton.

Respondent called Angela King to testify as a witness at the time of arbitration. Ms. King testified that she is currently employed by Respondent and that she has worked there for 15 years. She testified that her position with Respondent in June of 2015 was that of a shift supervisor. She testified that she was familiar with Petitioner and had a supervisory role over him in June of 2015. She testified that she saw Petitioner on a daily basis when their shifts rotated together. She testified that she was made aware that Petitioner was claiming a back injury in June of 2015 and that she eventually learned that the source of the accident was the picking up of flags. She testified that there were different sizes of flags and that each had a different height, which triggered a switch in the production process.

When asked if the position held by Petitioner in June of 2015 involved the picking up of flags, Ms. King testified he was not required to do that as part of his job duties. She testified that usually the back scale clerk would retrieve the flags approximately 90-95% of the time. She testified that the bucket runner or scoop runner was not required to retrieve the flags. She testified that if Petitioner was running buckets, he would help out and go retrieve them. She also testified that Petitioner did not like staying on the tractor all the time and liked to get up and move around.

Ms. King testified that she was not working at Respondent on the date of the accident. She testified that she had some time off and then they had inventory to do. She testified that when doing a shift change with her manager they were talking about Petitioner's incident and that she was puzzled because she knew nothing about the injury at that point in time. She testified that they indicated that Petitioner had gone to a supervisor saying he had a back injury from picking up the flags and that she asked when that occurred. She testified that she stated that Petitioner was in her office and had asked for Ibuprofen or Tylenol because his back was hurting him from a roofing job. She testified that she learned about Petitioner's injury probably in the beginning of July. She testified that Petitioner was in her office within a day or two before the claim was made. She testified that the conversation with Petitioner took place before she went on vacation and that he indicated that his back was sore from a roofing job, that he said his back was killing him and that he asked for Ibuprofen or Tylenol. She testified that he sat in the chair, got a cup of coffee and stated that he had to finish the roofing job the next day.

On cross examination, Ms. King testified that she has seen Petitioner outside of work before. She testified that she knows him to be honest and a good worker for Respondent. She testified that the weight of the flags depended on their length, but that the shortest weighed less than a pound to maybe one pound.

On cross examination, Ms. King testified that Petitioner came into her office sometime in June and that it was the first week in June before she went on vacation. She testified that she had a couple of days of vacation before she had to come back and that they then had to continue working through inventory.

On cross examination when asked why Petitioner would be asking for medications, Ms. King responded that many times individuals asked for Ibuprofen but that they could not dispense any medications. She testified that she did not remember the exact dates that she was on vacation in June of 2015. She testified that she was off work on June 8th and that as of June 8th she had been off work for only a few days.

On cross examination, Ms. King denied having recorded anything the day that Petitioner was in her office asking for Ibuprofen. She testified that she remembered that it was the beginning of June because it was right before her vacation. She testified that she was off work the very next day after Petitioner asked her for the medication. She testified that she did not know whether Petitioner worked after that interaction.

On rebuttal, Petitioner testified that he did not remember asking Ms. King for Ibuprofen a few days before the accident. He testified that he was in that office all the time. He testified that he had asked Ms. King for Ibuprofen before because he had a headache every now and then, but that it was not because of his back. He denied doing any roofing in June of 2015 and testified that he did not have any equipment to do any roofing. When asked whether he did any roofing at all in 2015, Petitioner responded that he did not and then testified that in November of 2015 he did a tear off and replacement on a flat roof. He testified that he did this after he had returned to work. He testified that it was the week before Thanksgiving, that there was a big snow and that he only had two days to complete the project. He denied doing any other roofing in 2015 and testified that he was "getting too old for that."

The Employer's Physical Demand Analysis was entered into evidence at the time of arbitration as Petitioner's Exhibit 1.

The State of Illinois January 15, 2016 Form 10-999 was entered into evidence at the time of arbitration as Petitioner's Exhibit 2. The document noted that Petitioner earned $19,444.49 in wages, tips and other compensation in 2015. (PX2).

The medical records of Olin Take Care Clinic were entered into evidence at the time of arbitration as Petitioner's Exhibit 3. The records reflect that Petitioner was seen by the nurse practitioner on June 8, 2015 at 8:43 a.m., at which time it was noted that he stated that he was at work and about 3:15 a.m. bent over to pick up a flag out of a box and felt a "pop" in his lower back with some pain. It was noted that Petitioner told his supervisor, C. Mix, and then went to lunch. It was noted that when Petitioner stood up his pain had increased in the lower back and that he went to Alton Memorial Hospital per the fire department. It was noted that Petitioner had no x-ray but that the emergency room physician stated that he needed an MRI but no order was given. It was noted that Petitioner was complaining of pain in the lower back with numbness in the left buttock. The assessment was noted to be that of pain/discomfort. It was noted that Petitioner was given a script for Metaxalone as needed for back spasm and that he was to be off work that day. The entry further noted that Petitioner reported to medical after injuring his lower back at work. It was noted that Petitioner stated that the metal flags tube dropped down and that he bent over, picked up two flags weighing approximately 3 pounds each and felt a pop in his lower back. It was noted that Petitioner reported the injury and went to lunch and that when he stood up, the pain had increased in his lower back and he asked to go the emergency room. It was noted that Petitioner denied previous back injury, that he stated that the left buttock felt numb, that he could feel light touch and that it just felt "funny." It was noted that Petitioner denied changes in his bowels or bladder functioning, that there was no weakness in his legs and that there was no radiating pain down his legs. The assessment was noted to be that of a lumbar strain. Petitioner was ordered to take Metaxalone for spasm and pain. It was noted that Petitioner was inquiring about an MRI of his lower back and stated that he was concerned about his SI joint on the left. It was noted that Petitioner was reassured that he had no radicular symptoms and that he should recover. It was noted that Petitioner stated that he would go ahead and get an MRI either way. (PX3).

The records of Olin Take Care Clinic reflect that Petitioner was seen on June 9, 2015 at 1:29 p.m., at which time it was noted that he stated that he had the MRI done and was going to see his doctor at 4:00 p.m. It was noted that Petitioner stated that he was supposed to be on midnights but that he could not work like this and that it was easier to stand. It was noted that Petitioner's gait was slow and guarded and that he sat in a chair but needed assistance getting up. The assessment was that of health seeking behaviors. At the time of the June 10, 2015 visit, it was noted that Petitioner had seen Dr. Genova and had a release stating that he was off work from June 8, 2015 to June 15, 2015 when he would be re-evaluated. It was noted that Petitioner stated that he was given pain medications and steroids and that he had an MRI and was told that he had a bulging disc at L3-4 and a torn disc at L5. It was noted that Petitioner was complaining of mid and lower back pain with numbness in the left hip. The assessment was noted to be that of pain/discomfort. At the time of the June 15, 2015 visit, it was noted that Petitioner stated that he saw Dr. Genova on June 12, 2015 and that he had a release stating that he was to be referred to Dr. Kennedy and to remain off work until evaluated by him. It was noted that Petitioner was complaining of low back pain and numbness in the left leg and that he was walking with a walker given to him by Dr. Genova. The assessment was noted to be that of pain/discomfort. (PX3).

The records of Olin Take Care Clinic reflect that Petitioner was seen on June 25, 2015, at which time it was noted that he stated that he wanted to bring in his papers, that he got approval for a walker and a cane and that his physician wrote a script for a muscle relaxer but that he had to put it on his insurance. It was noted that Petitioner was scheduled to see a neurologist on the 21st and that he was to see Dr. Genova again on the 10th. It was noted that Petitioner had a slip from Dr. Genova dated June 16, 2015 stating that he was unable to return to work until all treatment was finished and he was cleared by all physicians involved. It was noted that Petitioner also had orders for a walker for acute back pain and an order for a cane with a rotating end. The assessment was noted to be that of health seeking behaviors. (PX3).

The medical records of Alton Memorial Hospital were entered into evidence at the time of arbitration as Petitioner's Exhibit 4. The records reflect that Petitioner was seen on June 8, 2015, at which time it was noted that he presented complaining of pain in the left low back and that the pain was due to heavy lifting. It was noted that Petitioner was complaining of left low back pain after feeling a pop when standing up at work when picking up heavy equipment about an hour ago. It was noted that Petitioner's pain was rated 8/10 and that the left side of his butt was numb. The diagnosis was noted to be that of back pain. Petitioner was instructed to follow-up with his worker's compensation physician for further evaluation and that he was aware that MRIs were not available through the emergency room. (PX4).

The medical records of St. Luke's Hospital were entered into evidence at the time of arbitration as Petitioner's Exhibit 5. The records reflect that Petitioner underwent an MRI of the lumbar spine on June 8, 2015, which was interpreted as revealing degenerative disc and joint disease in the lumbar spine as described; at L3-L4 there is moderate spinal canal stenosis with mild bilateral foraminal narrowing; at L4-L5 there is mild spinal canal stenosis with mild bilateral foraminal narrowing. (PX5).

The medical records of Dr. Gregory Genova were entered into evidence at the time of arbitration as Petitioner's Exhibit 6. The records reflect that Petitioner was seen on June 9, 2015, at which time he reported that he bent over at work to pick up a metal flag and felt a pop in his lower back. It was noted that the pain became progressively worse with numbness in his left buttock and increased pain of his lower back and that he was seen and given a muscle relaxant, heat and rest. It was noted that Petitioner had trouble with bending, extending, twisting and lateral movement and that he had been taking Ibuprofen without much benefit. It was noted that Petitioner had scheduled an appointment with a back orthopedic surgeon and a pain specialist, and that he had an MRI that showed spinal stenosis, facet arthritis, degenerative disc disease and foraminal narrowing. The assessment was noted to be that of (1) acute low back pain; (2) hypertension. Petitioner was prescribed multiple medications and was instructed to rest and watch his posture and positioning. It was noted that if Petitioner was no better after a week, he would need to see a

specialist. A work slip was issued dated June 9, 2015, excusing Petitioner from work June 8, 2015 through June 15, 2015. (PX6).

The records of Dr. Genova reflect that on June 12, 2015, Petitioner was referred to Dr. Shelton for an evaluation and that he was to remain off work until evaluated by Dr. Shelton. Petitioner was also issued on June 12, 2015 a referral to Dr. Kennedy for an evaluation and that he was instructed to remain off work until evaluated by Dr. Kennedy. At the time of the June 16, 2015 visit, it was noted that Petitioner had ongoing back pain with numbness in his left leg. It was noted that Petitioner had developed a rash consistent with Zoster. It was noted that Petitioner was scheduled to see Dr. Kennedy but it had been postponed until mid-July and that his appointment with Dr. Graven was cancelled by his work. It was noted that Petitioner was scheduled to see another physician through work and that he was walking with a walker. The assessment was noted to be that of (1) acute low back pain; (2) hypertension; (3) shingles. It was noted that Petitioner had shingles so it was hard to determine how much of his pain was related to this or his original injury and that he had definite left SI tenderness. Petitioner was prescribed various medications. A work slip was issued on that date, indicating that Petitioner was unable to return to work until all treatment was finished and he was cleared by all physicians involved. (PX6).

The records of Dr. Genova reflect that Petitioner was seen on July 10, 2015, at which time it was noted that he had ongoing back pain with increased numbness in the left leg. It was noted that Petitioner had developed Zoster and that his rash was in the final stages. It was noted that Petitioner was back to work but sat around not able to resume his job. It was noted that Petitioner could not put on his pants or vest without help nor could he put on his work boots. It was noted that Petitioner continued to have left sacroiliac pain and left lateral and anterior leg numbness. The assessment was noted to be that of (1) acute low back pain; (2) shingles; (3) hypertension. Petitioner was prescribed various medications. At the time of the August 18, 2015 visit, it was noted that Petitioner had been seen in the emergency room at Alton recently with a left groin rash and that he was worried about recurrent shingles. It was noted that Petitioner had improving low back pain, that he was seen by Dr. Kennedy and that he was scheduled to see a pain specialist that week. It was noted that Petitioner still had pain and stiffness that made it difficult to work. The assessment was noted to be that of (1) left low back pain; (2) hypertension; (3) groin rash. Petitioner was prescribed various medications. (PX6).

The records of Dr. Genova reflect that Petitioner was seen on October 19, 2015, at which time it was noted that he was finishing up physical therapy and had had good recovery with minimal pain. It was noted that Petitioner was able to lift and do more in physical therapy than he would be at work and that he was given the go-ahead to return to work by his back pain specialist. It was noted that Petitioner had received an epidural injection and that he continued to smoke. The assessment was noted to be that of (1) essential hypertension; (2) radiculopathy, lumbar region. It was noted that Petitioner was able to return to work on October 21st. A Return to School/Work slip was issued on that date, noted that Petitioner had been seen on October 19, 2015, that the dates he missed school/work were that of June 8, 2015 through October 20, 2015 and that he could return to work on or after October 21, 2015 with no restrictions. (PX6).

The medical records of Dr. David Kennedy were entered into evidence at the time of arbitration as Petitioner's Exhibit 7. The records reflect that Petitioner was seen on July 21, 2015, at which time it was noted that he was involved in a work-related injury on May 8, 2015. It was noted that Petitioner was reaching down to pick something up at work and while bending felt a popping sensation with immediate onset of pain in the left lower lumbar area with intermittent radiation into the buttocks and groin area. It was noted that occasionally this would extend into the posterolateral thigh to about the level of the knee with numbness in a similar distribution. It was noted that Petitioner had not had any prior problems with his lumbar spine and that he had not had any treatment yet. The diagnostic impression was noted to be that of lumbar strain with associated focal tenderness. Petitioner was recommended to undergo trigger point injections followed by physical therapy and that this was not likely to need operative intervention. It was noted that Petitioner should not lift more than 15 pounds, no bending, twisting or stooping and that he

should be able to stand and stretch every 15-30 minutes as well as alternate walking, sitting and standing intermittently. It was noted that Dr. Kennedy attributed Petitioner's symptoms and need for treatment directly to the work-related injury of May 8, 2015. (PX7).

The medical records of Dr. Chad Shelton/Physicians Pain Services were entered into evidence at the time of arbitration as Petitioner's Exhibit 8. The records reflect that Petitioner was seen on August 21, 2015, at which time it was noted that he reported low back pain that was primarily in the midline and that the pain had been present for the past three months. It was noted that the pain began following an injury when he bent over to pick up an object. It was noted that radiation occurred to the left lower extremity and radiation into the left lateral thigh predominantly and that associated symptoms included numbness, tingling and weakness. It was noted that Petitioner was there on a referral from Dr. Genova. The assessment was noted to be that of (1) displacement of lumbar intervertebral disc without myelopathy; (2) spinal stenosis of the lumbar region; (3) thoracic or lumbosacral neuritis or radiculitis, unspecified. Petitioner was prescribed medications and given an L3-L4 interlaminar epidural steroid injection. It was noted that Petitioner had pain consistent with spinal stenosis lumbar radicular pain. (PX8).

The records of Dr. Shelton reflect that Petitioner was seen on August 27, 2015, at which time it was noted that he responded quite well to the lumbar epidural steroid injection on the last visit and that he reported initially 100% improvement with some persistently beyond that. It was noted that Petitioner had still had to significantly reduce his activity since his initial injury and had worked himself up to full activity levels to the level that he was at before the injury. The assessment was noted to be that of (1) displacement of lumbar intervertebral disc without myelopathy; (2) spinal stenosis of lumbar region; (3) thoracic or lumbosacral neuritis or radiculitis, unspecified. It was noted that Petitioner was doing quite well currently and that Dr. Shelton thought it was reasonable for him to go ahead with physical therapy. Petitioner was referred to physical therapy. A work slip was issued on that date, excusing Petitioner from work until physical therapy had been completed. (PX8).

The records of Dr. Shelton reflect that Petitioner was seen on September 18, 2015, at which time it was noted that he stated that his pain was resolved after his epidural steroid injection. It was noted that Petitioner was continuing to work with physical therapy and seemed to be improving, that he had two more sessions left and that he still required some occasional Hydromorphone for pain but had reduced his usage down to just two tablets per day. It was noted that Petitioner felt he was improved significantly and would like to consider returning to work after he completed his physical therapy. The assessment was noted to be that of (1) displacement of lumbar intervertebral disc without myelopathy; (2) spinal stenosis of lumbar region; (3) thoracic or lumbosacral neuritis or radiculitis, unspecified. It was noted that Petitioner would be continued on his medical regimen and that a discussion was had regarding the importance of weaning himself back on the medications. It was noted that Petitioner was going to complete physical therapy and was planning on returning to work as tolerated at that point. At the time of the October 16, 2015 visit, it was noted that Petitioner stated that he was doing much better and would like to return to work although he still had some occasional soreness that was quite bothersome to him. The assessment was noted to be that of (1) radiculopathy, lumbar region; (2) other intervertebral disc displacement, lumbar region; (3) spinal stenosis, lumbar region. It was noted that a discussion was had regarding Petitioner trying to cut back on the medication as tolerated because physical dependence was a concern was limited long-term efficacy. It was noted that Petitioner felt that he was able to return to work with full function as he did not report any radiating leg pain, numbness or weakness at that point. A work slip was issued on that date, allowing Petitioner to return to work October 21, 2015 without restrictions. (PX8).

The medical records of SSM Physical Therapy were entered into evidence at the time of arbitration as Petitioner's Exhibit 9. The records reflect that Petitioner underwent physical therapy for the timeframe of September 2, 2015 through September 24, 2015. At the time of the Initial Evaluation, it was noted that Petitioner was doing full duty, full time work at Olin which involved lifting metal flags (12-16 inches long, 1 pound each) constantly throughout the day. It was noted that Olin paid worker's compensation initially

after the injury, that Petitioner returned to work for two weeks on light duty and that on July 21st Petitioner was seen by the neurosurgeon and was not cleared to return to work. It was noted that Petitioner applied for short-term disability at the end of August and that it was approved, but that he had not received a paycheck yet. It was noted that Petitioner required increased time with all daily activities, especially bending forward, and that he was not lifting anything over 5 pounds. It was noted that Petitioner used a straight cane for going out in the community to walk longer distances and that he used a unilateral handrail and increased time for stair climbing. It was noted that Petitioner's chief complaint was that of low back soreness, stiffness and tenderness and that his pain was 0/10 currently. It was noted that prior to the injection two weeks ago, prolonged sitting and walking aggravated his symptoms. It was noted that Petitioner noticed stiffness after prolonged sitting which was relieved quickly with getting up and walking around and that he stated he initially had some numbness/tingling into the left lower extremity after the injury but no longer had any. At the time of the Re-Evaluation on September 24, 2015, it was noted that Petitioner was still not working as he had not yet been released, that he reported no difficulty with activities of daily living or gait and that he stated that he had not had any pain or stiffness in the past few weeks. It was noted that Petitioner requested to place physical therapy on hold until he returned to work in mid-October and did not plan to return to physical therapy unless his low back pain resumed. The Discharge Summary dated October 27, 2015 noted that Petitioner completed his current program and that his goals were met. (PX9).

The transcript of the deposition of Dr. Chad Shelton was entered into evidence at the time of arbitration as Petitioner's Exhibit 10. Dr. Shelton testified that he is an anesthesiologist, that he has a subspecialty in pain medicine and that he is board-certified. He testified that approximately 70% of his practice was low back pain. (PX10).

Dr. Shelton testified that he initially saw Petitioner on August 21, 2015 and that he was referred to him by his primary care physician, Dr. Genova. He testified that Petitioner stated that he was at work and was picking things up, that he had a pop and onset of pain which persisted, and that he had a lot of pain in his left thigh which he believed was above the knee. He testified that Petitioner stated that he had not had anything like that before in his life and was pretty distraught and concerned and had trouble ambulating. He testified that Petitioner had been prescribed Hydromorphone prior to his seeing him. He testified that Petitioner's pain was more on the left side which correlated to the left leg pain that he was having, so usually that meant that something was irritating a nerve on the left side. He testified that Petitioner had a little bit of weakness to extending his knee as compared to the right. He testified that the MRI findings at L3-4 was most likely the area that accounted for the complaints Petitioner had because it was the worst on MRI, that it fit with the symptoms he had and that it fit with the physical examination. He testified that it was possible that an individual could be asymptomatic and have the same findings on MRI and that, to his knowledge, Petitioner was asymptomatic before the lifting incident that reported. He further testified that the diagnosis that he made was that of lumbar radiculopathy. (PX10).

When given a hypothetical question asking him to assume Petitioner was employed by Global Brass since November of 2005, that in June of 2015 Petitioner's job, among other duties, required him to lift 0-10 pounds about 2/3 or more of his time working, that it required him to lift 11-20 pounds 2/3 or more of his time working and that it required him to lift 21-100 pounds up to ½ of his time working, that as part of his job Petitioner was required to bend over and pick up metal flags weighing approximately 1-2 pounds each on occasion and that when his job required that task 3-4 times per day he was required to bend over and pick up 6-10 flags an hour (amounting to 18-40 flags per shift per machine unit he was servicing and that he would service approximately 6 units, which amounted to him bending over and picking up about 100-240 flags per shift) and that while working at his job on or about June 8, 2015 Petitioner bent over to pick up a flag out of a box and felt a pop in his low back, stood up and had an immediate increase in low back pain, Dr. Shelton testified that he believed that the activities were the cause of the onset of symptoms that he treated. (PX10).

Dr. Shelton testified that the treatment plan as of August 21st was to proceed with an epidural steroid injection at the L3-4 level. He testified that he thought that Petitioner was off work at the time. He testified that he saw Petitioner again on August 27th and that he reported that the epidural steroid injection had helped. He testified that Petitioner did not trust himself to get back to his regular activity level because of fear of re-injury and that he was referred to physical therapy at that time, which he underwent at SSM Physical Therapy. He testified that when he saw Petitioner on September 18, 2015, he indicated that he wanted to consider returning to work and that he recommended that he complete his physical therapy to increase his tolerance. He testified that he last saw Petitioner on October 16, 2015, at which time he was doing well and that they needed to get him off the medication. He testified that Petitioner again voice a desire to return to work so he was released from his care on October 16, 2015 and was allowed to return to work without restrictions on October 21, 2015. (PX10).

Dr. Shelton testified that the treatment he provided Petitioner, including the physical therapy, was reasonable and necessary to cure and relieve the effects of his June 8, 2015 work injury. He testified that Petitioner was a good patient and seemed to be consistent with his pain complaints. He testified that he saw no signs of symptom magnification or malingering and that Petitioner appeared to be motivated to return to work. (PX10).

On cross examination, Dr. Shelton agreed that it was not in his notes that Petitioner picked up an object at work and that his back popped. He agreed that he did not know the weight of the object nor did he know the frequency with which Petitioner needed to pick up objects throughout the day. He agreed that Petitioner never made any representations to him that he had to do repetitive bending at work. (PX10).

On cross examination, Dr. Shelton testified that he saw the MRI films and that from what he could tell, the symptom-generating level was L3-4. He agreed that he could not date the fissure at L5-S1. He agreed that it could have been asymptomatic at the time that he first examined Petitioner and that L3-4 could have been asymptomatic as well. He testified that there was some stenosis at L4-5 and that some degree of the stenosis likely pre-dated the event of June 8, 2015. (PX10).

On cross examination, Dr. Shelton agreed that part of the reason that he ordered the physical therapy was to improve Petitioner's core strength and that his core strength was not exceptional at least as of the time of his examination. He denied knowing whether he had a copy of any off work slip that was issued at the time of the first visit, but that he would make mention in his progress note that he was taking him off work. He testified that he did not think that Petitioner was working at that time. He testified that he typically makes a copy of any work slips written and keeps it in his chart. (PX10).

On cross examination, Dr. Shelton agreed that when Petitioner returned after the epidural on August 27, 2015, he reported significant improvement in his symptoms. He testified that Petitioner basically said that it initially took his pain away completely but he was still significantly reduced in his ability to function. He agreed that he ordered physical therapy for a period of 4-6 weeks and that he kept Petitioner off work at that point given his note. He agreed that keeping Petitioner off work had a component of patient-direction, but testified that he would encourage his patient to at least complete physical therapy after an injury like this before they went back to work so that they were taught the proper way to go forward with their occupational activities. (PX10).

On cross examination, Dr. Shelton testified that if Petitioner had an off work slip at the September 18, 2015 exam, he certainly would have turned it in to his employer. He testified that he believed that Petitioner was going to return to work as tolerated at that point. He testified that he saw Petitioner one more time in October, which was the last visit. He testified that at the September visit, Petitioner was going to return to work after he finished physical therapy. He agreed that from a medical standpoint, it would have been acceptable to him for Petitioner to go back to work as soon as his physical therapy was over as long as he was better. (PX10).

On cross examination, Dr. Shelton agreed that Petitioner was released on October 16, 2015 and that he seemed to have responded well to treatment. He agreed that Petitioner has not returned. (PX10).

On redirect, Dr. Shelton agreed that the history contained in the company medical department note of June 8, 2015 which referenced that Petitioner bent over to pick up a flag out of a box and felt a pop in his lower back with some pain was consistent with the history that he took. He testified that an annular fissure was the same thing as an annular tear. He testified that it was possible that the annular tear could have been aggravated by the history of accident given by Petitioner or the hypothetical scenario posed by Petitioner's attorney. He testified that the same was true for the stenosis that was revealed on the MRI. (PX10).

The Medical Bills Exhibit was entered into evidence at the time of arbitration as Petitioner's Exhibit 11.

The Photograph of a Weighed Flag was entered into evidence at the time of arbitration as Respondent's Exhibit 1. The photograph reflects that the single flag featured in the photograph weighed 1.1595 pounds. (RX1).

The medical records of Dr. Genova (June 24, 2011 through June 6, 2015) were entered into evidence at the time of arbitration as Respondent's Exhibit 2.[1] The records reflect that Petitioner was seen on June 24, 2011 to establish as a new patient. It was noted that Petitioner denied back pain but admitted to having joint pain. It was noted that Petitioner had degenerative joint disease in his knees. At the time of the June 25, 2012 visit, it was noted that Petitioner reported back pain. At the time of the September 13, 2013 visit, it was noted that Petitioner denied back pain. At the time of the January 30, 2015 visit, it was noted that Petitioner denied back pain. (RX2).

CONCLUSIONS OF LAW

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

The Arbitrator finds that Petitioner failed to prove that he sustained accidental injuries that arose out of and in the course of his employment with Respondent on June 8, 2015, and that his current condition of ill-being is causally related to his work activities.

In so concluding that Petitioner failed to prove that he sustained accidental injuries that arose out of and in the course of his employment with Respondent, the Arbitrator notes that Petitioner occasionally needed to bend to retrieve flags and that it seemed to be a sporadic assignment. In fact, Angela King testified that Petitioner was not even required to pick up flags, but rather could do it if he chose to do so. Furthermore, the physical demand analysis entered into evidence as Petitioner's Exhibit 1 stated that Petitioner's position required 80% of the time driving a tractor and only occasional bending and stooping at the waist. (PX1). The Arbitrator finds that these job duties were supported by Angela King's testimony that Petitioner would only pick up flags and run buckets for the back scale because he did not like staying on the tractor all the time and liked to get up and move around.

The Arbitrator further notes the causal connection opinion offered by Dr. Shelton appears not to be based upon a repetitive trauma theory of recovery but rather that of single event of picking up a flag, thereby causing the onset of symptoms. Dr. Shelton testified on cross examination that Petitioner never made any representations that he had to do repetitive bending at work and he further admitted that he had no idea how

[1] Any markings made in the exhibit were not made by the Arbitrator.

often Petitioner would pick up objects throughout the day. (PX10). That said, the Arbitrator finds the foundation on which Dr. Shelton's causation opinion was based to be questionable.

Furthermore, the Arbitrator notes that the metal flags do not appear heavy enough to create any type of risk of a back injury even if Petitioner were pursuing a specific trauma claim. The weight of a sample flag was proven to be 1.15 pounds pursuant to Respondent's Exhibit 1 and even Petitioner testified that the flags weighed anywhere between 1-3 pounds each. (RX1). Furthermore, Ms. King testified that she believed that the flags weighed up to 1 pound each.

Perhaps most significantly in this case, the Arbitrator admittedly questions Petitioner's credibility and the fact that the accident even occurred as testified to by Petitioner. Petitioner claims Mark Langley witnessed the accident, but the Arbitrator notes that he was not present to testify as a witness at the time of arbitration to support Petitioner's version of events. Additionally, the Olin Take Care Clinic records of June 8, 2015 noted that Petitioner told his supervisor, C. Mix, and then went to lunch, which the Arbitrator finds to be odd given the purported severity of pain as testified to by Petitioner at the time of arbitration. (PX3). Moreover, Angela King testified that Petitioner sought Tylenol or Ibuprofen because of a roofing job shortly before the alleged date of accident. Petitioner denied doing any roofing jobs in June of 2015 and testified that he did not have any equipment to do any roofing. When asked whether he did any roofing at all in 2015, Petitioner responded that he did not and then changed his testimony and stated that in November of 2015, he did a tear off and replacement on a flat roof. This specific change in testimony causes the Arbitrator to place little evidentiary weight on Petitioner's testimony, particularly in light of his admission that he continued to work – and be paid -- as a caregiver for a disabled individual while he was actively treating with Dr. Shelton.

Based upon the foregoing and the record as a whole, the Arbitrator concludes that Petitioner has failed to prove that he sustained accidental injuries that arose out of and in the course of his employment with Respondent on June 8, 2015 and that his current condition of ill-being is causally related to his work activities. All benefits are denied. The remaining issues of medical bills, temporary total disability benefits and nature and extent of the injury are moot, and the Arbitrator makes no conclusions as to those issues.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jeremy McBride,
Petitioner,

vs.

NO: 15WC 20593

SOI - Department of Corrections,
Respondent.

18IWCC0658

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 April 9, 2018 is hereby affirmed and adopted.

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

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

No bond or summons required for State of Illinois cases.

OCT 30 2018

DATED:
d101618
KWL/jrc
042

Kevin W. Lamborn

Michael J. Brennan

18IWCC0658

DISSENT

I believe that the Arbitrator woefully undervalued the extent of Petitioner's permanent disability – necessitating surgery in the form of an anterior decompression and lumbar fusion at L5-S1 with 14 mm x 26 mm LT cages, large kit BMP and crushed allograft – and would instead find that Petitioner sustained permanent partial disability to the extent of 25% person-as-a-whole pursuant to §8(d)2 of the Act. And while I recognize that as a State of Illinois case this matter will go no further than this tribunal, I felt the need to point out the inadequacy of this award.

Therefore, I respectfully dissent.

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

McBRIDE, JEREMY
Employee/Petitioner

Case# **15WC020593**

DEPT OF CORRECTIONS
Employer/Respondent

18IWCC0658

On 4/9/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.90% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

3067 KIRKPATRICK LAW OFFICES PC
ERIC KIRKPATRICK
#3 EXECUTIVE WOODS CT STE 100
BELLEVILLE, IL 62226

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

0558 ASSISTANT ATTORNEY GENERAL
AARON L WRIGHT
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

1350 CENTRAL MANAGEMENT SERVICESS
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

APR 9 - 2018

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

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

Jeremy McBride
Employee/Petitioner

v.

Department of Corrections
Employer/Respondent

Case # **15** WC **20593**

Consolidated cases: **N/A**

18IWCC0658

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **February 8, 2018**. By stipulation, the parties agree:

On the date of accident, **3/6/14**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**61943.00**, and the average weekly wage was $**1,191.21**.

At the time of injury, Petitioner was **37** years of age, ***married*** with **4** dependent child.

Necessary medical services and temporary compensation benefits have been provided by Respondent. The parties have stipulated that Respondent has paid or will pay the medical bills included in Petitioner's Exhibit 2 pursuant to the Medical Fee Schedule and that Respondent should receive credit for any medical bills paid by its group medical plan for which credit is allowed under Section 8(j) of the Act and shall hold Petitioner harmless from same.

Respondent shall be given a credit of $**23,711.92** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**23,711.92**.

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner the sum of **$714.72/week** for a further period of **87.5 weeks,** as provided in Section **8(d)2** of the Act, because the injuries sustained caused **17.5% loss of a person as a whole.**

Respondent shall pay Petitioner compensation that has accrued from **3/6/14** through **2/8/18**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Nancy Lindsay
Signature of Arbitrator

April 3, 2018
Date

Jeremy McBride v Department of Corrections,
15WC 20593

Findings of Fact and Conclusions of Law

The Arbitrator finds:

Petitioner's case proceeded to arbitration on the sole issue of the nature and extent of Petitioner's injury to his low back.[1]

Petitioner worked as a correctional officer for Respondent. On March 6, 2014 he helped lift a disabled inmate out of a car and experienced pain in his low back that did not subside with conservative treatment

Petitioner was examined by orthopedic surgeon, Dr. Matthew Gornet, on November 5, 2015. This visit was a follow-up visit for a completely unrelated cervical spine surgery of over a decade ago. At this visit Petitioner complained of low back pain, particularly on the right side, along with intermittent buttock, hip and right leg pain. Dr. Gornet noted Petitioner already had an MRI ordered by his primary care physician. He recorded there had been no intervening slips, falls, or other trauma. Dr. Gornet noted the MRI of 6/5/15 revealed a large central herniation with a right-sided annular tear at L5-S1 which correlated with his symptoms. All other levels, "appear to be clean." Dr. Gornet recommended a course of physical therapy and one injection on the right to be performed by Dr. Boutwell. If there was no improvement consideration could be given for further treatment. On an unrelated matter, he also mentioned referring him for a CT scan of the neck.

Petitioner underwent a right-sided L5-S1 epidural space injection procedure performed by Dr. Boutwell on 11/5/15. He then returned to Dr. Gornet on 1/21/16. Petitioner reported he was able to tolerate his symptoms but at times it would be so severe he was not able to stand it. Dr. Gornet recommended a new MRI. Dr. Gornet requested Petitioner to inventory his symptoms for his next follow-up visit.

Petitioner returned on 3/31/16 at which time Dr. Gornet reported the MRI scan of that date revealed a central large herniation/annular tear. His plan was for Petitioner to undergo a discogram at L4-5 and L5-S1 with MRI spectroscopy at L3-S1. Dr. Gornet's tentative plan was an anterior lumbar fusion L5-S1. The MRI report did list a "Central annular tear at the apex of the central broad-based protrusion with superior and inferior extrusion at the L5-S1 level."

A discogram was performed on 5/3/16 with pertinent findings of a central broad-based protrusion with an associated broad based annular tear at L5-S1. The report noted the protrusion measured up to 8 mm in thickness and results in a moderate central canal stenosis and bilateral lateral recess stenosis. Dr. Gornet summarized it as a provocative disc at L5-S1 with annular tear. Eventually Dr. Gornet performed surgery on 12/6/16 in the form of an anterior decompression

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[1] Dr. Gornet's initial treatment records for this injury reference a cervical injury; however, the attorneys advised the Arbitrator that any cervical treatment was not related to this accident. Rather, Dr. Gornet was referring to earlier treatment.

L5-S1 and an anterior lumbar fusion at L5-S1 with 14 mm X 26 mm LT cases, a large kit of BMP and crushed cancellous allograft.

Petitioner returned for a follow-up visit on 12/19/16. He reported his back pain was doing well but he had some achiness in his hips. Physical exam demonstrated 5/5 strength in all groups. Dr. Gornet recorded he was doing extremely well and the Petitioner was very pleased with his progress. He returned on 1/19/17 doing well. His back, buttock and hip pain were already starting to improve. Dr. Gornet recorded he was doing well clinically. Petitioner was released to full duty work on July 1, 2017.

Petitioner returned to see Dr. Gornet on December 4, 2017 at which time the doctor recorded that Petitioner was doing "exceedingly well." Dr. Gornet released him to work full duty and placed him at MMI.

Petitioner has sought no further treatment for his back since December 4, 2017.

Petitioner's case proceeded to arbitration on February 8, 2018. The sole issue was the nature and extent of his injury. Petitioner was the only witness testifying at the hearing.

Petitioner testified he has worked with the Department of Corrections almost 20 years. Since the accident he has been promoted to Lieutenant.

Petitioner testified to experiencing stiffness in the mornings and has learned to stretch out to relieve it. He further testified that he believes continuing his work-outs and staying in good physical shape have helped prevent symptoms. He notices pain when he fails to work out. Petitioner further testified that he has changed the way in which he lifts, especially the elderly inmates, as he now "staggers" his stance when doing so. When lifting heavy items from the floor he will go down on one knee to lift. Petitioner also testified that he tries to avoid lifting inmates as he did when the accident occurred.

Petitioner testified that he continues to work for Respondent and has been so employed there for almost twenty years. At the time of his accident, he was a Correctional Officer but he has since been promoted to Correctional Lieutenant.

Petitioner further testified that his latest visit with Dr. Gornet went "perfectly." He noted Dr. Gornet indicated that his healing had gone well. Petitioner stated he still had some stiffness in his back and has to do some stretches in the morning. He attempts to avoid bending straight over. He doesn't take any medication for his back. He continues to work out with weights on a regular basis, mainly free weights; however, he avoids some exercises and has learned his limitations.

The Arbitrator concludes:

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." 820 ILCS 305/8.1b(b).

(i) Impairment Rating: The Arbitrator notes that no AMA rating has been offered in this case. Therefore, the Arbitrator gives no weight to this factor.

(ii) Occupation: Petitioner has been employed by Respondent for twenty years. At the time of his accident, he was a Correctional Officer. He has since been promoted to a Correctional Lieutenant. Since returning to work after his surgery, the only change in the manner in which he performs his job duties concerns bending and lifting. He avoids bending straight over at the back and changes his "stance" when lifting from the floor. Petitioner's testimony was very credible and unrebutted by Respondent. The Arbitrator gives great weight to this factor.

(iii) Age: At the time of accident Petitioner was 37 years old. As such, the Arbitrator reasonably infers that Petitioner will live and work with the effects of his injury for a reasonable time into the future. The Arbitrator gives some weight to this factor.

(iv) Earning Capacity: There is no evidence that Petitioner's future earning capacity has been affected by the injury. Therefore, the Arbitrator gives no weight to this factor.

(v) Disability as corroborated by the treating medical records: As a result of his accidental injury, Petitioner sustained an injury to his lumbar spine resulting in a fusion at the L5-S1 level. When last seen by Dr. Gornet, he was doing "exceedingly well." Petitioner's testimony about his ongoing symptoms, limitations, and alterations in activities was generally credible. While not wholly corroborated by the treating records, especially the last office note with Dr. Gornet, Petitioner's ongoing symptoms and changes are not necessarily amenable to further treatment; rather, they are understandable consequences of the treatment, including surgery, he has received to his low back as a result of his work-related injury.

Based upon the foregoing, the Arbitrator finds that Petitioner suffered an injury resulting in 17.5% loss of a person as a whole for the injuries to his lumbar spine.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Carl Hughlett,
Petitioner,

vs.

NO: 10WC 27385

18IWCC0659

Center for Comprehensive Services,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical, 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 December 13, 2017 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

OCT 30 2018

DATED:
o101618
MJB/jrc
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HUGHLETT, CARL
Employee/Petitioner

Case# 10WC027385

CENTER FOR COMPREHENSIVE SERVICES
Employer/Respondent

18IWCC0659

On 12/13/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.46% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

1296 CHILTON YAMBERT PORTER LLP
MEGAN A REID
303 W MADISON ST SUITE 2300
CHICAGO, IL 60606

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

Carl Hughlett
Employee/Petitioner

v.

Center for Comprehensive Services
Employer/Respondent

Case # **10** WC **27385**

Consolidated cases: **n/a**

18IWCC0659

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Melinda Rowe-Sullivan**, Arbitrator of the Commission, in the city of **Herrin**, on **November 16, 2017.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **May 19, 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 involving the right foot/ankle that arose out of and in the course of employment, but *did not* sustain an accident involving the left foot/ankle 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.

Per the stipulation of the parties, the average weekly wage was that of **$340.00.**

On the date of accident, Petitioner was **47** years of age, *married* with **2** dependent children.

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

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

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 **$ all amounts paid under group health plan** under Section 8(j) of the Act.

ORDER

Petitioner failed to prove by a preponderance of the evidence that his current condition of ill-being of the right foot/ankle is causally related to the accident on May 19, 2010. All benefits are denied; the remaining issues are moot and the Arbitrator makes no conclusions as to those issues.

Respondent is entitled to a credit for **all amounts paid under group health plan** under Section 8(j) of the Act.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Melinda M. Pace-Gillivan

Signature of Arbitrator

12/11/17

Date

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Carl Hughlett
Employee/Petitioner

Case # 10 WC 27385

v.

Consolidated cases: N/A

Center for Comprehensive Services
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

On May 19, 2010, Petitioner was working as a home health aide for Respondent. Petitioner testified that his job duties required him to assist a client get ready for work in the morning. On this date, Petitioner was in the process of transferring a client from his bed to a wheelchair when the client fell. Petitioner testified that he twisted both ankles. He testified that he called his supervisor and 9-1-1 to get himself to the hospital and to get his client to his job. Petitioner testified that he went to the emergency room and that he was given walking boots for both of his feet, which he wore for almost a year. He testified that he continued to have problems with his right foot after he was taken out of the boot.

Petitioner testified that after he was out of the boot, he continued to have problems with his right foot. He testified that it was hard to walk on that foot because of the way that he fell on it. He testified that he has diabetic shoes for his foot and that he had to have different padded shoes to wear. He testified that when he is having discomfort or pain in his right foot, it is sore and that the more he walks on it the more it hurts. He testified that he has a walker that he uses on occasion. He testified that he also has numbness in addition to swelling every once in a while. He testified that he sometimes soaks his foot.

As for his left foot, Petitioner testified that the problems in his left foot lasted for about a year after he was taken out of the boot. He testified that every now and then he gets tendonitis in the foot and that he gets an electric shock in the foot. He testified that he is able to take Tylenol for the pain but cannot take Advil. Petitioner denied having any problems with either of his feet before the accident and denied even having had occasional soreness.

Petitioner testified that he is no longer working and that he has not worked in five years. He testified that in those five years, he has had other serious health issues including dealing with diabetes and hypertension. He testified that he was bitten by a Rocky Mountain tick and that both of his kidneys shut down. He testified that he "died" three times and was in a coma for 30 days. He testified that is trying to bounce back now and that he has a family to take care of. He testified that because of the multitude of his health problems, he has been approved for SSDI.

On cross examination, Petitioner agreed that he did not have any other injuries to his right or left foot prior to the accident at issue. He denied having sought any treatment for either of his feet prior to the accident. He agreed that at the time of the accident, his primary care physician was Dr. Kupferer. He agreed that he was honest and truthful with Dr. Kupferer and that he wanted to get better. When confronted with medical records from Dr. Kupferer reflecting that he had sought treatment for his right foot six days prior to the accident, Petitioner then agreed that he had sought treatment for his feet with Dr. Kupferer prior

to the date of accident. Petitioner further agreed that he had x-rays at Memorial Hospital on May 13, 2010, just six days before the accident. He agreed that he was diagnosed with diabetes in approximately 1995 and that he has been insulin-dependent since 1995. He further agreed that he was diagnosed with diabetic neuropathy prior to the date of accident.

On cross examination, Petitioner agreed that he was honest and truthful with the emergency room doctors at Memorial Hospital of Carbondale on May 19, 2010. He further agreed that he was honest and truthful with Dr. Wood. He agreed that at the time of the first exam with Dr. Wood on May 25, 2010, he completed a questionnaire. He agreed that his signature appeared at the bottom of Respondent's Exhibit 6 and that his handwriting appeared on the document. He also agreed that he indicated that the body part involved was that of the right foot.

On cross examination, Petitioner agreed that his signature and handwriting appeared on Respondent's Exhibit 7. He agreed that on the front page he indicated a chief complaint of his right foot and that on the pain diagram, he only marked pain in the right foot.

On cross examination, Petitioner agreed that he later developed left foot pain around June 18, 2010 and that he returned to Dr. Wood after he developed left foot pain. He agreed that his handwriting and signature appeared on Respondent's Exhibit 8. He agreed that when asked when the symptoms began, he wrote June 19th and that when asked how it happened, he indicated that it just started.

On cross examination, Petitioner agreed that he continued to treat with Dr. Wood until June 14, 2011 when he was released. He agreed that he has not returned to see Dr. Wood since. He further agreed that he continued to work for Respondent after the full duty release from Dr. Wood.

On cross examination, Petitioner agreed that he presented for an IME with Dr. Schmidt on June 27, 2010 and that he provided him a history of his complaints at that time. He agreed that he presented for second exam with Dr. Schmidt on June 5, 2017. He further agreed that he was honest and truthful with Dr. Schmidt at both examinations.

On cross examination, Petitioner denied having had any other injuries to either foot since June of 2010. He denied having moved to Austin, Texas in 2014. He testified that he had plans to move to work as a preacher but that he did not go. He testified that he has been working as a preacher in southern Illinois and that he has been working as a preacher since 1985.

On redirect, Petitioner agreed that his left foot problems started later than his right foot problems. He testified that after his left foot problems started, he was given a walking boot for the left foot as well.

The medical records of Memorial Hospital of Carbondale were entered into evidence at the time of arbitration as Petitioner's Exhibit 1. The records reflect that Petitioner was seen on May 19, 2010, at which time it was noted that he sustained a right ankle and foot injury while helping a resident from falling. It was noted that Petitioner twisted his right ankle and foot but did not fall and that he stated that he saw Dr. Kupferer two weeks ago for right foot pain and swelling. Petitioner underwent a CT of the right lower extremity on May 19, 2010, which was interpreted as revealing findings most concerning for osteomyelitis involving the distal tarsal bones and the proximal metatarsis, particularly the second, third and fourth proximal metatarsals; there is subchondral lucency/erosion with cortical irregularity and hypertrophic ossification noted involving the dorsal and distal aspects of the tarsal bones with least involvement of the navicular bone; there is cortical erosion and hypertrophic ossification involving the second through fourth metatarsals and to a lesser extent the proximal first metatarsal; there are small non-displaced fractures involving the proximal third and fourth metatarsals with involvement of the articular surfaces; there is diffuse edema over the midfoot and there is a small low density collection deep to the fourth and fifth tarsometatarsal articulations measuring approximately 2 cm transverse by 1.1 cm craniocaudal by

approximately 3 cm AP, which may represent a small abscess. X-rays of the right foot performed on May 19, 2010 were interpreted as revealing (1) periosteal reaction right third and fourth metatarsals; this may represent a stress response or developing stress fracture; (2) there is abnormal widening of the ankle mortise laterally compatible with ligamentous injury and orthopedic consultation is advised; no evidence of right ankle fracture. It was noted that the Emergency Room physician thought that Petitioner's symptoms may be due to Charcot arthropathy. Petitioner was placed in a splint/boot and referred to Dr. Wood. (PX1).

The records of Memorial Hospital of Carbondale reflect that Petitioner was seen on June 16, 2010, at which time it was noted that he was seen for left foot pain that began at about 3:00 on that date. It was noted that Petitioner had been wearing a boot to the right foot and that he denied any injury on that date. Petitioner underwent x-rays of the left foot, which were interpreted as revealing degenerative changes as described; no acute fracture or dislocation; plantar calcaneal spur. It was noted that the Emergency Room physician thought that Petitioner's symptoms may be due to a foot sprain. Petitioner was referred to Dr. Wood. (PX1). A Discharge Summary reflects that Petitioner was discharged on May 22, 2012 for (1) angioedema/anaphylactic reaction; (2) acute respiratory failure secondary to above; (3) possible adverse drug reaction; (4) acute respiratory acidosis; (5) possible dialysis catheter infection; (6) recurrent prophylaxis; (7) acute renal failure on chronic kidney disease, stage 4, requiring hemodialysis; (8) acute liver failure which seems to be improving slowly; (9) obstructive sleep apnea; (10) diabetes mellitus type 2; (11) history of uncontrolled hypertension. Petitioner was seen on August 14, 2012 for hypoglycemia. The Discharge Summary dated June 25, 2012 noted that Petitioner's discharge diagnoses were that of (1) fever, possibly from line sepsis; (2) diabetes mellitus with hypoglycemia at the time of presentation, slight altered mental status currently improved; needs more intense education and close follow-up on blood sugar for strict control and avoid fluctuations; (3) hypertension on three medications, should control blood pressure better with ongoing treatment; (4) recent DRESS (drug rash with eosinophilia and systemic symptoms) on steroid therapy, to continue; (5) recent Rocky Mountain Spotted Fever; (6) anemia, needed blood transfusion; (7) thrombocytopenia; (8) anemia status post blood transfusions three units; (9) avoid nephrotoxic agents and allergies are multiple, specifically DRESS syndrome suspected. (PX1).

The records of Memorial Hospital of Carbondale reflect that Petitioner was seen on May 8, 2012 for vomiting. The clinical impressions were noted to be that of gastroenteritis, febrile illness, right lower lobe pneumonia and hyponatremia. The Discharge Summary dated May 19, 2012 noted that Petitioner's discharge diagnoses were that of (1) acute renal failure on chronic kidney disease requiring hemodialysis; (2) acute liver failure; (3) anaphylactic reaction to allopurinol versus Pravachol; (4) right lower lobe healthcare-associated pneumonia; (5) Type 2 diabetes mellitus; (6) hypertension; (7) obstructive sleep apnea; (8) muscle twitches and cramps secondary to possible allopurinol toxicity; (9) sepsis syndrome. The History and Physical dated May 9, 2012 noted that Petitioner's past medical history was significant for, among other things, diabetes, type 2, insulin dependent, complicated by neuropathy, nephropathy and retinopathy. Petitioner was seen on March 23, 2012 for issues related to shortness of breath. The clinical impressions were noted to be that of (1) chest pain; (2) congestive heart failure; (3) elevated d-dimer. The Discharge Summary dated March 26, 2012 noted that the discharge diagnoses were that of (1) systolic congestive heart failure with ejection fraction of 45%, a new diagnosis; (2) uncontrolled diabetes mellitus secondary to non-compliance with diabetic diet; (3) uncontrolled high blood pressure; (4) obesity; (5) acute and chronic renal failure; (6) diabetic retinopathy; (7) neuropathy; (8) obstructive sleep apnea. (PX1).

The records of Memorial Hospital of Carbondale reflect that Petitioner underwent physical therapy for right midfoot Charcot foot for the timeframe of February 8, 2011 through April 5, 2011. Petitioner cancelled his appointments for therapy on February 16th, February 21st, February 23rd, February 28th, March 24th and April 4th and was a no-show for the March 29th and April 5th visits. The Outpatient Discharge Summary dated April 11, 2011 noted that discharge recommendations were unable to be given because Petitioner stopped attending. (PX1).

The medical records of Fresenius Medical Care were entered into evidence at the time of arbitration as Petitioner's Exhibit 2. The records pertained to treatment for Petitioner's renal-related issues including hemodialysis. (PX2).

The medical records of Southern Orthopedic Associates were entered into evidence at the time of arbitration as Petitioner's Exhibit 3. The records reflect that Petitioner was seen on June 14, 2011 for follow-up for his right foot Charcot process. It was noted that Petitioner had marked reduction in his swelling and erythema. It was noted that a discussion was had regarding the Charcot arthropathy and the risks for ulcerations and infection. Petitioner was recommended to go to an orthotist to create an accommodative orthotic with a tilaminar-type lining to prevent neuotropic ulceration. Petitioner was returned to work full duty. The Carbondale Prosthetic Lab script dated June 14, 2011 noted diagnoses of diabetic neuropathy, type 2 diabetes mellitus and Charcot arthropathy, right foot. Petitioner was recommended accommodative diabetic inserts. (PX3).

The records of Southern Orthopedic Associates reflect that Petitioner was seen on April 28, 2011 for follow-up of his nerve conduction studies of his left upper extremity. It was noted that Petitioner had numbness and tingling in his bilateral lower extremities. Petitioner was noted to desire a neurology consult to rule out anything medically causing some of the numbness and tingling in lieu of nerve conduction studies. Petitioner was seen on February 28, 2011 by Dr. Young, at which time it was noted that he had numbness and tingling in his left small finger that had been present for several months. The assessment was noted to be that of left elbow ulnar neuropathy. Petitioner was seen on January 25, 2011, at which time it was noted that he was seen in follow-up for his right foot. It was noted that since he was last seen, Petitioner had been in the hospital for pneumonia. It was noted that Petitioner's foot was still swollen and that it was a little bit warmer than his other foot. It was noted that Petitioner had some new custom inserts for his shoe and a custom shoe, which seemed to be tolerated well with his foot. It was noted that radiographs demonstrated the Charcot process. It was noted that Petitioner presented for plantar midfoot ulceration and that he needed to keep an eye on it on a regular basis. Petitioner was instructed to stop physical therapy to work on a gentle fitness program with pool exercises and predominantly upper extremity conditioning. (PX3).

The records of Southern Orthopedic Associates reflect that Petitioner was seen on October 14, 2010, at which time it was noted that he was doing better in regards to his right foot. It was noted that Petitioner had some progressive decrease in the swelling in his right foot. It was noted that Petitioner's left foot was a lot better and that he had had some Achilles tendinitis-type symptomatology previously. Petitioner was referred for custom orthotics from Carbondale Orthotics. It was noted that Petitioner had a severe neuropathy and had the Charcot midfoot collapse of the right foot. It was noted that once Petitioner had the orthotics, he would start weaning out of the CAM boots. At the time of the August 31, 2010 visit, it was noted that Petitioner returned in follow-up for his Charcot foot on the right side and that on the left side he had some peroneal tendonitis. It was noted that Petitioner felt that both feet were getting better and that he was using Shorty CAM boots on both sides. The impression was noted to be that of a Charcot arthropathy in the midfoot right foot, improving but not yet ready to come out of the CAM boot; left foot peroneal tendonitis decreasing. Petitioner was recommended weaning into a simple ankle lacer. At the time of the August 5, 2010 visit, it was noted that Petitioner returned in follow-up for his right foot where he had the Charcot arthropathy. It was noted that Petitioner had a sprain-type injury of his left foot and that he was put in a CAM boot for that side. It was noted that Petitioner was much better on the left foot and that he was going to advance out of his CAM boot. It was noted that as to the right foot, Petitioner was doing very well and that he still had not obtained his arch supports for the CAM boot. Petitioner also brought up issues regarding his left upper extremity for which he was referred to Dr. Young. (PX3).

The records of Southern Orthopedic Associates reflect that Petitioner was seen on June 21, 2010, at which time it was noted that he returned early because of increasing pain and discomfort over the lateral aspect of his left foot. It was noted that Petitioner indicated that it began hurting June 19, 2010 and that he

denied any specific injury. It was noted that Petitioner was under treatment for his right foot for a Charcot arthropathy and that he was in a CAM boot on his right. The impression was noted to be that of peroneal tendonitis of the left foot. Petitioner was recommended to try boot immobilization for the left foot and thus he would have two CAM boots. The questionnaire dated June 21, 2010 noted that the chief complaint was that of the left and right, that symptoms began on June 19, 2010, that it affected the side of his left foot and that it just started. The Nurse's Note dated June 17, 2010 noted that Petitioner reported that he went to the emergency room for left foot pain, that he stated that he was having "shocking" sensations and pain that just started in his left foot and that there was no new injury. It was noted that Petitioner stated that it was related to his worker's compensation case on the right foot. (PX3).

The records of Southern Orthopedic Associates reflect that Petitioner was seen on June 8, 2010, at which time he was seen in follow-up for his Charcot midfoot process. It was noted that since he was last seen Petitioner had gotten his Bledsoe diabetic walker but did not like it and that it was very uncomfortable for him to try to wear. It was noted that Petitioner was using his CAM walker once again. Petitioner was recommended to use his CAM walker and to have Carbondale Orthotics look at his Bledsoe and either fix it or take it back. At the time of the May 25, 2010 visit, it was noted that Petitioner was referred from the emergency room and was a patient of Dr. Kupferer. It was noted that Petitioner had about a one month history of pain and discomfort in his right foot and that radiographs demonstrated changes consistent with a midfoot Charcot process in the acute inflammatory phase. It was noted that Petitioner was a non-insulin dependent diabetic and that he stated that he had some known mild neuropathy of his feet. Petitioner was instructed to wear a CAM boot because he had already abandoned the boot that he was placed in by the emergency room. Petitioner was referred to Carbondale Orthotics for a Bledsoe diabetic walker. The Clinic Notes dated May 25, 2010 noted that worker's compensation was pending and that on May 19, 2010 he was transferring a client at CCS to his wheelchair. (PX3).

The medical records of SIH Medical Group were entered into evidence at the time of arbitration as Petitioner's Exhibit 4.[1] The records reflect that Petitioner was seen on June 2, 2014 by an Infectious Disease specialist for ampicillin suppression therapy due to two bouts of Strep agalctiae sepsis of unknown etiology. Petitioner was instructed to continue ampicillin suppression therapy. At the time of the February 11, 2014 visit, Petitioner had complaints of left leg swelling from the ankle to the calf which he stated got worse when his last Lasix dose was decreased. Included within the records was a letter dated June 4, 2013 from Dr. Bobo to Petitioner stating that a CT scan of May 19, 2010 due to an ankle injury showed 3rd and 4th toe fractures with some bone infection and that the later MRIs of April 2013 showed bone fragmentation of the tarso-metatarsal areas that were more compatible with neuropathic joint from diabetes. A telephone message dated May 28, 2013 noted that Petitioner called in regarding a letter he needed along with proof of MRI for his lawyer. Also included within the records was a Consultation Report dated May 14, 2013 which noted that Petitioner was a patient of Infectious Disease who was being treated for tricuspid valve endocarditis in the setting of beta strep group B bacteremia and foot cellulitis from an April admission. It was noted that Petitioner had right foot at Charcot's joint tendon tears and myositis by MRI, but no osteomyelitis in the foot or ankle. It was noted that Petitioner was a 49-year-old male with stigmata of poorly controlled diabetes including diabetic neuropathy and the bone and joint changes in the right foot, admitted with severe right calf pain. Petitioner was referred to Dr. Pfalzgraf, a rheumatologist. It was noted that there was sclerosis of the second toe shaft of the right foot which could be osteomyelitis; a nuclear medicine abscess localization study was ordered to rule out osteomyelitis. Petitioner underwent nuclear medicine imaging on May 15, 2013 for a diagnosis of right leg cellulitis, which was interpreted as revealing no scintigraphic evidence of acute or chronic osteomyelitis. Petitioner underwent x-rays of the right foot at St. Joseph Memorial Hospital on May 13, 2010, which were interpreted as revealing no acute fracture; slight hallux valgus with medial soft tissue swelling/bunion; ostoarthrosis; tarsometatarsal degenerative arthrosis/osteoarthrosis; generalized soft tissue swelling; plantar calcaneal spur; appearance of pes planus

[1] The Arbitrator did not make any markings that appear in the exhibit.

with loss of normal plantar arch on this non-weight bearing examination. Petitioner also underwent x-rays of the right calcaneus at St. Joseph Memorial Hospital on May 13, 2010, which were interpreted as revealing no acute fracture calcaneus; prominent plantar calcaneal spurring; degenerative arthrosis/osteoarthrosis. (PX4).

Included within the records of SIH Medical Group was an interpretive report for x-rays of the right ankle performed on April 25, 2013 at Memorial Hospital of Carbondale, which were interpreted as revealing no definite acute abnormality within this complicated setting; findings most consistent with relatively severe neuropathic arthropathy. Petitioner underwent an MRI of the right foot on April 28, 2013 at Memorial Hospital of Carbondale, which was interpreted as revealing (1) marked degenerative changes involving the midfoot with subluxation and osseous fragmentation at the tarsometatarsal and intertarsal articulations most compatible with a neuropathic joint; no overlying skin ulcer to suggest acute osteomyelitis/contiguous spread of infection; old injury of the Lisfranc ligament with abnormal subluxation of the metatarsal bases; (2) subcutaneous edema along the dorsal aspect of the midfoot and forefoot which is nonspecific but may represent cellulitis; no evidence of a drainable abscess or focal skin ulcer; no evidence of acute osteomyelitis; (3) less pronounced osteoarthrosis involving the metatarsophalangeal and interphalangeal joints; (4) tendinosis with superimposed tear involving the distal portion of the peroneus longus tendon; (5) diabetic muscle change/infarct. (PX4).

Included within the records of SIH Medical Group was an interpretive report for x-rays of the right lower leg performed on May 13, 2013 at Memorial Hospital of Carbondale, which were interpreted as revealing soft tissue swelling; no new fracture or other acute osseous abnormality; findings of the tarsal bones and tarsometatarsal joints are consistent with diabetic neurotrophic arthropathy. Petitioner underwent x-rays of the right foot on May 14, 2013 at Memorial Hospital of Carbondale, which were interpreted as revealing (1) findings consistent with diabetic neurotrophic arthropathy; (2) sclerosis of the second metatarsal bone concerning for chronic osteomyelitis. Petitioner underwent a CT of the right lower extremity on May 22, 2013 at Memorial Hospital of Carbondale, which was interpreted as revealing, among other issues, redemonstration of severe irregularity of the bones of the forefoot as well as their articulations, with sclerotic margins which are severely irregular; this appearance suggests severe neuropathic arthropathy. (PX4).

The records of SIH Medical Group reflect that Petitioner was seen on May 13, 2013, at which time it was noted that he was following up from hospitalization in late April, where he had CAP, bacteremia with Strep agalactiae and tricuspid valve endocarditis. It was noted that Petitioner also complained of sudden onset of right calf pain and swelling over the past two days and that he did not cite trauma or insect bite. The assessment was noted to be that of chronic tendon tears of the right ankle and foot, among other issues. (PX4).

The medical records of Barnes Jewish Hospital were entered into evidence at the time of arbitration as Petitioner's Exhibit 5. The records reflect that Petitioner underwent a History and Physical on May 22, 2012, which noted a chief complaint of OSH transfer for angioedema. (PX5).

The Medical Bills Exhibit was entered into evidence at the time of arbitration as Petitioner's Exhibit 6.

The Illinois Form 45 was entered into evidence at the time of arbitration as Respondent's Exhibit 1. The Form 45 noted a date of accident of May 19, 2010 at 9:45 a.m., that Petitioner stated that he had a bone spur in his right foot which was already painful and bothering him and that while transporting a client from the bed to a wheelchair the client began to fall back and that Petitioner ended up twisting his right ankle while supporting the client. (RX1).

The medical records of Dr. Thomas Kupferer were entered into evidence at the time of arbitration as Respondent's Exhibit 2. The records reflect that Petitioner was seen on July 28, 2010 for left hand pain and weakness. At the time of the May 13, 2010 visit, it was noted that Petitioner was seen for right foot pain. It was noted that Petitioner was told that it was a bone spur but that it was hurting and swelling worse. It was noted that Petitioner's glucose was running in the 200's. It was noted that Petitioner complained of a swollen and tender right foot and that he had seen a podiatrist. The assessment was noted to be that of diabetic neuropathy and foot pain, among other issues. Petitioner was instructed to undergo x-rays of the foot, ankle and heel. Petitioner was also instructed to increase his Lyrica. At the time of the February 3, 2010 visit, it was noted that Petitioner's diabetes mellitus was uncontrolled. At the time of the January 25, 2010 visit, it was noted that Petitioner's diabetes mellitus was not controlled. It was also noted that Petitioner complained of pain and swelling of the right ankle and that he denied any known injury. At the time of the December 23, 2009 visit, it was noted that Petitioner's glucose levels had been high. At the time of the August 31, 2009 visit, it was noted that Petitioner was seeing the foot doctor the next day for pain in his feet. (RX2).

The records of Dr. Kupferer reflect that Petitioner was seen on April 28, 2009, at which time it was noted that his blood sugar was 500 the day before and that he had numbness in his feet, among other issues. At the time of the November 11, 2008 visit, it was noted that Petitioner had a history of peripheral neuropathy and had been placed on Gabapentin. At the time of the August 11, 2008 visit, it was noted that Petitioner had diabetic neuropathy and that Lyrica worked well. At the time of the July 7, 2008 visit, Petitioner was seen in follow-up for his diabetes, among other issues. At the time of the June 24, 2008 visit, it was noted that Petitioner was experiencing numbness in his feet and hands. (RX2).

Included within the records of Dr. Kupferer was an interpretive report for x-rays of the right foot performed on January 26, 2010 at Memorial Hospital of Carbondale, which were interpreted as revealing mild soft tissue swelling along dorsum midfoot; no underlying fracture or lytic process seen; minimal spurring dorsum midfoot and along posterior plantar aspects os calcis; early bunion formation distal first metatarsal. X-rays of the right ankle were also performed on the same date, which were interpreted as revealing mild diffuse soft tissue swelling about the right ankle with no acute fracture or dislocation. (RX2).

The IME report of Dr. Gary Schmidt dated July 29, 2010 was entered into evidence at the time of arbitration as Respondent's Exhibit 3. The report reflects that Petitioner was seen for an IME on July 29, 2010, at which time he reported that he injured his feet and ankles on May 19, 2010 when he was helping a client that he estimated weighed 381 pounds. It was noted that the client was being transferred from bed into a chair and that during this transfer, the client lost his balance and fell. It was noted that Petitioner claimed that he grabbed the client and pulled him towards him and fell back against the bed from which the client was coming, and that he did not fall to the ground but that the movement caused him to twist both of his ankles. It was noted that Petitioner's supervisor came and picked him up, taking him to the emergency room where he was assessed and put in a CAM walker boot for his right foot. It was noted that Petitioner claimed his right foot was sore and swollen at that time and that he did not have significant symptoms on the left side. It was noted that Petitioner reported that an orthopedic surgeon was present but did not evaluate him and that he followed up with the same orthopedic surgeon approximately a week later, at which time he was assessed and told to remain in the CAM walker boot on the right side. It was noted that Petitioner reported that approximately one month after his injury to his right foot, his left foot became painful and that he again went to the emergency room, that he was diagnosed with tendonitis on the left foot and that he was placed in a CAM walker boot on this side as well. (RX3).

The report noted that Petitioner reported that the right ankle remained swollen although the swelling had decreased over time, that he had swelling on the outside of the ankle and that he had pain across the anterior aspect of his ankle. The report noted that on the left side, Petitioner reported that he was improving but still had pain on the lateral aspect of his ankle, that he reported his current pain level to be 7/10 having intermittent pain on the left ankle and constant pain on the right side and that he was unable to get any

relief. The report noted that Dr. Schmidt's diagnosis was that of right foot Charcot arthropathy and left foot peroneal tendonitis. (RX3).

The report noted that Dr. Schmidt opined that he did not feel that the May 19, 2010 alleged work injury was the prevailing factor in Petitioner's present condition. It was noted that Dr. Schmidt opined that the findings on the diagnostic studies performed on May 19, 2010 were consistent with Charcot arthropathy and were present on the day of his injury, and given that Petitioner was treated a month prior to this and had these findings on the day of the injury, indicated that the Charcot arthropathy was not caused by the twisting injury of his foot. It was noted that Dr. Schmidt opined that the changes in Petitioner's foot were consistent with Charcot neuropathy and that the prevailing condition would be attributed to his neuropathy and diabetes, rather than an inversion injury to his ankle. It was noted that Dr. Schmidt did not think that the alleged work injury aggravated Petitioner's pre-existing conditions and that Petitioner demonstrated to him that he had a pure inversion injury to his right ankle and that he currently had no ankle instability, no swelling around his ankle, no tenderness in the area of his ankle and had essentially no ankle symptoms. It was noted that the Charcot arthropathy findings were present at least at the time of the injury and that it had to be present prior this. It was also noted that Petitioner reported that his left foot only became painful one month after the initial injury as reported, and that this would not be consistent with an injury to his peroneal tendons. (RX3).

The report noted that Petitioner's treatment had been reasonable and necessary, that Dr. Schmidt thought that Petitioner would need to get out of his CAM walker boots and into regular footwear, that given his Charcot arthropathy Petitioner would need a total contact insert and an extra depth shoe, but that this would not be related to his alleged work injury. It was noted that Dr. Schmidt opined that he did not think that any further treatment, testing or injections would be related to Petitioner's ankle sprains and that he needed shoes and inserts for diabetic neuropathy, but that this was not related to his work injury. It was noted that Dr. Schmidt opined that he did not think that Petitioner needed any further restrictions in regards to his bilateral ankle sprains, that he may have had a strain or strains of both of his ankles and that they seemed to have healed satisfactorily. It was noted that Petitioner may need some restrictions in regards to his midfoot Charcot arthropathy, but that this was not related to his ankle sprain. It was further noted that Dr. Schmidt opined that Petitioner had reached maximum medical improvement in regards to his May 19, 2010 accident and that the date of maximum medical improvement was that of the date of the exam, *i.e.*, July 29, 2010. (RX3).

The IME report of Dr. Gary Schmidt dated June 5, 2017 was entered into evidence at the time of arbitration as Respondent's Exhibit 4. The report noted that Petitioner was seen for an IME on June 5, 2017, at which time it was noted that Dr. Schmidt reviewed with Petitioner that he suffered bilateral inversion injuries to his ankles. It was noted that Petitioner indicated that he wore his CAM walker boot for approximately a year. It was noted that Petitioner reported that his left foot had healed up well, that he had not continued to have ongoing problems with his left foot or ankle and that he reported that the ankle pain that he had previously was completely gone and that his problem was just his right foot. It was noted that Petitioner felt that his right foot had been progressively deformed and remained painful, that he felt like the midfoot was going to break and that he had been treated in the boot and now wore "diabetic shoes" and special inserts. It was noted that Petitioner reported that his foot was crooked but stable and that he reported there were no significant events since his last visit in 2010. It was noted that Petitioner's current symptoms were focused on the right foot and ankle, that he stated that he had intermittent swelling in his foot and that it felt like it was going to break. It was further noted that Petitioner rated his pain as 9/10 and that he felt that he was limited in his ability to drive, stand, walk, lift, carry, bend, push, pull, climb, squat and kneel. It was also noted that Petitioner had obtained disability and received disability payments, that he had not returned to work and that he had no intention of returning to work. (RX4).

The report noted that Dr. Schmidt's diagnosis was that of Charcot arthropathy, right, resolved; ankle sprain, left. It was noted that Dr. Schmidt opined that the ankle sprain and possible peroneal tendonitis

that Petitioner suffered from his sprain on the date of injury had resolved and had healed. It was noted that Petitioner had no tenderness over his peroneal tendons, that he had no ankle instability, that he had no subluxation of his peroneal tendons and that Petitioner was very pleased with the left side. It was noted that on the right side, there were no signs of ongoing ankle instability or ankle pain and that Petitioner had no subluxation of his peroneal tendons. It was also noted that Petitioner had a Charcot arthropathy collapse of his midfoot and a rocker bottom foot that was typical of the disease and that he had ongoing pain and deformity secondary to his Charcot arthropathy, not secondary to his ankle sprain, and that it was not related to his May 19, 2010 injury. (RX4).

The report noted that Dr. Schmidt opined that Petitioner's treatment had been reasonable and necessary, initially for an ankle sprain and now for his Charcot arthropathy, and that Petitioner was in appropriate footwear. It was noted that Dr. Schmidt opined that Petitioner did not require any future treatment for the alleged work injury of May 19, 2010, that the ankle sprain that he had on the left side was resolved and that Petitioner had done well. It was noted that the changes that Petitioner had in his right foot were related to dense neuropathy, presumably secondary to his poorly controlled diabetes, and was not secondary to an ankle sprain. It was noted that Petitioner had reached maximum medical improvement from his work injury and that Dr. Schmidt maintained that Petitioner was at maximum medical improvement at the initial exam on July 29, 2010. It was noted that Dr. Schmidt opined that Petitioner appeared to have sprained his left ankle and possibly his right ankle at the time of the injury and that he did not feel that Petitioner had sustained a permanent disability or impairment due to the ankle sprains. (RX4).

The Cover Letter to Dr. Schmidt dated May 30, 2017 was entered into evidence at the time of arbitration as Respondent's Exhibit 5.

The Dr. Wood Intake Form dated May 25, 2010 was entered into evidence at the time of arbitration as Respondent's Exhibit 6. The Dr. Wood Medical Form dated May 25, 2010 was entered into evidence at the time of arbitration as Respondent's Exhibit 7. The Dr. Wood Medical Form dated June 21, 2010 was entered into evidence at the time of arbitration as Respondent's Exhibit 8. The records were duplicative of those as contained in Petitioner's Exhibit 3. (RX6; RX7; RX8; PX3).

CONCLUSIONS OF LAW

With respect to disputed issue (C) pertaining to the issue of accident, the Arbitrator notes that Petitioner claims that he sustained an injury to both of his feet/ankles while working for Respondent on May 19, 2010. (AX2). Regarding the left foot/ankle, the Arbitrator finds that Petitioner did not bear his burden of proof to support a finding that an accident involving the left foot/ankle occurred on May 19, 2010.

In support of the finding that no accident involving the left foot/ankle occurred on this date, the Arbitrator notes that the medical records do not document any report of symptoms to the left foot for over one month until June 16, 2010, when Petitioner presented to the emergency room at Memorial Hospital of Carbondale. (PX1). Moreover, the medical records from Dr. Wood do not support any report of an injury to the left foot/ankle on May 19, 2010. (PX3). Rather, the first report of symptoms involving the left foot in Dr. Wood's records was not until June 21, 2010. (*Id.*).

The Arbitrator notes that the contemporaneous medical records, as well as the questionnaires completed by Petitioner when he initially presented to Dr. Wood on May 25, 2010, do not support a finding of any injury to the left foot. (RX6; RX7). Furthermore, the Arbitrator finds it significant that Petitioner completed a questionnaire on June 21, 2010, stating that the symptoms in his left foot "just started". (RX8).

As a result thereof, the Arbitrator finds Petitioner failed to produce sufficient evidence to support a finding that he sustained an accident to the left foot on May 19, 2010.

As it pertains to the right foot/ankle, the Arbitrator finds that Petitioner sustained an accident to his right foot on May 19, 2010, when he twisted his right foot while transferring a patient. The Arbitrator notes that while this was an unwitnessed event, Petitioner's testimony was unrebutted at the time of trial. The Illinois Form 45 documents that Petitioner reported that he twisted his right ankle. (RX1). The Arbitrator further notes that the Form 45 also suggests that Petitioner was under active care for his right foot at the time of the alleged accident. The contemporaneous medical records are consistent with the report of an accident to Petitioner's right ankle only on May 19, 2010. (PX1).

With respect to disputed issue (F) pertaining to the issue of causation, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that his current condition of ill-being of the right foot is causally related to the accident on May 19, 2010.

The Arbitrator finds Petitioner's testimony concerning his pre-accident medical history to be of questionable credibility. The Arbitrator notes that Petitioner denied any prior symptoms or medical care for his feet before May 19, 2010. However, the medical records from Dr. Kupferer clearly document a longstanding history of peripheral neuropathy in his bilateral lower extremities, as well as complaints of right foot pain in the months prior to the accident on May 19, 2010. (RX2). Moreover, Petitioner underwent x-rays at Memorial Hospital of Carbondale for his right foot and right ankle a mere six days before the work incident. (RX2). The Arbitrator notes that no testimony was proffered by Petitioner so as to differentiate his pre-accident versus post-accident symptomatology in the right foot.

The Arbitrator notes that the medical records evidence the fact that Petitioner has been diagnosed with a Charcot arthropathy involving the right midfoot. (PX3; RX3; RX4). The Arbitrator finds the opinions of Dr. Schmidt to be credible in this case. Dr. Schmidt opined in his reports that the Charcot process was a result of Petitioner's longstanding diabetic condition and not the result of any ankle sprain or traumatic injury to the right ankle on May 19, 2010, which the Arbitrator finds to be credible and supported by the treating medical records. (RX3; RX4). Moreover, the Arbitrator notes that Petitioner did not present any medical opinion providing a causal connection between the May 19, 2010 injury to the right ankle and his diagnosis of Charcot arthropathy, nor did the medical records from Dr. Wood provide any medical opinion causally connecting or referencing any aggravation to Petitioner's Charcot process in the right foot to any event on May 19, 2010. (PX3). Furthermore, the medical records document Petitioner presented Memorial Hospital of Carbondale with right foot pain only six days before the alleged work injury, on May 13, 2010, which the Arbitrator finds supports the fact that Petitioner's right foot condition of ill-being was not only present but also symptomatic prior to the accident at issue in this case. (PX1).

Having considered and reviewed the record as a whole, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that his current condition of ill-being of the right foot is causally related to the accident on May 19, 2010. All benefits are denied. The remaining issues of medical bills and nature and extent of the injury are moot, and the Arbitrator makes no conclusions as to those issues.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOSE CABRERA,

Petitioner,

vs. NO: 15 WC 17038

CITY OF CHICAGO,
DEPARTMENT OF WATER,

18IWCC0660

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 permanent partial disability (PPD) and "classification of injury as leg," and being advised of the facts and applicable law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission writes to correct the scrivener's error contained in page two of the Arbitrator's Order. The Order states: "The Respondent shall pay the Petitioner the sum of $712.55 per week for a further period of 95 weeks, as provided in Section 8(d)2 of the Act, because the injury to Petitioner's **left leg** caused a 19% loss of use of the person-as-a-whole."

As the injury was to Petitioner's left shoulder and not his left leg, the Commission corrects the Order so that it reads "The Respondent shall pay the Petitioner the sum of $712.55 per week for a further period of 95 weeks, as provided in Section 8(d)2 of the Act, because the injury to Petitioner's **left shoulder** caused a 19% loss of use of the person-as-a-whole." All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 27, 2018 is hereby affirmed and adopted.

18IWCC0660

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 30 2018

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

MJB/tdm
d: 10/23/18
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CABRERA, JOSE
Employee/Petitioner

Case# **15WC017038**

15WC017037

CITY OF CHICAGO
Employer/Respondent

18IWCC0660

On 2/27/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.83% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0070 LAW OFFICES OF BOGUSZ & BOGUSZ
KAREN S BOGUSZ
166 W WASHINGTON ST SUITE 500
CHICAGO, IL 60602

0010 CITY OF CHICAGO
KEVIN REID
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JOSE CABRERA
Employee/Petitioner

v.

CITY OF CHICAGO
Employer/Respondent

Case # 15 WC 17038

Consolidated cases: 15 WC 17037

18IWCC0660

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **DOUGLAS S. STEFFENSON**, Arbitrator of the Commission, in the city of **CHICAGO**, on **FEBRUARY 1, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **OCTOBER 18, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned **$72,800.00**; the average weekly wage was **$1,400.00**.

On the date of accident, Petitioner was **63** 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 **$52,069.64** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$52,069.64**.

Respondent is entitled to a credit of **$0.00** under Section 8(j) of the Act.

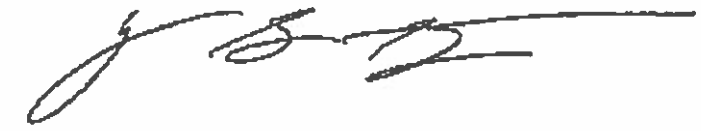
ORDER

As detailed in the attached memorandum discussing the *Findings of Fact and Conclusions of Law*:

> The Respondent shall pay the Petitioner the sum of **$712.55 per week** for a further period of **95 weeks**, as provided in **Section 8(d)2** of the Act, because the injury to the Petitioner's left leg caused a **19% loss of use of the person-as-a-whole.**

RULES REGARDING APPEALS: Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE: If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.



Signature of Arbitrator

FEBRUARY 26, 2018
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mark Morrell,
Petitioner,

vs.

NO: 14WC 20817

18IWCC0661

Pella Corporation,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical, notice, temporary total disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 20, 2017 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $51,300.00. 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 30 2018
o101618
MJB/jrc
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MORRELL, MARK
Employee/Petitioner

Case# **14WC020817**
14WC020818

PELLA CORPORATION
Employer/Respondent

18IWCC0661

On 12/20/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.48% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0000 SIMPSON PETERSEN
BRIAN PETERSEN
246 E MAIN ST SUITE 201
GALESBURG, IL 61401

0264 HEYL ROYSTER VOELKER & ALLEN
DANA HUGHES
PO BOX 6199
PEORIA, IL 61601-6199

STATE OF ILLINOIS)
)SS.
COUNTY OF Peoria)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Mark Morrell
Employee/Petitioner

v.

Pella Corporation
Employer/Respondent

Case # 14 WC 20817

Consolidated cases: 14 WC 20818

18IWCC0661

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Nowak**, Arbitrator of the Commission, in the city of **Peoria**, on **6/21/17**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ 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 _____

18IWCC0661

FINDINGS

On **11/18/13**, 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 **$32,364.80**; the average weekly wage was **$622.40**.

On the date of accident, Petitioner was **40** years of age, ***married*** with **3** dependent children.

Petitioner *has* received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$1,596.67** for other benefits, for a total credit of **$1,596.67**.

Respondent is entitled to a credit of **$N/A** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services of $43,249.70, as set forth in Petitioner's exhibit 6, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $414.93/week for 5 6/7 weeks, commencing 4/21/14 through 5/31/14, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $1,596.67 for non-occupational indemnity disability benefits that have been paid.

Based on the factors enumerated in §8.1b of the Act, which the Arbitrator addressed in the attached findings of fact and conclusions of law, and the record taken as a whole, Respondent shall pay Petitioner the sum of **$373.44**/week for a further period of **19** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **10% loss of use of the right hand.**

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Michael K. Nowak, Arbitrator

12/16/17
Date

ICArbDec p. 2

DEC 20 2017

BACKGROUND

Petitioner filed two claim alleging repetitive trauma injuries to his hands and wrists. The cases were consolidated for trial. 14 WC 20817 pertains to carpal tunnel syndrome of the right wrist. 14 WC 20818 pertains to carpal tunnel syndrome of the left wrist. The stated manifestation date for both claims is November 18, 2013, the date EMG/NCV testing confirmed the diagnosis of bilateral carpal tunnel syndrome.

At hearing the parties stipulated to the period of incapacity and the reasonableness of the medical treatment rendered to Petitioner. Respondent, however disputes its liability for TTD and medical benefits based upon the issues of accident, accident date, notice, and causal connection.

The Arbitrator also notes that Petitioner had sustained an unrelated elbow fracture in June of 2013 which resulted in his being unable to work, or work on light duty, from mid June 2013 until September 11, 2013 and again from October 9, 2013 until December 9, 2013.

FINDINGS OF FACT

Petitioner was employed by the Respondent continuously since April 17, 2006. He testified that in November of 2013 he held the job title of Prime and Pre-finish Kitter. He had been in that position for two to three months following his return from the elbow injury.

Prior to being a Prime and Pre-finish Kitter, he was in the position of Secondary Processing Operating for about 2 years. Petitioner worked full time in the position of Secondary Processing Operator, plus overtime when needed. Petitioner testified that in the position of Secondary Processing Operator, he was using his hands to grip, flip and twist the various window parts that he worked with continuously throughout the day. His duties included grabbing and inserting jambs and sill fillers into a jamb drill, removing them from the jamb drill, flipping the parts around and placing them in buckets. During this process, it was necessary to place the jambs into a clamp to secure them for the drill. In each shift, Petitioner would complete 8 to 9 buckets a night with approximately 56 jambs per bucket. Petitioner also testified that in this position he would cut down sill fillers throughout his shift. The process for cut downs included taking each sill filler by hand to a cut down isle, putting it through a saw, pushing a button for the saw, and holding the sill filler down with one hand while it was cut. He testified that he would then pull the sill filler out, put it into a vice, drill a pilot hole in the sill filler, put it in a dip tank, and return it to a bucket. The Petitioner testified the drill used on the sill fillers would vibrate. Petitioner would operate the drill with both hands. On any given night, the Petitioner would work on approximately 15-20 sill fillers. Petitioner also worked on pack out boards and flanges. For these products, Petitioner grabbed the boards by hand, put them through a machine, took them out of the machine after they had been cut, and placed them back into a bucket. He did this multiple times per shift. Petitioner credibly testified that in his position as a Secondary Processing Operator, his work involved gripping parts, lifting parts, and twisting parts with his hands.

In addition to Petitioner's testimony as to his duties as a Secondary Processing Operator, Alisa Reimolds, registered nurse and occupational health nurse at Pella Corporation, testified that Petitioner's Exhibit 10 contains a true and accurate job description and job functions for a Secondary Processing Operator. Ms. Reimolds agreed that between 34% and up to 100% of the job duties for Secondary Processing Operator involved handling and grasping of objects. Ms. Reimolds testified that up to 66% of the job duties of a

Secondary Processing Operator involved forceful gripping. Exhibit 10 also reflects that up to 33% of Petitioner's duties as a Secondary Processing Operator involved fine motor manipulation.

In Petitioner's current role as a Prime and Pre-finish Kitter, Petitioner stated that he sanded various window parts by hand. He used one hand to grip the part and the other hand to exert pressure on the part with the sanding pad. In this position he was also required to grip, flip, and twist the window jambs as they came out of the oven and place them into the bucket. He also worked with rails, and often was required to use the sand paper on them to "rough them up" and put them through the oven. He was required to use his hands and fingers to grip plugs and insert and remove the plugs into the rails and stiles. Petitioner testified there are 16 plugs in each unit. This process involved pushing each plug into place with one hand while the other is gripping the part with force to hold it into place. Petitioner testified that while performing these duties, the wrist holding down the part was flexed as he was standing over the part during this process. Petitioner testified that he inserted and removed approximately 2,500 plugs per shift. Respondent did not contest the number of plugs inserted or removed by the Petitioner. Petitioner also testified that in his role as a Prime and Pre-finish Kitter his duties include taping products and removing the tape from window parts such as sill fillers. For the sill fillers, Petitioner must hold the tape on one end of the part by hand and pull it over to the other end of the part, and then smooth it down on the back. After the sill filler is painted or stained, Petitioner must grab the part with one hand and grab and rip the tape off with the other hand. Petitioner testified that for most of his workday as a Prime and Pre-finish Kitter he is required to grasp, grab, and apply force to products. Petitioner testified that his work involves repetitive flexing of his wrists.

Petitioner also testified that he did not believe the DVDs produced by Respondent accurately depicted his job duties. (RX 1, 2) Petitioner testified the DVDs did not accurately depict the number of times he is required to perform each task. Petitioner testified that while he believes the speed of the conveyor belt shown in the DVD's was accurate, he believes more products come off the conveyor belt at a pace of one part every 2 or 3 seconds. The DVD's did not depict the taping and removing tape from products. Further, the DVDs did not show the insertion or removal of plugs.

Alisa Reimolds testified that PX 9 contains a true and accurate job description and job functions for a Prime and Pre-finish Kitter. Ms. Reimolds testified that from 34% to 100% of the job duties of a Prime and Pre-finish Kitter included handling and grasping parts. Ms. Reimolds testified that up to 33%, or up to 2.5 hours, of the job duties of a Prime and Pre-finish Kitter included forceful gripping. She further indicated that PX 9 also accurately reflects that up 66% of Petitioner's duties as a Prime and Pre-kit Finisher included fine motor manipulation. Ms. Reimolds testified that PX 9 was prepared in connection with Pella personnel. Ms. Reimolds' testimony also reflected that the DVDs did not accurately depict the number of tasks performed by a Prime and Pre-finish Kitter in that the videos failed to show insertion or removal of plugs, or the taping and removing of tape from items. In fact, despite Ms. Reimolds' testimony that she has observed Petitioner performing his work duties, she was unaware that Petitioner's job duties included taping and removal of tape. She does not dispute that taping was a job duty performed by Petitioner.

The Arbitrator notes that the employees depicted on the DVDs appear to be working at somewhat leisurely pace. The Arbitrator finds it difficult to believe that Respondent allows its employees to work at such a relaxed pace. Further, given that the DVDs do not depict the number of times Petitioner performs each work task, in that they fail to depict the insertion and removal of plugs, fail to depict the taping or removal of tape on

window parts, the Arbitrator finds that the DVDs do not accurately depict the Petitioner's job duties or the pace at which they were performed in either position.

Petitioner credibly testified that he began to develop painful conditions in his wrists and hands, while performing the duties of a Secondary Processing Operator and that his symptoms became progressively worse throughout the years and that he began to experience them more frequently throughout 2013.

On November 11, 2013 Petitioner returned to Dr. Gregory Schierer, with whom he had treated for his fractured elbow following removal of the hardware from the elbow. He gave Dr. Schierer a history of intermittent pain in hands. The note indicates "Thinks he may have CTS...." (PX 1, p.4) Dr. Schierer recommended EMG/NCV testing.

A nerve conduction test was performed by Dr. Marc Katchen on November 18 , 2013. Dr. Katchen's letter of that date states "In summary, Mr. Morrell has symptoms of carpal tunnel syndrome in the right hand greater than the left. The nerve conduction studies are consistent with this showing mainly motor decline with loss of axonal response despite multiples trials of maximum sensitivity. There are also the temporal dispersion suggesting motor nerve compression at this level also." (PX 2) The Arbitrator notes that this is the first definitive diagnosis of bilateral carpal tunnel syndrome.

On December 9, 2013, the 11/18/13 NCV was reviewed by Dr. Schierer, who noted "[p]aresthesias and weakness right hand for 2 years. Nocturnal exacerbation. NCV by Dr. Katchen shows bilateral carpal tunnel syndrome worse on right" (P 1, p.6) The Arbitrator notes that this 2 year period is approximately the same length of time that Petitioner testified he was employed as a Secondary Processing Operator. The doctor's plan at that point was "[h]as work related RT carpal tunnel syndrome. Need right carpal tunnel release." (Id. at p.8).

Petitioner testified he notified Respondent on December 9, 2013 of his condition and that he believed the condition was work related. Petitioner's testimony in this regard was not refuted. In fact, the employees report of claim supports Petitioner's testimony. (RX 11).

On April 11, 2014, Petitioner returned to Dr. Schierer with joint pain, instability and weakness in both wrists with nocturnal exacerbation. A right carpal tunnel release was performed on April 29, 2014. A left carpal tunnel release was performed on May 12, 2014. (Petitioner's Exhibit 3)

Petitioner returned to work without restriction on June 1, 2014.

Dr. Schierer testified that assuming Petitioner's job duties as outlined in the August 9, 2016 correspondence, attached to his deposition as Exhibit 2, were accurate, Petitioner's job activities contributed to his bilateral carpal tunnel syndrome. The Arbitrator notes that Petitoner testified consistently with the job duties outlined on deposition Exhibit 2.

Dr. James Williams performed an examination pursuant to section 12 of the Act. Dr. Williams opined that Petitioner's bilateral carpal tunnel syndrome did not arise out of his employment with Respondent. (RX 5, p. 21). However, this opinion was based on Dr. Williams' belief that Petitioner's job duties did not include any significant vibration, nor any sustained repetitive forceful gripping and or pinching, nor any awkward sustained positions of the hand or wrist. (Id., at p.21). Ms. Reimhold testified that up to 100% of Petitioner's job duties in his two years as a Secondary Processing Operator involved handling and grasping. Ms. Reimhold testified

that up to 66% of Petitioner's job duties as a Secondary Processing Operator involved forceful gripping. Petitioner testified that he has to insert and remove up to 2,500 plugs per shift with his fingers, that he has to tape parts, remove tape from parts, the drill he operates vibrates, and that he has to flex his wrist at various stages of window production to hold items down. The Arbitrator found Petitioner's testimony in this regard persuasive. Dr. Williams' opinion was not based on an accurate understanding of Petitioner's job duties.

CONCLUSIONS

Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?

An injury is accidental within the meaning of the Act if "a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor." *Laclede Steel. Co. v. Industrial Commission*, 128 N.E.2d 718, 720 (Ill. 1955); *General Electric Co. v. Industrial Commission*, 433 N.E.2d 671, 672 (Ill. 1982). In a repetitive trauma case, issues of accident and causation are intertwined. *Elizabeth Boettcher v. Spectrum Property Group and First Merit Venture*, 99 I.I.C. 0961 (1999). Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672-73 (Ill. 2003) (emphasis added). As in establishing accident, to show causal connection Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury. *Fierke v. Industrial Commission*, 723 N.E.2d 846 (3rd Dist. 2000).

In *Edward Hines Precision Components v. Indus. Comm'n*, 825 N.E.2d 773, (2nd Dist. 2005). the Court expressly stated, "There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma." *Id.* at N.E.2d 780. Similarly, the Commission noted in *Dorhesca Randell v. St. Alexius Medical Center*, 13 I.W.C.C. 0135 (2013), a repetitive trauma claim, a claimant must show that work activities are a cause of his or her condition; the claimant does not have to establish that the work activities are the sole or primary cause, and there is no requirement that a claimant must spend a certain amount of time each day on a specific task before a finding of repetitive trauma can be made. *Randell* citing *All Steel, Inc. v. Indus. Comm'n*, 582 N.E.2d 240 (2nd Dist. 1991) and *Edward Hines supra.*

The Appellate Court in *City of Springfield v. Illinois Workers' Comp. Comm'n*, 901 N.E.2d 1066 (4th Dist., 2009) issued a favorable decision in a repetitive trauma case to a claimant whose work was "varied" but also "repetitive" or "intensive" in that he used his hands, albeit for different task, for at least five (5) hours out of an eight (8) hour work day. *Id.* "While [claimant's] duties may not have been 'repetitive' in a sense that the same thing was done over and over again as on an assembly line, the Commission finds that his duties required an intensive use of his hands and arms and his injuries were certainly cumulative." *Id.*

In this case, the evidence shows that Petitioner used his hands and arms extensively during the performance of his job duties for Respondent. Further, the Arbitrator finds the opinions and testimony of Dr. Schierer much more persuasive than those of Dr. Williams in this case.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner has met his burden of establishing that he sustained accidental injuries which arose out of and in the course of his

employment with Respondent and that his current condition(s) of ill-being are causally related to the employment.

Issue (D): What was the date of the accident?
Issue (E): Was timely notice of the accident given to Respondent?

The Workers' Compensation Act is a humane law of a remedial nature that should be liberally construed to achieve its purpose. *Hagene v. Derek Polling Const.*, 388 Ill. App. 3d 380, 902 N.E.2d 1269 (2009). Hence, the Supreme Court has established a flexible but fair standard for determining manifestation dates in repetitive trauma claims. *Durand v. Industrial Commission*, 224 Ill.2d 53, 862 N.E.2d 918 (Ill. 2007). Although the date on which the employee becomes aware that he has a condition related to work was the first method for determining a manifestation date, it is not the only permissible means for alleging or proving manifestation. The manifestation date can be set as: (a) the date the employee actually became aware of the physical condition and its relation to work through medical consultation; (b) the date the employee requires medical treatment; (c) the date on which the employee can no longer perform work activities; or (d) when a reasonable person would have plainly recognized the injury and its relation to work. *Durand v. Industrial Commission*, 224 Ill.2d 53, 862 N.E.2d 918 (Ill. 2007), *see also Peoria County Belwood Nursing Home v. Industrial Commission*, 115 Ill.2d 524, 505 N.E.2d 1026 (Ill. 1987); *Oscar Mayer & Co. v. Industrial Commission*, 176 Ill.App.3d 607, 531 N.E.2d 174 (3rd Dist. 1988); *Three "D" Discount Store v. Industrial Commission*, 198 Ill.App.3d 43, 556 N.E.2d 261 (4th Dist. 1989).

Although a claimant is aware of symptoms and carries a suspicion that these are work-related, the Supreme Court has stated, "The 'fact of injury' is not synonymous with the 'fact of discovery'" *Durand,* N.E.2d at 927. Claimants are not charged with filing a claim as soon as they believe they may have a work-related condition, nor are they penalized for failing to realize a condition is work-related when the employer feels that he or she should have. The Supreme Court stated that to rely solely on a claimant's testimony concerning symptoms, without accurate knowledge of the cause of those symptoms, would essentially be asking them to "rely on 'expert' medical testimony from a layperson." *Id.* at 929. The Court also recognized that claimants would have had difficulty proving injury with a sketchy and equivocal understanding of the cause of their symptoms. *Id.* at 930. The standard that "the 'fact of injury' is not synonymous with the 'fact of discovery'" has since become a safety measure employed by all Courts to ensure that the employers do "penalize an employee who diligently worked through" his or her symptoms. *Durand v. Indus. Comm'n*, 862 N.E.2d at 927, 930. In *Durand*, the claimant was not sure her pain was from carpal tunnel syndrome, but "she believed it was work-related" in 1997, some 3 years before her injuries manifested in 2000. *Durand v. Indus. Comm'n*, 862 N.E.2d at 929-30.

In *Oscar Mayer*, the Court embraced the "date of collapse" method of determination, setting the manifestation date on the date of surgery, or the date the employee could no longer work. Compensation was awarded to a claimant, despite his full knowledge that his condition was work-related well before he filed a claim, because the claimant diligently served his employer until he could no longer do so without intervention for his repetitive injuries. *Oscar Mayer supra.* The Court noted that no prejudice can occur in employing such a method, since it is not until the employee actually misses work for his injuries that the employer becomes adversely affected; and the notice provisions were not impugned as this flexible and fair provision in no way interfered with an employer's ability to effectively investigate the claim.

In *Three "D" Discount*, the Court held the manifestation date of claimant's injury was the date "petitioner first learned that his condition of ill-being was work related." (*Id.*, 556 N.E.2d at 265) The Court went on to caution "[a]lthough our finding that the injury in this case 'manifested itself' on July 10, rather than August 10, does not affect the Commission's ruling in petitioner's favor, we emphasize that the peculiar facts of each case must be closely analyzed in repetitive-trauma cases to be fair to the faithful employee and his employer as well as to the employer's compensation insurance carrier." (*Id.*)

The Supreme Court in *Durand* noted that the manifestation date is typically set on the date the employee requires medical treatment or the date on which the employee can no longer perform work activities. *Durand*, 862 N.E.2d at 929. The law also allows Petitioner to select a manifestation date that coincides with discovery of injury and its relation to work after medical consultation. See *Steven Beal v. Town of Normal*, 06 IL.W.C. 25261, 10 I.W.C.C. 0380 (2010); *see also White v Worker's Compensation Commissio*n, 374 Ill.App.3d 907, 873 N.E.2d 388, 392-393 (4th Dist. 2007) (holding Petitioner could select accident date); *A.C. & S. v. Industrial Commission*, 304 Ill.App.3d 875, 710 N.E.2d 837, 841-842 (1st Dist. 1999).

In *Linda Peters v. Village of Caseyville*, the Commission gave the most weight to when the claimant possessed a "confirmed diagnosis" of her condition in setting the manifestation date. *Linda Peters v. Village of Caseyville*, 14 I.W.C.C. 0796 (2014). The Commission stated:

> The Commission finds that the manifestation date of Petitioner's right carpal tunnel syndrome was March 1, 2012. Although the parties had stipulated to an accident date of September 1, 2010, we find that it is within our discretion to change the accident date to conform-to the evidence. *See Beal v. Town of Normal*, 10 IWCC 380 (2010). The medical records are clear that the first mention of any correlation between Petitioner's right carpal tunnel syndrome and her work duties is the March 1, 2012, office note of Dr. Mirly. Although Petitioner's report of injury on March 2, 2012, indicates a date of accident of "Sept 2011," we find that this is not an appropriate manifestation date in this case because Petitioner did not have a confirmed diagnosis at that time. Based on our determination of the date of accident, we find that Petitioner provided timely notice of her accidental injuries. *Id.*

In this case a nerve conduction test was performed by Dr. Marc Katchen on November 18 which confirmed the diagnosis of bilateral carpal tunnel syndrome, right worse than left.

Petitioner's testimony that he provided notice of the accidents to Respondent on December 9, 2013 in not refuted.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds that December 9, 2013, is an appropriate manifestation date under the Act. Petitioner has met his burden of establishing his date of accident and further has provided proper notice as required by the Act.

Issue (J): **Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?**

Petitioner's Exhibit 6 was admitted into evidence. This exhibit identifies the providers of services to the Petitioner, details the date the services were provided and the charges for those services. Those bills total $43,249.70. Petitioner's surgeries were performed at the specific recommendation of Dr. Schierer.

As indicated above, Respondent did not dispute the reasonableness of the medical treatment rendered to Petitioner, only their liability to pay medical benefits based upon the issues of accident, accident date, notice, and causal connection. Having found in Petitioner's favor with regard to issues C, D, E, and F, the Arbitrator finds Petitioner is entitled to medical expenses in the amount stated above.

Respondent shall pay reasonable and necessary medical services of $43,249.70, as set forth in Petitioner's exhibit 6, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Issue (K): **What temporary benefits are in dispute?**

Petitioner claimed entitlement to TTD benefits from April 21, 2013 through May 31, 2013. (AX 1)

Respondent did not dispute the period of incapacity, only their liability to pay TTD benefits based upon the issues of accident, accident date, notice, and causal connection. Having found in Petitioner's favor with regard to issues C, D, E, and F, the Arbitrator finds Petitioner is entitled to TTD benefits from April 21, 2013 through May 31, 2013.

Respondent shall pay Petitioner temporary total disability benefits of $414.93/week for 5 6/7 weeks, commencing 4/21/14 through 5/31/14, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $1,596.67 for non-occupational indemnity disability benefits that have been paid

Issue (L): **What is the nature and extent of the injury?**

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 is to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of §8.1b of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that neither party submitted an impairment rating. The Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes Petitioner continues to work as a Prime and Pre-finish Kitter. The Arbitrator therefore gives *some* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 40 years old at the time of his injuries. Petitioner will have to deal with the sequala of his injuries, including the risk of recurrence

longer than would an older worker. Furthermore, Petitioner has hand and arm intensive employment. The Arbitrator therefore gives *some* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes there is no direct evidence of reduced earning capacity contained in the record. The Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the Petitioner was a credible witness. Petitioner underwent bilateral carpal tunnel releases. However, he continues to work for Respondent as a Prime and Pre-finish Kitter. The Arbitrator therefore gives *greater* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 10% loss of use of each hand pursuant to §8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mark Morrell,
Petitioner,

vs.

NO: 14WC 20818

Pella Corporation,
Respondent.

18IWCC0662

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, notice, temporary total disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 20, 2017 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 30 2018
o101618
MJB/jrc
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MORRELL, MARK
Employee/Petitioner

Case# **14WC020818**
14WC020817

PELLA CORPORATION
Employer/Respondent

18IWCC0662

On 12/20/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.48% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0000 SIMPSON PETERSEN
BRIAN PETERSEN
246 E MAIN ST SUITE 201
GALESBURG, IL 61401

0264 HEYL ROYSTER VOELKER & ALLEN
DANA HUGHES
PO BOX 6199
PEORIA, IL 61601-6199

STATE OF ILLINOIS)
)SS.
COUNTY OF Peoria)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Mark Morrell
Employee/Petitioner

v.

Pella Corporation
Employer/Respondent

Case # 14 WC 20818

Consolidated cases: 14 WC 20817

18IWCC0662

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Nowak**, Arbitrator of the Commission, in the city of **Peoria**, on **6/21/17**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ 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 _____

18IWCC0662

FINDINGS

On **11/18/13**, 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 **$32,364.80**; the average weekly wage was **$622.40**.

On the date of accident, Petitioner was **40** years of age, *married* with **3** dependent children.

Petitioner *has* received all reasonable and necessary medical services.

Respondent *has not* paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$1,596.67** for other benefits, for a total credit of **$1,596.67**.

Respondent is entitled to a credit of **$N/A** under Section 8(j) of the Act.

ORDER

Medical benefits, TTD benefits, and credit are awarded in 14 WC 20817.

Based on the factors enumerated in §8.1b of the Act, which the Arbitrator addressed in the attached findings of fact and conclusions of law, and the record taken as a whole, Respondent shall pay Petitioner the sum of **$373.44**/week for a further period of **19** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **10% loss of use of the left hand.**

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Michael K. Nowak, Arbitrator — **12/16/17** Date

ICArbDec p 2

DEC 20 2017

BACKGROUND

Petitioner filed two claim alleging repetitive trauma injuries to his hands and wrists. The cases were consolidated for trial. 14 WC 20817 pertains to carpal tunnel syndrome of the right wrist. 14 WC 20818 pertains to carpal tunnel syndrome of the left wrist. The stated manifestation date for both claims is November 18, 2013, the date EMG/NCV testing confirmed the diagnosis of bilateral carpal tunnel syndrome.

At hearing the parties stipulated to the period of incapacity and the reasonableness of the medical treatment rendered to Petitioner. Respondent, however disputes its liability for TTD and medical benefits based upon the issues of accident, accident date, notice, and causal connection.

The Arbitrator also notes that Petitioner had sustained an unrelated elbow fracture in June of 2013 which resulted in his being unable to work, or work on light duty, from mid June 2013 until September 11, 2013 and again from October 9, 2013 until December 9, 2013.

FINDINGS OF FACT

Petitioner was employed by the Respondent continuously since April 17, 2006. He testified that in November of 2013 he held the job title of Prime and Pre-finish Kitter. He had been in that position for two to three months following his return from the elbow injury.

Prior to being a Prime and Pre-finish Kitter, he was in the position of Secondary Processing Operating for about 2 years. Petitioner worked full time in the position of Secondary Processing Operator, plus overtime when needed. Petitioner testified that in the position of Secondary Processing Operator, he was using his hands to grip, flip and twist the various window parts that he worked with continuously throughout the day. His duties included grabbing and inserting jambs and sill fillers into a jamb drill, removing them from the jamb drill, flipping the parts around and placing them in buckets. During this process, it was necessary to place the jambs into a clamp to secure them for the drill. In each shift, Petitioner would complete 8 to 9 buckets a night with approximately 56 jambs per bucket. Petitioner also testified that in this position he would cut down sill fillers throughout his shift. The process for cut downs included taking each sill filler by hand to a cut down isle, putting it through a saw, pushing a button for the saw, and holding the sill filler down with one hand while it was cut. He testified that he would then pull the sill filler out, put it into a vice, drill a pilot hole in the sill filler, put it in a dip tank, and return it to a bucket. The Petitioner testified the drill used on the sill fillers would vibrate. Petitioner would operate the drill with both hands. On any given night, the Petitioner would work on approximately 15-20 sill fillers. Petitioner also worked on pack out boards and flanges. For these products, Petitioner grabbed the boards by hand, put them through a machine, took them out of the machine after they had been cut, and placed them back into a bucket. He did this multiple times per shift. Petitioner credibly testified that in his position as a Secondary Processing Operator, his work involved gripping parts, lifting parts, and twisting parts with his hands.

In addition to Petitioner's testimony as to his duties as a Secondary Processing Operator, Alisa Reimolds, registered nurse and occupational health nurse at Pella Corporation, testified that Petitioner's Exhibit 10 contains a true and accurate job description and job functions for a Secondary Processing Operator. Ms. Reimolds agreed that between 34% and up to 100% of the job duties for Secondary Processing Operator

involved handling and grasping of objects. Ms. Reimolds testified that up to 66% of the job duties of a Secondary Processing Operator involved forceful gripping. Exhibit 10 also reflects that up to 33% of Petitioner's duties as a Secondary Processing Operator involved fine motor manipulation.

In Petitioner's current role as a Prime and Pre-finish Kitter, Petitioner stated that he sanded various window parts by hand. He used one hand to grip the part and the other hand to exert pressure on the part with the sanding pad. In this position he was also required to grip, flip, and twist the window jambs as they came out of the oven and place them into the bucket. He also worked with rails, and often was required to use the sand paper on them to "rough them up" and put them through the oven. He was required to use his hands and fingers to grip plugs and insert and remove the plugs into the rails and stiles. Petitioner testified there are 16 plugs in each unit. This process involved pushing each plug into place with one hand while the other is gripping the part with force to hold it into place. Petitioner testified that while performing these duties, the wrist holding down the part was flexed as he was standing over the part during this process. Petitioner testified that he inserted and removed approximately 2,500 plugs per shift. Respondent did not contest the number of plugs inserted or removed by the Petitioner. Petitioner also testified that in his role as a Prime and Pre-finish Kitter his duties include taping products and removing the tape from window parts such as sill fillers. For the sill fillers, Petitioner must hold the tape on one end of the part by hand and pull it over to the other end of the part, and then smooth it down on the back. After the sill filler is painted or stained, Petitioner must grab the part with one hand and grab and rip the tape off with the other hand. Petitioner testified that for most of his workday as a Prime and Pre-finish Kitter he is required to grasp, grab, and apply force to products. Petitioner testified that his work involves repetitive flexing of his wrists.

Petitioner also testified that he did not believe the DVDs produced by Respondent accurately depicted his job duties. (RX 1, 2) Petitioner testified the DVDs did not accurately depict the number of times he is required to perform each task. Petitioner testified that while he believes the speed of the conveyor belt shown in the DVD's was accurate, he believes more products come off the conveyor belt at a pace of one part every 2 or 3 seconds. The DVD's did not depict the taping and removing tape from products. Further, the DVDs did not show the insertion or removal of plugs.

Alisa Reimolds testified that PX 9 contains a true and accurate job description and job functions for a Prime and Pre-finish Kitter. Ms. Reimolds testified that from 34% to 100% of the job duties of a Prime and Pre-finish Kitter included handling and grasping parts. Ms. Reimolds testified that up to 33%, or up to 2.5 hours, of the job duties of a Prime and Pre-finish Kitter included forceful gripping. She further indicated that PX 9 also accurately reflects that up 66% of Petitioner's duties as a Prime and Pre-kit Finisher included fine motor manipulation. Ms. Reimolds testified that PX 9 was prepared in connection with Pella personnel. Ms. Reimolds' testimony also reflected that the DVDs did not accurately depict the number of tasks performed by a Prime and Pre-finish Kitter in that the videos failed to show insertion or removal of plugs, or the taping and removing of tape from items. In fact, despite Ms. Reimolds' testimony that she has observed Petitioner performing his work duties, she was unaware that Petitioner's job duties included taping and removal of tape. She does not dispute that taping was a job duty performed by Petitioner.

The Arbitrator notes that the employees depicted on the DVDs appear to be working at somewhat leisurely pace. The Arbitrator finds it difficult to believe that Respondent allows its employees to work at such

a relaxed pace. Further, given that the DVDs do not depict the number of times Petitioner performs each work task, in that they fail to depict the insertion and removal of plugs, fail to depict the taping or removal of tape on window parts, the Arbitrator finds that the DVDs do not accurately depict the Petitioner's job duties or the pace at which they were performed in either position.

Petitioner credibly testified that he began to develop painful conditions in his wrists and hands, while performing the duties of a Secondary Processing Operator and that his symptoms became progressively worse throughout the years and that he began to experience them more frequently throughout 2013.

On November 11, 2013 Petitioner returned to Dr. Gregory Schierer, with whom he had treated for his fractured elbow following removal of the hardware from the elbow. He gave Dr. Schierer a history of intermittent pain in hands. The note indicates "Thinks he may have CTS...." (PX 1, p.4) Dr. Schierer recommended EMG/NCV testing.

A nerve conduction test was performed by Dr. Marc Katchen on November 18 , 2013. Dr. Katchen's letter of that date states "In summary, Mr. Morrell has symptoms of carpal tunnel syndrome in the right hand greater than the left. The nerve conduction studies are consistent with this showing mainly motor decline with loss of axonal response despite multiples trials of maximum sensitivity. There are also the temporal dispersion suggesting motor nerve compression at this level also." (PX 2) The Arbitrator notes that this is the first definitive diagnosis of bilateral carpal tunnel syndrome.

On December 9, 2013, the 11/18/13 NCV was reviewed by Dr. Schierer, who noted "[p]aresthesias and weakness right hand for 2 years. Nocturnal exacerbation. NCV by Dr. Katchen shows bilateral carpal tunnel syndrome worse on right" (P 1, p.6) The Arbitrator notes that this 2 year period is approximately the same length of time that Petitioner testified he was employed as a Secondary Processing Operator. The doctor's plan at that point was "[h]as work related RT carpal tunnel syndrome. Need right carpal tunnel release." (Id. at p.8).

Petitioner testified he notified Respondent on December 9, 2013 of his condition and that he believed the condition was work related. Petitioner's testimony in this regard was not refuted. In fact, the employees report of claim supports Petitioner's testimony. (RX 11).

On April 11, 2014, Petitioner returned to Dr. Schierer with joint pain, instability and weakness in both wrists with nocturnal exacerbation. A right carpal tunnel release was performed on April 29, 2014. A left carpal tunnel release was performed on May 12, 2014. (Petitioner's Exhibit 3)

Petitioner returned to work without restriction on June 1, 2014.

Dr. Schierer testified that assuming Petitioner's job duties as outlined in the August 9, 2016 correspondence, attached to his deposition as Exhibit 2, were accurate, Petitioner's job activities contributed to his bilateral carpal tunnel syndrome. The Arbitrator notes that Petitoner testified consistently with the job duties outlined on deposition Exhibit 2.

Dr. James Williams performed an examination pursuant to section 12 of the Act. Dr. Williams opined that Petitioner's bilateral carpal tunnel syndrome did not arise out of his employment with Respondent. (RX 5, p. 21). However, this opinion was based on Dr. Williams' belief that Petitioner's job duties did not include any

significant vibration, nor any sustained repetitive forceful gripping and or pinching, nor any awkward sustained positions of the hand or wrist. (Id., at p.21). Ms. Reimhold testified that up to 100% of Petitioner's job duties in his two years as a Secondary Processing Operator involved handling and grasping. Ms. Reimhold testified that up to 66% of Petitioner's job duties as a Secondary Processing Operator involved forceful gripping. Petitioner testified that he has to insert and remove up to 2,500 plugs per shift with his fingers, that he has to tape parts, remove tape from parts, the drill he operates vibrates, and that he has to flex his wrist at various stages of window production to hold items down. The Arbitrator found Petitioner's testimony in this regard persuasive. Dr. Williams' opinion was not based on an accurate understanding of Petitioner's job duties.

CONCLUSIONS

Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?

An injury is accidental within the meaning of the Act if "a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor." *Laclede Steel. Co. v. Industrial Commission*, 128 N.E.2d 718, 720 (Ill. 1955); *General Electric Co. v. Industrial Commission*, 433 N.E.2d 671, 672 (Ill. 1982). In a repetitive trauma case, issues of accident and causation are intertwined. *Elizabeth Boettcher v. Spectrum Property Group and First Merit Venture,* 99 I.I.C. 0961 (1999). Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672-73 (Ill. 2003) (emphasis added). As in establishing accident, to show causal connection Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury. *Fierke v. Industrial Commission*, 723 N.E.2d 846 (3rd Dist. 2000).

In *Edward Hines Precision Components v. Indus. Comm'n,* 825 N.E.2d 773, (2nd Dist. 2005). the Court expressly stated, "There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma." *Id.* at N.E.2d 780. Similarly, the Commission noted in *Dorhesca Randell v. St. Alexius Medical Center*, 13 I.W.C.C. 0135 (2013), a repetitive trauma claim, a claimant must show that work activities are a cause of his or her condition; the claimant does not have to establish that the work activities are the sole or primary cause, and there is no requirement that a claimant must spend a certain amount of time each day on a specific task before a finding of repetitive trauma can be made. *Randell* citing *All Steel, Inc. v. Indus. Comm'n*, 582 N.E.2d 240 (2nd Dist. 1991) and *Edward Hines supra.*

The Appellate Court in *City of Springfield v. Illinois Workers' Comp. Comm'n*, 901 N.E.2d 1066 (4th Dist., 2009) issued a favorable decision in a repetitive trauma case to a claimant whose work was "varied" but also "repetitive" or "intensive" in that he used his hands, albeit for different task, for at least five (5) hours out of an eight (8) hour work day. *Id.* "While [claimant's] duties may not have been 'repetitive' in a sense that the same thing was done over and over again as on an assembly line, the Commission finds that his duties required an intensive use of his hands and arms and his injuries were certainly cumulative." *Id.*

In this case, the evidence shows that Petitioner used his hands and arms extensively during the performance of his job duties for Respondent. Further, the Arbitrator finds the opinions and testimony of Dr. Schierer much more persuasive than those of Dr. Williams in this case.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner has met his burden of establishing that he sustained accidental injuries which arose out of and in the course of his employment with Respondent and that his current condition(s) of ill-being are causally related to the employment.

Issue (D): What was the date of the accident?
Issue (E): Was timely notice of the accident given to Respondent?

The Workers' Compensation Act is a humane law of a remedial nature that should be liberally construed to achieve its purpose. *Hagene v. Derek Polling Const.*, 388 Ill. App. 3d 380, 902 N.E.2d 1269 (2009). Hence, the Supreme Court has established a flexible but fair standard for determining manifestation dates in repetitive trauma claims. *Durand v. Industrial Commission*, 224 Ill.2d 53, 862 N.E.2d 918 (Ill. 2007). Although the date on which the employee becomes aware that he has a condition related to work was the first method for determining a manifestation date, it is not the only permissible means for alleging or proving manifestation. The manifestation date can be set as: (a) the date the employee actually became aware of the physical condition and its relation to work through medical consultation; (b) the date the employee requires medical treatment; (c) the date on which the employee can no longer perform work activities; or (d) when a reasonable person would have plainly recognized the injury and its relation to work. *Durand v. Industrial Commission*, 224 Ill.2d 53, 862 N.E.2d 918 (Ill. 2007), *see also Peoria County Belwood Nursing Home v. Industrial Commission*, 115 Ill.2d 524, 505 N.E.2d 1026 (Ill. 1987); *Oscar Mayer & Co. v. Industrial Commission*, 176 Ill.App.3d 607, 531 N.E.2d 174 (3rd Dist. 1988); *Three "D" Discount Store v. Industrial Commission*, 198 Ill.App.3d 43, 556 N.E.2d 261 (4th Dist. 1989).

Although a claimant is aware of symptoms and carries a suspicion that these are work-related, the Supreme Court has stated, "The 'fact of injury' is not synonymous with the 'fact of discovery'" *Durand*, N.E.2d at 927. Claimants are not charged with filing a claim as soon as they believe they may have a work-related condition, nor are they penalized for failing to realize a condition is work-related when the employer feels that he or she should have. The Supreme Court stated that to rely solely on a claimant's testimony concerning symptoms, without accurate knowledge of the cause of those symptoms, would essentially be asking them to "rely on 'expert' medical testimony from a layperson." *Id.* at 929. The Court also recognized that claimants would have had difficulty proving injury with a sketchy and equivocal understanding of the cause of their symptoms. *Id.* at 930. The standard that "the 'fact of injury' is not synonymous with the 'fact of discovery'" has since become a safety measure employed by all Courts to ensure that the employers do "penalize an employee who diligently worked through" his or her symptoms. *Durand v. Indus. Comm'n*, 862 N.E.2d at 927, 930. In *Durand*, the claimant was not sure her pain was from carpal tunnel syndrome, but "she believed it was work-related" in 1997, some 3 years before her injuries manifested in 2000. *Durand v. Indus. Comm'n*, 862 N.E.2d at 929-30.

In *Oscar Mayer*, the Court embraced the "date of collapse" method of determination, setting the manifestation date on the date of surgery, or the date the employee could no longer work. Compensation was awarded to a claimant, despite his full knowledge that his condition was work-related well before he filed a claim, because the claimant diligently served his employer until he could no longer do so without intervention for his repetitive injuries. *Oscar Mayer supra.* The Court noted that no prejudice can occur in employing such a method, since it is not until the employee actually misses work for his injuries that the employer becomes adversely affected; and the notice provisions were not impugned as this flexible and fair provision in no way interfered with an employer's ability to effectively investigate the claim.

In *Three "D" Discount*, the Court held the manifestation date of claimant's injury was the date "petitioner first learned that his condition of ill-being was work related." (*Id.*, 556 N.E.2d at 265) The Court went on to caution "[a]lthough our finding that the injury in this case 'manifested itself' on July 10, rather than August 10, does not affect the Commission's ruling in petitioner's favor, we emphasize that the peculiar facts of each case must be closely analyzed in repetitive-trauma cases to be fair to the faithful employee and his employer as well as to the employer's compensation insurance carrier." (*Id.*)

The Supreme Court in *Durand* noted that the manifestation date is typically set on the date the employee requires medical treatment or the date on which the employee can no longer perform work activities. *Durand*, 862 N.E.2d at 929. The law also allows Petitioner to select a manifestation date that coincides with discovery of injury and its relation to work after medical consultation. See *Steven Beal v. Town of Normal*, 06 IL.W.C. 25261, 10 I.W.C.C. 0380 (2010); *see also White v Worker's Compensation Commissio*n, 374 Ill.App.3d 907, 873 N.E.2d 388. 392-393 (4th Dist. 2007) (holding Petitioner could select accident date); *A.C. & S. v. Industrial Commission*, 304 Ill.App.3d 875, 710 N.E.2d 837, 841-842 (1st Dist. 1999).

In *Linda Peters v. Village of Caseyville*, the Commission gave the most weight to when the claimant possessed a "confirmed diagnosis" of her condition in setting the manifestation date. *Linda Peters v. Village of Caseyville*, 14 I.W.C.C. 0796 (2014). The Commission stated:

> The Commission finds that the manifestation date of Petitioner's right carpal tunnel syndrome was March 1, 2012. Although the parties had stipulated to an accident date of September 1, 2010, we find that it is within our discretion to change the accident date to conform-to the evidence. *See Beal v. Town of Normal*, 10 IWCC 380 (2010). The medical records are clear that the first mention of any correlation between Petitioner's right carpal tunnel syndrome and her work duties is the March 1, 2012, office note of Dr. Mirly. Although Petitioner's report of injury on March 2, 2012, indicates a date of accident of "Sept 2011," we find that this is not an appropriate manifestation date in this case because Petitioner did not have a confirmed diagnosis at that time. Based on our determination of the date of accident, we find that Petitioner provided timely notice of her accidental injuries. *Id.*

In this case a nerve conduction test was performed by Dr. Marc Katchen on November 18 which confirmed the diagnosis of bilateral carpal tunnel syndrome, right worse than left.

Petitioner's testimony that he provided notice of the accidents to Respondent on December 9, 2013 in

not refuted.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds that December 9, 2013, is an appropriate manifestation date under the Act. Petitioner has met his burden of establishing his date of accident and further has provided proper notice as required by the Act.

Issue (J): Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Petitioner's Exhibit 6 was admitted into evidence. This exhibit identifies the providers of services to the Petitioner, details the date the services were provided and the charges for those services. Those bills total $43,249.70. Petitioner's surgeries were performed at the specific recommendation of Dr. Schierer.

As indicated above, Respondent did not dispute the reasonableness of the medical treatment rendered to Petitioner, only their liability to pay medical benefits based upon the issues of accident, accident date, notice, and causal connection. Having found in Petitioner's favor with regard to issues C, D, E, and F, the Arbitrator finds Petitioner is entitled to medical expenses in the amount stated above.

Respondent shall pay reasonable and necessary medical services of $43,249.70, as set forth in Petitioner's exhibit 6, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Issue (K): What temporary benefits are in dispute?

Petitioner claimed entitlement to TTD benefits from April 21, 2013 through May 31, 2013. (AX 1)

Respondent did not dispute the period of incapacity, only their liability to pay TTD benefits based upon the issues of accident, accident date, notice, and causal connection. Having found in Petitioner's favor with regard to issues C, D, E, and F, the Arbitrator finds Petitioner is entitled to TTD benefits from April 21, 2013 through May 31, 2013.

Respondent shall pay Petitioner temporary total disability benefits of $414.93/week for 5 6/7 weeks, commencing 4/21/14 through 5/31/14, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $1,596.67 for non-occupational indemnity disability benefits that have been paid

Issue (L): What is the nature and extent of the injury?

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 is to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of §8.1b of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that neither party submitted an impairment rating. The Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes Petitioner continues to work as a Prime and Pre-finish Kitter. The Arbitrator therefore gives *some* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 40 years old at the time of his injuries. Petitioner will have to deal with the sequala of his injuries, including the risk of recurrence longer than would an older worker. Furthermore, Petitioner has hand and arm intensive employment. The Arbitrator therefore gives *some* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes there is no direct evidence of reduced earning capacity contained in the record. The Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the Petitioner was a credible witness. Petitioner underwent bilateral carpal tunnel releases. However, he continues to work for Respondent as a Prime and Pre-finish Kitter. The Arbitrator therefore gives *greater* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 10% loss of use of each hand pursuant to §8(e) of the Act.

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

Gloria L. Leach,
Petitioner,
vs.

NO: 15WC 41888

Roto-Rooter Group, Inc.,
Respondent.

18IWCC0663

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical, temporary total disability, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 21, 2017 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 30 2018
o102318
MJB/jrc
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LEACH, GLORIA L
Employee/Petitioner

Case# **15WC041888**

ROTO-ROOTER GROUP INC
Employer/Respondent

18IWCC0663

On 12/21/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.48% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1315 DWORKIN AND MACIARIELLO
GERALD CONNOR
134 N LASALLE ST SUITE 650
CHICAGO, IL 60602

0560 WIEDNER & McAULIFFE LTD
TIMOTHY S McNALLY
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF DUPAGE)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Gloria L. Leach
Employee/Petitioner

v.

Roto-Rooter Group, Inc.
Employer/Respondent

Case # 15 WC 41888

Consolidated cases:

18IWCC0663

An *Application for Adjustment 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 **Geneva, Illinois**, on **November 14, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

FINDINGS–

On **4/12/15**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner ***did 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 $34,117.20; the average weekly wage was **$656.10**.

On the date of accident, Petitioner was 43 years of age, ***married*** with 0 dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $.

Respondent is entitled to a credit of $0.00 under Section 8(j) of the Act.

ORDER

The Arbitrator finds that petitioner failed to carry her burden of proof to establish a causal connection between her work activities and her bilateral carpal tunnel syndrome. Based on this failure of proof, all 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.

12/20/17

Signature of Arbitrator — Date

DEC 21 2017

18IWCC0663

FINDINGS OF FACT

This case involves a Petitioner alleging injuries sustained due to repetitive trauma while working for the Respondent on April 12, 2015. Respondent disputes Petitioner's claims and the issues in dispute are: 1) accident, 2) causation, 3) medical expenses, 4) TTD and 5) permanency.

On April 12, 2015, Petitioner worked for Respondent as a dispatcher. She described her daily job duties as "Typing. Answering the phones. Texting technicians and listening to customer service calls as well." (Tr. at 11). Petitioner noted that she would work 8 hour days and 40 hour weeks, during which she would receive one daily 30 minute lunch break and two 15 minute breaks. (Tr. at 11 - 12). Petitioner noted that she began to experience pain in both hands, which she believed was worse at the end of a workday. (Tr. at 12). Petitioner, who was 46 years old as of the date of hearing, testified that she worked for respondent for 1½ years. (Tr. at 12 13).

Petitioner noted that she began to experience symptoms in her bilateral hands 2 weeks before presenting to an emergency department on April 12, 2015. (Tr. at 13). She claimed that her department had been short-staffed in the time leading up to feeling the onset of her symptoms. (Tr. at 13 14). Petitioner testified that the evening prior to her emergency room visit "The pain became so unbearable I went to the emergency room." (Tr. at 16). Petitioner testified that she was eventually referred to Dr. Schiffman at Loyola Medical Center. Dr. Schiffman performed a right carpal tunnel release surgery in July 2015 and a left carpal tunnel release surgery in October 2015. Petitioner was ultimately was placed at MMI, released to full duty, and released from medical care.

As of the date of hearing, petitioner testified that she no longer worked for respondent. She is now employed with Waste Management as a customer service representative. (Tr. at 18 19). Her daily job duties involve "Taking in customer service calls. Typing. Data entry." (Tr. at 19). Petitioner testified that she continues to experience a numbness and tingling sensation in her hands, such that she continues to practice her therapy exercises in attempts to alleviate the same. (Tr. at 19).

On cross-examination, efforts were made to further assess petitioner's allegations as to her repetitive job duties. Petitioner noted that, as a dispatcher, she would also sometimes take customer service calls. Petitioner's job was to assess a customer's needs, and match the customer with the technician to fix a plumbing-related problem. (Tr. at 20 21). Petitioner acknowledged that a good portion of her day was spent on the phone, and denied having a headset available. Petitioner testified that she would hold the phone in her hand, such that she would type with one hand. (Tr. at 21 22).

As a dispatcher, petitioner acknowledged that many times customer service representatives had already placed customer information such as name, address and other background information into the computer system. As such, petitioner's job was to speak with the customer and type a description of the plumbing problem into the computer system. (Tr. at 22 23). Petitioner testified that cellular phones would also be used to text message with technicians.

Petitioner's Exhibit 7 was admitted into evidence. It is a job description for a dispatcher. The job description indicates repetitive wrist motion with repetitive flexion and rotation. There was no indication in this exhibit or in any of the evidence that quantified with any specificity the actual time spent typing versus other tasks.

Respondent called Jim Bozarth as a witness. (Tr. at 26). Mr. Bozarth has worked for respondent for 15 years and is currently an evening operations manager. Mr. Bozarth's job includes managing the evening dispatchers. Prior to being a supervisor, Mr. Bozarth worked as a dispatcher. (Tr. at 27). Mr. Bozarth testified that an

evening dispatcher, and estimated that 15 to 20 percent of a dispatcher's time is spent typing at a computer. (Tr. at 35). There is no word per minute typing requirement. (Tr. at 35 36). Even when a dispatcher was taking customer service calls, Mr. Bozarth noted that the data entry would likely only require 50 words per call. (Tr at 37 38). Mr. Bozarth testified that he would approximate a dispatcher may take six to seven calls per hour, while also noting that call volume would vary. (Tr. at 38).

Respondent offered a video job description as Respondent's Exhibit No. 1. Mr. Bozarth testified that the video truly and accurately portrayed the physical demands of a dispatcher. (Tr. at 30). Mr. Bozarth noted that dispatchers would also at times perform the job duties of a customer service representative, which were not depicted in the video. (Tr. at 30). As to the dispatchers, Mr. Bozarth described the duties that were depicted in the video. The video depicted a dispatch worker sitting at a computer desk, equipped with a computer keyboard, two monitors, a telephone and a smart phone. Mr. Bozarth noted that the dispatcher would view tickets on the monitor to assess plumbing-related problem descriptions. (Tr. at 32). The dispatcher is presented with a customer's problem, and is then to match the customer with a technician in the field. (Tr. at 32). A mouse is used to open the tickets and perform dragging and toggling functions. The mouse may also be used to click on phone numbers to have the computer dial out to call a customer. (Tr. at 32 33). Mr. Bozarth also noted that telephone headsets are provided to employees. (Tr. at 33). The smart phone depicted in the video, Mr. Bozarth testified, is a walkie-talkie type system that dispatchers may use to speak with technicians in the field. (Tr. at 33). Mr. Bozarth described the typing tasks as typing of information consisting of short entries in addition to the background information that may have been previously typed by a customer service representative.

Petitioner was recalled by petitioner's counsel to discuss the job video. Petitioner noted that the job video was accurate, but "a lot of things left out." (Tr. at 43). Specifically, petitioner noted that the video did not accurately portray the information that was shown on the computer monitors, and that she was required to open up job lists on the computer. (Tr. at 43). Petitioner did not specifically describe what this task physically involved. Petitioner also noted that she had a different type of phone than depicted in the video, and reiterated that she did not receive a headset. (Tr. at 44). Petitioner's final disagreement was with the testimony of Mr. Bozarth. While Mr. Bozarth estimated that customer service representatives took five to seven calls per hour, petitioner noted that "it was more so probably like 20 to 30 calls in an hour."

Petitioner's treating physician, Dr. Schiffman and respondent's Section 12 examiner, Dr. Papierski, both testified via evidence deposition. Dr. Schiffman's testimony was quite brief. (PX1). He noted that he diagnosed petitioner with acute bilateral carpal tunnel syndrome. (Px. 1 at 6). Dr. Schiffman noted that petitioner explained her job, and stated that "she works at a keyboard during most of her workday." Dr. Schiffman stated that his opinion that the "bilateral carpal syndrome was aggravated or worsened through the course of her work on a keyboard."

On cross-examination, Dr. Schiffman noted that petitioner reported to him that she worked at keyboard most of the day. (Px. 1 at 10). Dr. Schiffman acknowledged that he did not review a job description. (Px. 1 at 10). Dr. Schiffman noted that he had not offered an opinion on the issue of causal connection until asked to generate a report by petitioner's counsel. (Px. 1 at 10 11). Dr. Schiffman noted that he did not specifically know what petitioner did for a living, nor did he know how long petitioner worked for respondent. Other than stating "she spent most of her workday at a keyboard," Dr. Schiffman was unable to provide any information regarding petitioner's job duties. Dr. Schiffman did not know how many hours per week petitioner worked, or how many hours per week she spent at a keyboard. He did not know whether petitioner typed long narratives or short sentences. (Px.1 at 12). Dr. Schiffman was unaware of how many words per minute petitioner typed. (Px. 1 at

12). Dr. Schiffman's sole understanding of petitioner's job duties came from petitioner's history. (Px. 1 at 13). Dr. Schiffman also noted that there is a lack of consensus in the medical community as to whether typing on a keyboard causes carpal tunnel syndrome. (Tr. at 15 16). On re direct examination, Dr. Schiffman reiterated the basis for his causation opinion, stating "Again, that she, according to her history, spent most of her workday at a computer keyboard striking keys and that activity worsening or aggravated her condition." (PX1 at 17).

Dr. Papierski conducted a Section 12 examination on January 27, 2016. (Rx. 2 at 6). In conjunction with his evaluation, Dr. Papierski analyzed the video job analysis, as well as a physical demands analysis prepared by a company known as Genex. (Rx. 2 at 9 10). Upon reporting to Dr. Papierski, petitioner had undergone bilateral carpal tunnel release surgeries. Dr. Papierski did not take issue with the diagnosis or care rendered. However, Dr. Papierski was of the opinion that petitioner's job duties did not cause or aggravate the carpal tunnel syndrome. Dr. Papierski noted that the primary occupational hazards involving carpal tunnel syndrome relate to frequent or constant use of the hands for gripping and pinching. This is particularly true if the hands or wrists "are held in awkward positions in conjunction with those gripping activities..." (Rx. 2 at 13 14). Based upon his analysis of the Genex physical demands analysis, Dr. Papierski noted that petitioner performed customer service work involving entering data while taking calls from customers at a computer. (Rx. 2 at 14). Typing and mouse use was noted to be continuous. (Rx. 2 at 15). Dr. Papierski noted that forceful extension or flexion was not present in the job demands. In explaining the basis for his opinions that the carpal tunnel syndrome would not be work related, Dr. Papierski noted that "The kinds of activities that this individual was doing would not be something that the medical literature would believe or indicate would be causing carpal tunnel syndrome." (Rx. 2 at 15 16). Dr. Papierski further explained that "Although this individual's job does require her to use her hands on a fairly continuous basis, and when I say 'continuous' I typically mean used more than 60 or 65 percent of the day, the kinds of activities being performed really included typing, and there was no forceful grip, unusual positioning or pinch activities required or done during the job activities. Therefore, her job activities would not be considered contributing to carpal tunnel syndrome."

Dr. Papierski further noted that "The literature is pretty well summarized in a publication from the American Medical Association published in 2014, and its title is Guides to Evaluation of Disease and Injury Causation. In this publication there's a section that talks about occupational risks and do they result in various conditions, including carpal tunnel. And there's a fairly long section of the book that talks about carpal tunnel, and it indicates in that book in particular that typing is not considered a cause of carpal tunnel syndrome. So our medical literature is summarized, and so that's the basis. It's not just my own opinion." (Rx. 17 18).

Dr. Papierski testified that petitioner is a female, over 40 with a body mass index of 34.7, which would place her into a group carrying a biological risk for carpal tunnel syndrome. (Rx. 2 at 18 19).

CONCLUSIONS OF LAW

1. With regard to the issues of accident and causation, the Arbitrator finds that the Petitioner has failed to meet her burden of proof. In support of this finding, the Arbitrator relies on the testimony at trial, the expert testimony and the medical evidence. Petitioner alleges that repetitive workplace trauma led to development of bilateral carpal tunnel syndrome. The parties do not dispute the diagnosis or course of medical treatment. Rather, the disputes relative to petitioner's entitlement to benefits centers upon whether petitioner's job duties caused or aggravated the diagnosis. It is well established that "an employee seeking benefits for gradual injury due to repetitive trauma must meet the same standard of proof as a petitioner alleging a single, definable accident. Williams v. Industrial Commission, 244 Ill.App.3d at 209. "In cases relying on the repetitive-trauma concept, the claimant generally relies on medical testimony establishing a causal connection between

the work performed and claimant's disability." Id. In support of her claim, Petitioner relies on the opinions of Dr. Schiffman. However, the Arbitrator notes that Dr. Schiffman's causation opinion is predicated on the notion that petitioner spends her entire day typing. Dr. Schiffman stated, "[a]gain, that she, according to her history, spent most of her workday at a computer keyboard striking keys and that activity worsened or aggravated her condition." (PX1 at 17). The evidence does not support Dr. Schiffman's presumption because the Petitioner did not spend her entire day typing. Petitioner did not quantify during her testimony the amount of time she spent typing, versus time she spent talking on her phone, using a walkie-talkie system, texting, reviewing customer orders, or performing other tasks. The testimony of Jim Bozarth - that typing only constituted 15-20% of a dispatcher's - job was not rebutted by Petitioner. The job analysis video entered into evidence does not support petitioner's claims of constant typing, and petitioner did not voice disagreement with the level of typing depicted in the video. Dr. Papierski reviewed the job analysis video and noted that the activities performed would not be sufficient to cause or aggravate carpal tunnel syndrome based on authoritative medical literature. It is further worth noting that Dr. Schiffman agreed that there is a lack of consensus in the medical community as to whether typing on a keyboard causes carpal tunnel syndrome. (Tr. at 15 - 16).

In reviewing the evidence as a whole, the Arbitrator notes the lack of testimony as to the frequency, duration or force of Petitioner's job activities. Moreover, Dr. Schiffman's opinion in favor of a causal connection failed to demonstrate an accurate understanding of the petitioner's job duties. Based on all these factors, the Arbitrator concludes that the Petitioner has failed to prove she sustained an accident on April 12, 2015 or that her current condition of ill-being is causally related to her employment with the Respondent. Accordingly, her claim for benefits is denied.

2. Based on the Arbitrator's findings above, all other issues are rendered 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 Other (explain)	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RICHARD ECHAVARRIA,

Petitioner,

vs. NO: 16 WC 024391

APPLIED CONTROLS & ACCOUNTING and JOHNSON CONTROLS,

Respondents.

18IWCC0664

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 accident and premature issuance of the Decision of the Arbitrator and being advised of the facts and law, reverses the Decision of the Arbitrator issued March 8, 2017, as stated below and remands the matter to an arbitrator assigned by the Commission with instructions for said arbitrator to conclude the arbitration hearing.

Jurisdiction over the instant matter was conferred to the Commission upon Petitioner filing a Petition for Review on March 17, 2017. Said Petition and Petitioner's subsequent pleadings took exception to the issuance of the Decision of the Arbitrator prior to the close of proof in the arbitration hearing. The Commission agrees with Petitioner that the Decision of the Arbitrator was prematurely issued.

The Arbitrator presiding over the arbitration hearing twice stated that proofs would not be closed at the end of the arbitration hearing to allow Respondent Johnson Controls the opportunity to have medical records that were subpoenaed but not received entered into evidence. At the time of the arbitration hearing, Respondent Johnson Controls had received only a portion of the medical records requested under the subpoena. Despite the Arbitrator's proclamation that proofs were to remain open, the Decision of the Arbitrator was issued on March 8, 2017, without Respondent Johnson Controls having the opportunity to have the subpoenaed medical recorded

18IWCC0664

entered into evidence.

The Commission finds 50 Ill. Adm. Code 9030.80 instructive. Paragraph (b) of 50 Ill. Adm. Code 9030.80 states, "After closing proofs, the Arbitrator shall issue a written decision . . .." 50 Ill. Admin. Code pt. 9030 (2016). The Commission finds no language in either the Act or within the Administrative Rules pertaining to the Workers' Compensation Commission that allows for the issuance of an arbitration decision while proofs remain open.

The Commission, accordingly, remands this matter to the Chairman of the Commission for it to be assigned to an arbitrator for the arbitrator to receive the subpoenaed medical records Respondent sought to enter into evidence, to close proofs, and issue a decision, if the parties desire to so proceed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Arbitration Decision, dated March 8, 2017, is vacated and this matter be remanded to the Chairman for it to be reassigned to an arbitrator for the purposes of closing proofs and issuing a new arbitration decision.

No bond is set by the Commission as the bond requirement under Section 19(f)(2) of the Act is applicable only when the Commission enters an award for payment of money. 820 ILCS 305/19(f)(2). The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

OCT 30 2018

DATED:
KWL/mav
O: 09/25/18
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

ECHAVARRIA, RICHARD
Employee/Petitioner

Case# **16WC024391**

APPLIED CONTROLS & CONTRACTING SERVICES AND JONSON CONTROLS
Employer/Respondent

18IWCC0664

On 3/8/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.83% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2208 CAPRON & AVGERINOS PC
DANIEL F CAPRON
55 W MONROE ST SUITE 900
CHICAGO, IL 60603

0481 MACIOROWSKI SACKMANN & ULRICH
ROBERT E MACIOROWSKI
105 W ADAMS ST SUITE 2200
CHICAGO, IL 60603

0507 RUSIN & MACIOROWSKI LTD
MICHAEL E RUSIN
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

18IWCC0664

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)

Richard Echavarria
Employee/Petitioner

v.

Case # **16** WC **24391**

Consolidated cases: _____

Applied Controls & Contracting Services and Johnson Controls
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 **Deborah L. Simpson**, Arbitrator of the Commission, in the city of **Chicago**, on **January 19, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [x] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [x] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] 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. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On the date of accident, **April 29, 2016**, Respondents *were* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondents.

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, Applied Controls & Contracting Services.

In the year preceding the injury, Petitioner earned **$47,840.00**; the average weekly wage was **$920.00**.

On the date of accident, Petitioner was **38** years of age, ***single*** with **0** dependent children.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

ORDER

The Petitioner failed to prove a compensable accident within the meaning of the Act. Benefits requested pursuant to Section 8 are therefore denied.

The Petitioner's request for attorney's fees and penalties 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.

Deborah L. Simpson

Signature of Arbitrator

March 5, 2017
Date

ICArbDec19(b)

MAR 8 - 2017

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Richard Echavarria,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**No. 16 WC 24391**
	)	
Applied Controls & Contracting Services, and Johnson Controls, Inc.,	)	**18IWCC0664**
	)	
Respondent.	)	
	)	

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The parties, Richard Echavarria and both Respondents, Applied Controls & Contracting Services and Johnson Controls, Inc., agree that on April 29, 2016, that in the year preceding the injuries which are the subject matter of this dispute, the Petitioner earned $47,840.00 and that his average weekly wage was $920.00 and that the Petitioner was 38 years old, single with no dependent children.

At issue in this hearing is as follows: (1)Were the Petitioner and the Respondent operating under the Illinois Worker's Compensation or Occupational Diseases Act and was their relationship one of employee and employer; (2) Did the Petitioner sustain accidental injuries or was he last exposed to an occupational disease that arose out of and in the course of employment on April 29, 2016; (3) Did the Petitioner give notice of the accident to the Respondent within the time limits stated in the Act; (4) Is the Petitioner's current condition of ill-being causally connected to this injury or exposure; (5) Is the Respondent liable for the unpaid medical bills, currently Petitioner's out of pocket expenditures of $597.00; (6) Is the Petitioner entitled TTD from May 18, 2016 through January 19, 2017; (7) Is Petitioner entitled to penalties and attorney's fees pursuant to Sections 19 (k), 19(l) and 16 of the Act; and (8) Is Petitioner entitled to prospective medical care.

STATEMENT OF FACTS

The Petitioner is an electrician. In November of 2015 he was hired by Applied Controls and Contracting Services (hereinafter "Applied"). Shortly after being hired by Applied the Petitioner was assigned out to a project at the University of Chicago, the hospital and/or the dorms at the University, the name of the building was "CCD." The Petitioner believes that the

date he was contracted out by Respondent Applied Controls was January 4, 2016. While he was contracted out, he was working for Respondent Johnson Controls (hereinafter "Johnson"). Petitioner testified that he did not leave Applied to go to work for Johnson.

While working for Respondent Johnson the Petitioner was there to build, install and maintain heating and cooling equipment. He began working on this project in January of 2016 and was still working on it on April 29, 2016, when he was injured. He was assigned to the third and fourth floors. Petitioner worked from 7 a.m. to 3 p.m.

Petitioner testified that on April 29, 2016 he was ordered by project manager Robert Biliskov, an employee of Respondent Johnson, designated as the project manager/foreman for the project at the University of Chicago. On that date Petitioner was sent to the 11th floor to build a control panel. The Panel he was directed to build controls and regulates the heating and cooling system, it electronically turns on the heat or air conditioning. Petitioner was given the schematics to build two panels; they were three feet tall and two feet wide. Petitioner exhibits one through 3 are photographs of the panels that Petitioner took after completing them to confirm that he had completed the job. Petitioner was actually responsible for wiring up and installing the devices inside the panels. When the panel was completed it weighed approximately 130 pounds.

Petitioner testified further that he was working alone on April 29, 2016. When he completed building the first panel he had to take it off the table. It was while he was moving the panel off the worktable that he injured himself. According to the Petitioner when he lifted the panel off the worktable it was pretty heavy, and while turning with the panel in his arms he felt his knee buckle. He was able to keep the panel in his hands and get it down to the ground. He injured his left knee and his low back during the incident. Petitioner took a break, he sat down for a little bit, stretching his back and his knee. At the time he believed he may have pulled something, strained it or pulled it. He thought he relaxed for about 20 minutes, then because it was the end of the day he might have gotten up to look at the other panel and move it but does not recall exactly. At the end of the shift, Mr. Biliskov met the Petitioner in the parking lot, to find out what was taking so long. Petitioner advised Mr. Biliskov that the panels were heavy and because he was working by himself it was taking a little longer. Petitioner also advised Mr. Biliskov that he was sore, and that since it was Friday, hopefully he would feel better on Monday.

Over the weekend the Petitioner relaxed, layed down and iced his knee for the whole weekend.

The Petitioner returned to work on Monday, where he was assigned again to the 11th floor. Although not continuously on the 11th floor, Petitioner continued to work for on the project up until May 6, 2016, when Petitioner was laid off by Respondent Johnson. Petitioner has not worked anywhere else since he was laid off by the Respondent Johnson on May 6, 2016.

Petitioner testified that he did not have any other conversations with Mr. Biliskov regarding the incident on April 29, 2016. On May 6, 2016 Petitioner did tell Mr. Biliskov that he was going to need help with the panel, moving them where they needed to be moved to when

completed and Mr. Biliskov sent Eric one of the other workers to help him move the panels. After the panels were moved, Petitioner reports he got a phone call advising him to bring his tools down, that he was done. Petitioner testified that he never reported the accident from April 29, 2016, to anyone at Respondent Johnson, other than reporting to Mr. Biliskov on April 29, 2016 that he was sore. He did not fill out any accident reports with Respondent Johnson.

Petitioner testified that he returned to Respondent Applied around the end of May. At that time he told a female employee that his back and everything was sore, then she told him to come and fill an accident report. Petitioner identified Petitioner's exhibit number 11 as the accident report that he filled out and signed on May 31, 2016. Petitioner testified that he typed the report and put all the information into it. He stated that it was his signature on the bottom of the report. The form was an Allied form and was submitted to Respondent Allied. Petitioner testified further that the accident date of "5-29" was a typo and should have been "4-29." Petitioner testified that after he filed the report with Respondent Applied, he was contacted by their insurance company and gave a recorded statement to someone from the insurance company.

Petitioner testified that he eventually sought treatment for the injury with his primary care physician Dr. Keith Sarpolis, the first time was on May 18, 2016. Dr. Sarpolis ordered an MRI of Petitioner's knee which Petitioner had on May 31, 2016.

Petitioner returned to Dr. Sarpolis on June 2, 2016. Dr. Sarpolis referred the Petitioner to Dr. Marc Breslow, and orthopaedic surgeon with Illinois Bone and Joint. Petitioner saw Dr. Breslow on June 17, 2016, for his left knee.

On July 15, 2016, Petitioner saw Dr. Thomas Gleason at Illinois Bone and Joint with regard to his lower back who recommended physical therapy.

Petitioner returned to Dr. Sarpolis on September 2, 2016, who prescribed Tramadol for the pain. Petitioner returned to Dr. Sarpolis on October 5th and the medication was changed to Norco.

Petitioner returned to Dr. Sarpolis on November 14, 2016, at that time Dr. Sarpolis ordered an MRI for Petitioner's lower back which Petitioner had on December 2, 2016.

On December 13, 2016 Petitioner returned to Dr. Sarpolis and at that time Dr. Sarpolis ordered physical therapy for Petitioner's lower back.

Petitioner testified that he has not had the recommended surgery for his knee, or the recommended physical therapy for his lower back.

Petitioner denied any difficulty, medical treatment or accidents with respect to his left knee before the accident on April 29, 2016. When asked "same question with regard to your lower back?" Petitioner responded "No, nothing severe." When questioned regarding any other accident or injuries involving his left knee or his lower back since the events he described of April 29, 2016, Petitioner denied sustaining any other injuries to those body parts. He testified

further that both his left knee and his lower back have continued to get worse since the incident he described as occurring on April 29, 2016.

Petitioner has not seen any other medical providers since his visit to Dr. Sarpolis on December 13, 2016. He testified that to date he has paid $597.00, out of his own pocket for the medical treatment he outlined in his testimony.

On cross examination, Petitioner admitted that he had a prior injury to his lower back, which he described as spasms for which his primary care doctor sent him to physical therapy. He also testified that he had surgery on his right knee in 2006 for a torn ACL. Petitioner also admitted that he played baseball with his friends, jogged a couple of days a week with friends he denied being a big runner, he just would run with the guys once in a while when they got together.

Petitioner denied have any information with respect to either Respondent Applied or Respondent Johnson's requirements regarding reporting injuries that occur on the job.

On cross examination Petitioner testified that he had complained to Yolanda at respondent Allied that Respondent Johnson had him working by himself lifting the panels. He stated that on more than one occasion he told Yolanda "to tell George that these guys got me doing all this stuff by myself." He admitted that he did not tell her that he injured his knee or strained his back but he does remember complaining to her that he was sore, and that he was by himself and it was heavy labor.

Petitioner testified further that the job with Johnson was basically at the end of the job the week following the accident and that most of the time Monday through Thursday was just walking around, testing the computers to see what was working and what wasn't, it wasn't heavy labor so he was able to do it. Petitioner testified that he kept telling them that week that this was heavy labor and he needed help. He told them he was sore, but he never mentioned the incident that he claims he hurt his knee and his back doing.

Petitioner testified that on May 6, 2016 he was told by Yolanda to come in and see her on May 9, 2016. Petitioner testified that he applied for Unemployment on May 8, 2016, and he received it for the full 26 weeks. He was not receiving unemployment benefits at the time of the hearing. Petitioner testified that his group insurance through Respondent Applied was with Blue Cross/Blue Shield and his medical treatment through May 31, 2016 was paid for through group. He testified that he could not afford the Cobra payments so he has not had insurance since that date.

On cross examination by Respondent Johnson, the Petitioner admitted that during the time period that he was working for Johnson his hours were turned in to respondent Applied and his paychecks came from Respondent Allied. Respondent Applied, provided his health insurance. Petitioner also clarified that there were two jobs at the University of Chicago, one was the CCD job, which is the job he claims to have injured himself on , and there was a separate job at the dorms which he was also assigned to work on during the time he was contracted out to Respondent Johnson. Mr. Biliskov was the project manager for both, and he was the individual

who would direct the Petitioner on a daily basis which of the two projects he would work on on a particular day and what he would be doing for the job.

Petitioner admitted that before he started working on the project with Respondent Johnson, he had to go through safety training with the general contractor for the CCD project, a company called Gilbane. During the safety training Petitioner was advised that Gilbane had a paramedic on site at all times while work was going on. Petitioner was further instructed that if he sustained any injury while working on the project he was supposed to report to the paramedic on site. Petitioner identified Respondent Johnson's exhibit number 2 as the paperwork he filled out after completing safety training on January 13, 2016.

The Respondent Applied called Yolanda Moustakas to testify on their behalf; Ms. Moustakas is the Human Resources manager for Respondent Applied and has been so employed for two years. Ms. Moustakas testified that the Petitioner was an employee for Respondent Applied and that he was contracted out to Respondent Johnson. While Petitioner was working for Respondent Johnson, the foreman at Johnson would assign work responsibilities to the Petitioner. Respondent Johnson would report weekly to respondent Applied what work Petitioner completed during the week and the hours that Petitioner worked. Petitioner was paid by respondent Applied, who also provided benefits as well for the Petitioner. Petitioner picked up his checks on Fridays from Applied, he also helped them with their IT.

Ms. Moustakas testified that she had a telephone conversation with the Petitioner on May 6, 2016 when the job ended with Respondent Johnson at which time she told him to come in on Monday May 9, 2016 so that they could meet to discuss the lack of work that Applied currently was experiencing. Petitioner did not advise Ms. Moustakas that he had been injured on the Johnson project on April 29, 2016 or at any time while on the project at the University of Chicago.

According to Ms. Moustakas, the Petitioner applied for unemployment benefits on May 8, 2016. Petitioner appeared at Respondent Applied on May 9, 2016 and was advised that he was being laid off due to lack of work. He returned to Applied on May 11, 2016, and turned in his safety belt, tool bag, tool kit, safety vest and his hat. At no time on either of those days did the Petitioner advise Ms. Moustakas that he had been injured while working on the job at University of Chicago.

On May 20, 2016, Ms. Moustakas and the Petitioner had a conversation regarding the Petitioner not feeling well. At that time she asked him what was wrong and he told her he had pain in his back and told her about moving the panel and hurting his back. When she asked when it happened he stated the last week of work. She inquired why he did not say anything and he stated he did not think it was that bad. She then told him he had to fill out an accident report and send it back to her. Petitioner had contact with Ms. Moustakas on May 23 and May 25. He did not send the report back until May 31, 2016, after he saw his doctor.

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)

Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the witness' demeanor and any external inconsistencies with testimony. Where a claimant's testimony is inconsistent with his actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission*, 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission*, 52 Ill. 2d 490 (1972).

Internal inconsistencies in a claimant's testimony, as well as conflicts between the claimant's testimony and medical records, may be taken to indicate unreliability. *Gilbert v. Martin & Bayley/Hucks*, 08 IL.W.C. 004187 (Ill. Indus. Comm'n 2010).

In support of the Arbitrator's decision with regard to whether the Petitioner and the Respondents were operating under the Illinois Worker's Compensation or Occupational Diseases Act and was their relationship one of employee and employer, the Arbitrator makes the following conclusions of law:

The Arbitrator incorporates the above-referenced findings of fact and conclusions of law as if fully restated herein.

Both the Petitioner and Ms. Moustakas testified that the Petitioner was an employee of the Respondent Applied Controls & Contracting Services, and that while the responsibility of assigning the Petitioner work , directing him where to work and what to do was in the control of the Respondent Johnson Controls, Petitioner's work and hours were reported to the Respondent Applied and his paychecks and other benefits were provided by Respondent Applied Controls & Contracting Services. The Arbitrator finds that the Respondent Applied Controls and the Petitioner were operating under the Illinois Worker's Compensation or Occupational Diseases

Act and their relationship was one of employee and employer. Respondent Applied Controls & Contracting Services was a loaning employer and the Respondent Johnson Controls was a barrowing employer, also operating under the Illinois Worker's Compensation Act.

In support of the Arbitrator's decision with regard to whether Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent, the Arbitrator makes the following conclusions of law:

The Arbitrator incorporates the above-referenced findings of fact and conclusions of law as if fully restated herein.

It is well established that a claimant carries the burden of proof with respect to each element of his claim by the preponderance of credible evidence. *Parro v. Indus. Comm'n*, 260 Ill.App.3d 551, 554-55 (1st Dist. 1993). The claimant may present witnesses to prove his case. It is the function of the Arbitrator to determine the credibility of those witnesses, draw reasonable inferences based on the testimony, and determine the weight to be assigned the testimony. *Parro*, 260 Ill.App.3d at 554. The Arbitrator need not find for a claimant merely because there is some testimony that standing alone would justify a favorable outcome. *Burrgess v. Industrial Comm'n*, 169 Ill.App.3d 670, 676 (1st Dist. 1988). Rather, the Arbitrator should consider both direct and circumstantial evidence and draw reasonable inferences there from, even if it is contrary to the testimony. (*Id.*) It is the Commission's function to evaluate the evidence and resolve the conflicts that arise. *Beattie v. Industrial Comm'n*, 276 Ill.App.3d 446, 449 (1995).

After carefully reviewing the record, weighing the evidence, and assessing Petitioner's credibility, the Arbitrator finds that the Petitioner was not a credible witness for several reasons.

The Petitioner claims that he sustained an accidental injury on April 29, 2016, when he was taking a panel he completed working on off of the work table and was moving it to another place. He claims that when he turned with the panel he felt his knee buckle and felt pain in his lower back. He put the panel down without dropping it. He then took a break, rested, stretching moving his knee and his back. He does not do any more work that day. At the end of the day he met the foreman in the parking lot, who inquired why it was taking so long to complete the panels. Petitioner told him the work was heavy and he was sore, but did not tell the foreman that he had injured himself. Likewise he does not report the injury to the supervisor the next week when he was being given assignments or even on the last day he worked when they advised him the project was complete as far as Petitioner was concerned.

Additionally, at the time he started the job, Petitioner went through safety training with the general contractor, Gilbane. Petitioner was advised at that time that injuries had to be reported when they happened, that there was a paramedic on site at all times that work was being done, and that upon being injured the employee was to report to the paramedic on duty. Petitioned did not report to the paramedic on duty at any time after the alleged accidental injury on April 29, 2016.

On May 6, 2016, the Petitioner was advised by telephone that Respondent Applied did not have any work for him after the University of Chicago project ended. He was asked to meet with Ms. Moustakas on May 9, 2016, regarding the employment situation. On May 8, 2016, Petitioner applied for unemployment benefits, which he did receive. Petitioner met with Ms. Moustakas on that date, as well as on May 11, 2016 when he returned his company equipment. Petitioner did not advise Ms. Moustakas or anyone else at Respondent Applied, about the purported accidental injury on either of those dates.

Petitioner sought medical treatment from his family physician on May 18, 2016. On May 20, 2016, in a telephone conversation with Ms. Moustakas Petitioner first mentions the purported accident to Ms. Moustakas after Ms. Moustakas inquired what was wrong when Petitioner stated that he was not feeling well. Ms. Moustakas told Petitioner he needed to fill out an accident report and emailed it to him that day. Petitioner spoke with Ms. Moustakas again on May 23 and May 25. He indicated that he was waiting to see his doctor before he turned in the accident report. Petitioner turned the accident report in to the Respondent Applied on May 31, 2016, after he had an MRI and saw his doctor. May 31, 2016 was the last day that the Petitioner had medical insurance as he had declined the COBRA benefit offered to him when he was laid off by the Respondent Applied.

The medical record from Petitioner's treating physician on May 18, 2016, indicates that Petitioner is having pain in his knees and lower back. It further states he was lifting some heavy panels at work about two weeks ago when his left knee started bothering him, he iced the knee through the weekend and had some relief. The report also states that he has also been having lower back pain. This is not attributed to work, there is no description of the Petitioner's knee buckling or feeling pain in his back. (PX 4) It is not until June 17, 2016, that a report of how the injury to Petitioner's knee occurred is recorded and in that medical report from Dr. Breslow, it indicates that Petitioner was lifting an object, twisted and felt a pop in his knee. (PX 5, p. 000003)

Despite numerous opportunities to inform individuals about the accidental injury Petitioner claims to have suffered Petitioner failed to tell his supervisor at Respondent Johnson or the Human Resources Director at Respondent Applied that he sustained an injury while working at the University of Chicago on the CCD project. Additionally, Petitioner admitted to attending the safety training with the general contractor at which time he agrees that he was advised that on the job injuries had to be reported immediately and that there was a paramedic on site at all times and that injured workers were to report to the on duty paramedic upon sustaining an injury, but he failed to do so. It was not until after Petitioner was laid off, and opted not to continue his health insurance under COBRA that he decides to report the "work injury." The Petitioner's version of how the accident happened does not correspond with what he reported to the doctors, according to the medical records.

For all these reasons the Arbitrator concludes that the Petitioner did not prove by a preponderance of the evidence that he sustained an accidental injury that arose out of and in the course of his employment with either Respondent Applied Controls & Contracting Services or Respondent Johnson Controls.

In support of the Arbitrator's decision with regard to whether the Petitioner gave notice of the accident to the Respondent within the time limits stated in the Act; whether the Petitioner's current condition of ill-being causally connected to this injury or exposure; whether the Respondent liable for the unpaid medical bills, currently Petitioner's out of pocket expenditures of $597.00; whether the Petitioner is entitled TTD from May 18, 2016 through January 19, 2017; whether Petitioner is entitled to penalties and attorney's fees pursuant to Sections 19 (k), 19(l) and 16 of the Act; and whether Petitioner is entitled to prospective medical care, the Arbitrator makes the following conclusions of law:

The Arbitrator incorporates the above-referenced findings of fact and conclusions of law as if fully restated herein.

Petitioner failed to prove that he sustained an accidental injury that arose out of and in the course of his employment with Respondents therefore the above listed issues are moot.

ORDER OF THE ARBITRATOR

The Petitioner failed to prove a compensable accident within the meaning of the Act. Benefits requested pursuant to Section 8 are therefore denied.

The Petitioner's request for attorney's fees and penalties is denied.

Deborah L. Simpson

Signature of Arbitrator

March 5, 2017

Date

STATE OF ILLINOIS)
) SS
COUNTY OF LAKE)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS,
ILLINOIS WORKERS' COMPENSATION COMMISSION,
INSURANCE COMPLIANCE DIVISION

Petitioner,

vs.

NO. 11 INC 504

DAVID NOVAK, Individually, and as President, SUSAN NOVAK, Individually and as Secretary, of CHAIN-O-LAKES DENTAL LABORATORY, INC.,

18IWCC0665

Respondent,

DECISION AND OPINION RE: INSURANCE COMPLIANCE

Petitioner, the Illinois Workers' Compensation Commission (the Commission), Insurance Compliance Division, brings this action, by and through the Office of the Illinois Attorney General, against Respondents, DAVID NOVAK, Individually, and as President, SUSAN NOVAK, Individually and as Secretary, of CHAIN-O-LAKES DENTAL LABORATORY, INC, a/k/a CHAIN-O-LAKES DENTAL LABORATORY (Chain-O-Lakes Dental Laboratory, Inc. a/k/a Chain-O-Lakes Dental Laboratory hereinafter referred to as Chain-O-Lakes) alleging violations of Section 4(a) of the Illinois Workers' Compensation Act (the Act) and Section 9100.90 of the Rules Governing Practice Before the Industrial Workers' Compensation Commission (the Rules), codified as Title 50 of the Illinois Administrative Code, Chapter 6. Proper and timely notice was given to all parties.

An Insurance Compliance Hearing on the Merits was held before Commissioner Michael J. Brennan on June 15, 2015, in Waukegan, Illinois. Respondents failed to appear at the hearing despite having been served with notice of said hearing on February 26, 2018. PX.1.

Petitioner has requested penalties totaling $871,357.01, which represents 1,717 days of non-compliance with Section 4(a) of the Act, from August 24, 2007 through April 25, 2012, and $21,323.73 for savings realized through not having workers' compensation insurance. The Petitioner acknowledges that the Respondents are entitled to a credit of $8,466.72 for payments made pursuant to the October 30, 2014 settlement agreement.

The Commission, after considering the record in its entirety and being advised of the applicable law, finds that Respondents, DAVID NOVAK, Individually, and as

President, SUSAN NOVAK, Individually and as Secretary, of CHAIN-O-LAKES DENTAL LABORATORY, INC. a/k/a CHAIN-O-LAKES LABORATORY, knowingly and willfully violated Section 4(a) of the Act and Section 9100.90 of the Rules between August 24, 2007 through April 25, 2012, representing 1,717 days.

As a result, Respondent, Chain-O-Lakes, shall be held liable for non-compliance with the Act and shall pay a penalty in accordance with Section 4(d) of the Act and 9100.90(b) of the Rules. The Commission hereby assesses the penalty of $850,033.28 against the above-named Respondent for the reasons set forth below. The Commission declines to award $21,323.73 for the alleged premiums saved as that is not a relevant factor provided for in the Act.

The Commission further finds that in the event the Respondent, Chain-O-Lakes, fails to pay the penalty within 30 days, the penalty is then automatically assessed against the corporate officers, David Novak, individually, and Susan Novak, individually, as provided for in Section 4(d) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. An Insurance Compliance Hearing on the Merits was held before Commissioner Michael J. Brennan on June 15, 2015, in Waukegan, Illinois. Respondents, DAVID NOVAK, Individually, and as President, SUSAN NOVAK, Individually and as Secretary, of CHAIN-O-LAKES DENTAL LABORATORY, INC. and CHAIN-O-LAKES LABORATORY, failed to appear despite having been served with notice of said hearing on February 26, 2018. PX.1. Cathy Kaczanowski, Insurance Compliance Investigator, testified on behalf of the Petitioner.

2. Chain-O-Lakes Dental Laboratory, Inc. registered as a business with the Illinois Secretary of State and filed Articles of Incorporation with the Illinois Secretary of State on February 27, 1986. PX.10. Chain-O-Lakes filed annual reports thereafter. *Id.*

3. Records from Illinois Department of Employment Security showed that Respondent, Chain-O-Lakes, had employees during the third quarter of 2008 through the second quarter of 2012 each of whom received certain wages. The record also specified Respondent, Chain-O-Lakes, as the employer of said business. PX.11.

4. Records from the Illinois Department of Revenue showed that Respondent, Chain-O-Lakes, has paid compensation subject to income tax withholdings. PX.12.

5. On May 10, 2017, Esteban Ortiz, Proof of Coverage Analyst for NCCI Holdings, Inc., conducted a thorough search of the NCCI database. The search revealed that

the Respondent, Chain-O-Lakes, did not have workers' compensation insurance from August 24, 2007 through April 25, 2012. PX.2.

6. Per the Proof of Coverage Inquiry performed by NCCI Holdings, Respondent, Chain-O-Lakes, had workers' compensation insurance coverage from February 15, 1996 through August 23, 2007, and May 21, 2012 through May 21, 2018. PX.15.

7. Maria Sarli-Dehlin, of the Illinois Workers' Compensation Commission Office of Self-Insurance, certified on March 17, 2017 that no certificate of approval to self-insure was issued by the Illinois Workers' Compensation Commission to the Respondent, Chain-O-Lakes, between August 24, 2007 and April 25, 2012. PX.3.

8. An Insurance Compliance Settlement Agreement was entered into between David Novak, Individually and President, Susan Novak, Individually and as Secretary of Chain-O-Lakes Dental Laboratory, Inc. and Robert Ruiz, Manager of the Insurance Compliance Department of the Illinois Workers' Compensation Commission on October 30, 2014. Per the Settlement Agreement, the Respondent, Chain-O-Lakes, was to pay to the State of Illinois the sum of $20,000.00 for non-compliance with the requirements of 820 ILCS 305/4. The Respondent, Chain-O-Lakes, was required to make an initial payment of $833.41 on December 15, 2014 and monthly payments of $833.33 due on the 15th of the month for the following 23 months. The settlement further provided that failure to comply with the agreed payment terms will result in the immediate reinstatement of penalty assessment proceedings against the Employer without further notice. PX.7.

9. On February 23, 2017, a final notice of late payment was issued to the Respondent, Chain-O-Lakes. Per the correspondence, it was noted that the Respondents have failed to comply with the terms of the October 30, 2014 settlement agreement. The letter advised that if the amount of $11,533.28 was not remitted to the Petitioner by March 9, 2017 then the matter would be forwarded to the Illinois Attorney General's Office for collection. PX.8. Similar letters were sent to the Respondents on May 28, 2015, August 3, 2015, December 2, 2015, April 18, 2016, and November 22, 2016. *Id.*

10. On March 17, 2017, Robert Ruiz authored a letter to the Respondents advising that payment has not been made since December 2015, penalty assessment proceedings would be reinstated. PX.9.

Pursuant to the terms of the October 30, 2014 settlement agreement, the Respondents, Chain-O-Lakes, David Novak, and Susan Novak, acknowledged that they were not in compliance with Section 4 of the Illinois Workers' Compensation Act in that they failed to maintain workers' compensation insurance between August 24, 2007 and April 25, 2012 as required by the Act, for Chain-O-Lakes.

The Commission's authority and jurisdiction over insurance non-compliance cases is authorized by the Act, as well as the Rules. Under Section 4 of the Act, all employers

who come under the auspices of the Act are required to provide workers' compensation insurance, whether this is done through self-insurance, security, indemnity or bond, or through a purchased policy. Under Section 4(d):

> Upon a finding by the Commission, after reasonable notice and hearing, of the knowing and willful failure or refusal of an employer to comply with any of the provisions of paragraph (a) of this Section . . . , the Commission may assess a civil penalty of up to $500 per day for each day of such failure or refusal after the effective date of this amendatory Act of 1989. The minimum penalty under this Section shall be the sum of $10,000. Each day of such failure or refusal shall constitute a separate offense. The Commission may assess the civil penalty personally and individually against the corporate officers and directors of a corporate employer, the partners of an employer partnership, and the members of an employer limited liability company, after a finding of a knowing and willful refusal or failure of each such named corporate officer, director, partner, or member to comply with this Section. The liability for the assessed penalty shall be against the named employer first, and if the named employer refuses to pay the penalty to the Commission within 30 days after the final order of the Commission, then the named corporate officers, directors, partners, or members who have been found to have knowingly and willfully refused or failed to comply with this Section shall be liable for the unpaid penalty or any unpaid portion of the penalty.

Section 9100.90 of the Rules speaks to the language of the Act, and describes the notice of non-compliance required, as well as the procedures of the Insurance Compliance Division, and how hearings are to be conducted. Reasonable and proper notice, as noted above, was provided to the Respondents. Section 9100.90(d)(3)(D) of the Rules provide that "A certification from an employee of the National Council on Compensation Insurance stating that no policy information page has been filed in accordance with Section 9100.20 shall be deemed prima facie evidence of that fact." Petitioner's Exhibit 2 contains the certification from NCCI Holdings, Inc. indicating that Respondent, Chain-O-Lakes, did not have workers' compensation insurance between August 24, 2007 and April 25, 2012. Respondents failed to offer any evidence of compliance with the Act.

In *State of Illinois v. Murphy Container Service, et al.*, 2007 Ill.Wrk.Comp.LEXIS 1216, the Commission considered the following factors in assessing penalties against an uninsured employer: 1) the length of time the employer had been violating the Act; 2) the number of workers' compensation claims brought against the employer; 3) whether the employer had been made aware of his conduct in the past; 4) the number of employees working for the employer; 5) the employer's ability to secure and pay for workers'

compensation coverage; 6) whether the employer had alleged mitigating circumstances; and, 7) the employer's ability to pay the assessed amount.

In the instant case, the Commission finds that the period of time during which the Respondent, Chain-O-Lakes, violated the Act by failing to obtain workers' compensation insurance was significant. The Respondent, Chain-O-Lakes, failed to have insurance for 1,717 days, from August 24, 2007 and April 25, 2012. Further, the Respondent, Chain-O-Lakes, employed up to 18 employees during the period of non-compliance. The evidence establishes that the Respondents were aware of their obligation to secure workers' compensation insurance as Chain-O-Lakes previously had a workers' compensation insurance policy.

Having reviewed the record, the Commission finds no evidence as to Respondents inability to secure and pay for workers' compensation coverage and no evidence of any mitigating circumstances. The Commission, however, declines to award the $21,323.73 for the alleged premiums saved as that is not a relevant factor for consideration provided for under the Act.

The Commission finds Respondents knowingly and willfully failed to comply with the Act. Based on the significant period of time that Respondents failed to comply with the Act, the Commission hereby assesses the penalty of $850,033.28 against the above-named Respondent, Chain-O-Lakes. The Commission further finds that in the event the Respondent, Chain-O-Lakes, fails to pay the penalty within 30 days, then the penalty will automatically be assessed against the corporate officers, David Novak, individually, and Susan Novak, individually, as provided in Section 4(d) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent, CHAIN-O-LAKES DENTAL LABORATORY, INC. a/k/a CHAIN-O-LAKES DENTAL LABORATORY, is found to be an employer who was in non-compliance with the insurance provisions of Section 4(a) of the Act and Section 9100.90 of the Commission Rules, and is hereby ordered to pay to the Commission a penalty of $850,033.28 pursuant to Section 4(d) of the Act and Section 9100.90 of the Commission Rules. This amount represents 1,717 days of non-compliance with the Act, at $500.00 per day, from August 24, 2007 and April 25, 2012, with Respondent entitled to a credit of $8,466.72.

IT IS FURTHER ORDERED BY THE COMMISSION that in the event the Respondent, Chain-O-Lakes, fails to pay the penalty as aforesaid within 30 days, then the penalty will automatically be assessed against the corporate officers, David Novak, individually, and Susan Novak, individually, as pursuant to Section 4(b) of the Act.

Pursuant to Commission Rule 9100.90(f), once the Commission assesses a penalty against an employer in accordance with Section 4(d) of the Act, payment shall be made according to the following procedure: 1) payment of the penalty shall be made by certified check or money order made payable to the Commission; 2) payment shall be mailed or presented within thirty (30) days of the final order of the Commission or the order of the court of review after final adjudication to:

18IWCC0665

Workers' Compensation Commission
Insurance Compliance Division
100 West Randolph Street, Suite 8-328
Chicago, Illinois 60601

or any appropriate change of address as may be listed on the Illinois Workers' Compensation Commission's website.

Bond for the removal of this cause to the Circuit Court by the Respondents 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 30 2018
MJB/tdm
D: 10-16-18
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Larry Irving,

Petitioner,

vs. NO: 13 WC 20110

City of Chicago,

Respondent.

18IWCC0666

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of permanent disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 13, 2018 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

18IWCC0666

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 2018
SJM/sj
o-9/20/2018
44

Stephen J. Mathis

Deborah L. Simpson

DISSENT

I respectfully dissent from the majority decision and reverse the Arbitrator's decision to find Petitioner Permanently and totally disabled.

Petitioner worked heavy labor for Respondent from 1998 through the time of his injury in November 2011. On the date of accident Petitioner sustained an injury to his right leg and knee that necessitated prolonged therapy, surgery (to repair a diagnosed medial meniscus tear) and PRP and Supartz injections post surgery, in an attempt to alleviate ongoing pain complaints. Petitioner underwent a Functional Capacity evaluation which determined that Petitioner could no longer meet the physical demands of a concrete laborer (heavy). The FCE placed Petitioner at the medium-heavy physical demand level. Subsequent to the FCE, Petitioner was found to be at MMI and given permanent restrictions which Respondent was unable to accommodate.

Vocational rehabilitation consultations were performed at the direction of both Petitioner and Respondent. Both consultants agreed that Petitioner's valid FCE restrictions limited him to sedentary only work. Both consultants agreed that as a result of Petitioner's advanced age, limited education, and work history, Petitioner lacked the transferable work skills to enable him to obtain a job in the competitive labor market. Furthermore, Respondent's vocational consultant, Vocamotive, opined that it would not even recommend Petitioner attempt to obtain a GED or computer literacy skills because of his advanced age (Respondent, at no time, either directed or authorized Petitioner to participate in any such class or program). Accordingly, Respondent's consultant concluded that Petitioner had lost all access to any stable labor market and that he is totally disabled.

In spite of overwhelming evidence that the Petitioner is not qualified for or capable of obtaining gainful employment the Arbitrator awarded Petitioner permanency benefits of 50% of

a person as a whole. It is the opinion of the Arbitrator and the majority that Petitioner must exhaust all improbable possibilities of employment before being deemed totally disabled contrary to case law. Petitioner was 63 years old at the time of Arbitration. Given Petitioner's limited education and advanced age it is implausible to expect him to obtain not only a GED but computer literacy training in an attempt to obtain the skills and education that **MIGHT** enable him to obtain a job within his restrictions. Two vocational experts retained by the parties concluded that no stable labor market exists for Petitioner. Respondent's vocational expert explicitly concluded that Petitioner was totally disabled. Petitioner has presented sufficient evidence of total disability to shift the burden of proof to Respondent to show that some type of work is available to Petitioner. Respondent provided no evidence to prove that Petitioner is capable of obtaining gainful employment. Accordingly, I would reverse the decision of the Arbitrator to find Petitioner proved that he is permanently and totally disabled.

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

IRVING, LARRY
Employee/Petitioner

Case# **13WC020110**

CITY OF CHICAGO
Employer/Respondent

18IWCC0666

On 2/13/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.65% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0494 JOSEPH J SPINGOLA
AATORNEY AT LAW
1314 KESSINGTON SUITE 3843
OAK BROOK, IL 60522-7133

0010 CITY OF CHICAGO-LAW DEPT
DONALD CHITTICK
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

18IWCC0666

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

Larry Irving
Employee/Petitioner
v.
City of Chicago
Employer/Respondent

Case # **13** WC **20110**

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 **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **10/25/2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ 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 18IWCC0666

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 **11/2/2011**, 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 **$73,216**; the average weekly wage was **$1,408.00**.

On the date of accident, Petitioner was **57** 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 **$71,610.16** for TTD, **$0** for TPD, **$219,658.14** for maintenance, and **$0** for other benefits, for a total credit of **$291,268.30**.

Respondent is entitled to a credit of **$0** under §8(j) of the Act.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $695.78 per week for **250 weeks**, due to the work-related injury which caused a **50% loss of a person-as-a-whole.**

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

February 12, 2018
Date

FEB 13 2018

INTRODUCTION

This matter proceeded to hearing before Arbitrator Steven Fruth. The disputed issues were: ***F:*** Is Petitioner's current condition of ill-being causally related to the accident?; ***L:*** What is the nature and extent of the injury?

STATEMENT OF FACTS

On November 2, 2011, Petitioner Larry Irving was 57 years old. He was employed by Respondent as a Concrete Laborer (formerly Cement Mixer) for the Department of Transportation. He has worked for Respondent since 1998. As a Cement Mixer Petitioner would remove and replace concrete sidewalks, vaulted sidewalks, curbs, and gutters. The job required heavy labor which included breaking concrete, shoveling broken concrete and dirt, and building forms for pouring concrete. The job required kneeling about half the time. He described it as "grunt" work.

Petitioner testified that he had made two prior worker's compensation claims: right knee 15 years ago and left shoulder. He was able to work his regular job after his prior knee injury.

Petitioner testified that on November 2, 2011 he was working on pouring curbs and gutters when he stepped backward on a sewer cover that shifted. He fell through a sewer opening and had immediate pain in his right leg. Petitioner was helped out by his coworkers and was taken to MercyWorks for treatment (PX #1). He complained of "enormous" pain. Petitioner was diagnosed with a right knee contusion and knee strain. He was subsequently taken off work and referred for an MRI for his right knee.

The November 9, 2011 MRI revealed tricompartmental osteoarthritis with a displaced medial meniscal tear (PX #1). A low grade MCL sprain and low grade tibial collateral ligament sprain were also noted. Petitioner was then referred to Dr. Michael Maday at Midland Orthopedics for further treatment.

On December 7, 2011 Petitioner was examined by Dr. Michael Maday. Dr. Maday noted that Petitioner was asymptomatic before his work-related accident. Dr. Maday diagnosed a right medial meniscus tear which was displaced with degenerative changes and recommended physical therapy (PX #2). On January 25, 2012, after a course of physical therapy, Dr. Maday, recommended surgery for Petitioner's right knee. Dr. Maday performed an arthroscopic partial right medial meniscectomy April 2, 2012. Petitioner then followed with post-operative physical therapy through July 2012.

On July 31, 2012, Dr. Maday recommended transition from physical therapy to work conditioning (PX #2). After six weeks of work conditioning/work hardening,

authorization for further treatment was withheld. Due to Petitioner's continuing symptoms Dr. Maday injected Petitioner's right knee with DepoMedrol and Lidocaine on November 2, 2012. When Petitioner did not improve, he was referred to Dr. Robert Strugala for PRP (Platelet-Rich-Plasma) injections (PX #2). The PRP injections provided with little benefit. Dr. Strugala then administered a series of Supartz injections which also provided limited relief. After the injections, Dr. Strugala recommended a Functional Capacity Evaluation.

Petitioner had an FCE at Accelerated Rehab February 8, 2013 (PX #2). The results were noted as valid. Petitioner was found to be able to perform 66.2% of the physical demands of his job as a laborer. It notes he is unable to occasionally squat or lift. Petitioner exhibited consistent effort but it was noted that his reported pain rating was questionable. Petitioner was found to be capable of performing medium-heavy demand work but that his job was heavy demand work. The FCE found a high probability that Petitioner could not return to work as a laborer.

On February 15, 2013, Dr. Maday Petitioner had reached MMI with restrictions which would not allow his return to work. Dr. Strugala noted that Petitioner could only occasionally squat and walk. He noted that petitioner should avoid climbing ladders. He also noted Petitioner's ability to stand, shovel, and do ground work do not match the requirements of Petitioner's job. He further noted that Petitioner could work but within the restrictions outlined in his FCE (PX #2). Petitioner saw Dr. Maday again April 17, 2013, when the doctor reiterated the FCE is an accurate representation of Petitioner's current abilities. He again noted that Petitioner was at MMI and that further surgery would not significantly improve Petitioner's condition (PX #2).

Petitioner was examined by orthopedic surgeon Dr. Samuel Chmell March 18, 2014 (PX #3). Dr. Chmell also reviewed Petitioner's prior medical records. Dr. Chmell found reduced muscle strength about the right knee and signs of instability. The right knee was swollen. There was also reduced right knee range of motion. Dr. Chmell diagnosed right knee medial collateral ligament and lateral collateral ligament sprains and torn medial meniscus followed by partial medial meniscectomy. He also diagnosed a traumatic aggravation of tricompartmental osteoarthritis of the right knee. Dr. Chmell concluded that Petitioner's right knee injury and current condition were related to the November 2, 2011 work accident. He opined that Petitioner is at MMI with significant permanent impairment and disability. He opined that Petitioner was Dr. Mel unable to return to work as a cement mixer/construction worker.

Dr. Chmell also opined that Petitioner would require a total knee replacement within 5 years. Dr. Chmell reviewed his past report dated July 16, 2003 relating to Petitioner's October 8, 2001 injury.

Dr. Chmell prepared a supplemental report November 28, 2014 (PX #4). Dr. Chmell reviewed additional medical records, including Dr. Maday's April 17, 2013 note that Petitioner had achieved MMI. Based on his previous examination of Petitioner and review of medical records, Dr. Chmell performed an AMA impairment rating of Petitioner's right leg. Dr. Chmell opined that Petitioner sustained a 31% permanent partial impairment of the right lower extremity as a result of his work-related injury.

Steven Blumenthal conducted a vocational assessment of Petitioner April 25, 2014 (PX #5). Mr. Blumenthal is a Certified Rehabilitation Counselor, Certified Vocational Evaluation Specialist, and Licensed Clinical Professional Counselor. Mr. Blumenthal reviewed Petitioner's medical records from MercyWorks, DR. Maday/Midland Orthopedic Associates, and Accelerated Rehabilitations FCE, as well as Labor's Union Benefit fund records and Dr. Chmell's March 8, 2014 report. Mr. Blumenthal noted that Petitioner's current restrictions limited him to sedentary work.

After review of Petitioner's work history, educational level, and physical abilities, Mr. Blumenthal concluded Petitioner does have some transferrable skills but would require him to obtain a GED and computer literacy training. With a GED and computer literacy Petitioner would be able to earn an entry level wage of $9.76 to $10.36 per hour in a stable labor market. Without such training, he concluded Petitioner does not have the requisite education, physical abilities, or transferable skills to be able to obtain employment in a stable labor market.

Lisa Helma of Vocamotive conducted a vocational assessment of Petitioner July 21, 2015 (PX #6). The report, dated January 10, 2017, confirms Petitioner's testimony the initial evaluation interview was conducted on July 21, 2015. Ms. Helma reviewed Petitioner's educational history and prior work history. Petitioner's difficulties with both standing and walking were noted. Ms. Helma noted he would not be able to perform a majority of the light and medium duty occupations. Ms. Helma concluded Petitioner might only be considered for sedentary occupations. She commented that Petitioner's level of education and previous work experience do not provide him with any transferable skills. Ms. Helma opined that for Petitioner to be qualified for any sedentary occupations, he would need a minimum of a GED and marketable computer skills. Given Petitioner's advanced age obtaining a GED was not recommended. Ms. Helma concluded that, given the Petitioner's age, level of education, previous work experience, and lack of transferable skills along with his physical capabilities, he has lost access to any stable labor market and, therefore, is totally disabled.

At hearing, Petitioner testified that he has not attempted to earn a GED. Petitioner testified that he did attend some high school and that he was not in any special education classes nor diagnosed with any learning disabilities. Petitioner further testified that there was nothing specifically impeding his ability to earn a GED in order to increase his employability. When cross-examined regarding Mr. Blumenthal's recommendation that

Petitioner obtain a GED, Petitioner stated that he "wasn't counting on that" because he "already had a job."

Further, Petitioner testified that he has not participated in any formal vocational rehabilitation services or independent job search since the conclusion of his medical treatment. He testified that he hasn't been seeking new employment, and "never really felt the need."

CONCLUSIONS OF LAW

F: Is Petitioner's current condition of ill-being causally related to the accident?

There was no dispute that Petitioner sustained a compensable injury to his right knee November2, 2011. Petitioner began medical care and treatment for his right knee that same day. All subsequent medical treatment related to Petitioner's right knee. Dr. Chmell opined Petitioner sustained the injuries he assessed in the November 2, 2011 work accident.

This issue was not genuinely disputed. The circumstantial chain of events evidence clearly established a causal connection between the accident and Petitioner's current condition of ill-being in his right knee. Respondent has offered no evidence to refute or rebut a causal connection. Therefore, the Arbitrator finds that Petitioner proved that his right knee condition of ill-being is causally related to his work accident on November 21, 2001.

L: What is the nature and extent of the injury?

Petitioner's permanent partial disability was assessed in accord with §8.1b(b):

(i) Dr. Chmell found a 31% AMA Impairment Rating of Petitioner's right lower extremity. The Arbitrator gives great weight to this factor

(ii) Petitioner was a cement laborer. It is a job that requires heavy physical labor but little other skills. Petitioner demonstrated little inclination to acquire skills that may make him employable. Petitioner's disinterest in acquiring marketable skills impaired his future earning capacity. The Arbitrator gives great weight to this factor.

(iii) Petitioner was 57 years old at the time of his accident. He had a statistical lift expectancy of 24.1 years. He had a statistical worklife expectancy of 6.7 years. The Arbitrator gives great weight to this factor.

(iv) Petitioner has not returned to work since his accident. Various physicians opined that Petitioner was at MMI but was unable to return to his laborer's job with petitioner. He underwent vocational assessment twice. Both assessments found Petitioner unemployable with his current work skillset and education. Petitioner's testimony at hearing revealed little interest in obtaining marketable work skills that would enhance his employability. The Arbitrator notes Petitioner's prior right knee injury in 2001 but also

notes he was able to work full duty up to his November 2, 2011 accident. The Arbitrator gives great weight to this factor.

The Arbitrator finds that Petitioner has sustained a significant injury to his right knee that prevents him from returning to work for Respondent as a concrete laborer. However, the arbitrator takes note of petitioner's disinterest in acquiring skills that may assist his return to light duty are sedentary work. In light of all the evidence, including the above five factors, the Arbitrator finds that Petitioner sustained a permanent partial disability of 50% loss of a person-as-a-whole, 250 weeks, at $695.78 per week.

February 12, 2018

Steven J. Fruth, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

IRVING, LARRY
Employee/Petitioner

Case# **13WC020110**

CITY OF CHICAGO
Employer/Respondent

18IWCC0666

On 2/13/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.65% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0494 JOSEPH J SPINGOLA
AATORNEY AT LAW
1314 KESSINGTON SUITE 3843
OAK BROOK, IL 60522-7133

0010 CITY OF CHICAGO-LAW DEPT
DONALD CHITTICK
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

18IWCC0666

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

Larry Irving
Employee/Petitioner
v.
City of Chicago
Employer/Respondent

Case # 13 WC 20110

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 **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **10/25/2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ 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 18IWCC0666

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 **11/2/2011**, 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 **$73,216**; the average weekly wage was **$1,408.00**.

On the date of accident, Petitioner was **57** 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 **$71,610.16** for TTD, **$0** for TPD, **$219,658.14** for maintenance, and **$0** for other benefits, for a total credit of **$291,268.30**.

Respondent is entitled to a credit of **$0** under §8(j) of the Act.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $695.78 per week for **250 weeks**, due to the work-related injury which caused a **50% loss of a person-as-a-whole.**

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

February 12, 2018
Date

FEB 13 2018

INTRODUCTION

This matter proceeded to hearing before Arbitrator Steven Fruth. The disputed issues were: ***F:*** Is Petitioner's current condition of ill-being causally related to the accident?; ***L:*** What is the nature and extent of the injury?

STATEMENT OF FACTS

On November 2, 2011, Petitioner Larry Irving was 57 years old. He was employed by Respondent as a Concrete Laborer (formerly Cement Mixer) for the Department of Transportation. He has worked for Respondent since 1998. As a Cement Mixer Petitioner would remove and replace concrete sidewalks, vaulted sidewalks, curbs, and gutters. The job required heavy labor which included breaking concrete, shoveling broken concrete and dirt, and building forms for pouring concrete. The job required kneeling about half the time. He described it as "grunt" work.

Petitioner testified that he had made two prior worker's compensation claims: right knee 15 years ago and left shoulder. He was able to work his regular job after his prior knee injury.

Petitioner testified that on November 2, 2011 he was working on pouring curbs and gutters when he stepped backward on a sewer cover that shifted. He fell through a sewer opening and had immediate pain in his right leg. Petitioner was helped out by his coworkers and was taken to MercyWorks for treatment (PX #1). He complained of "enormous" pain. Petitioner was diagnosed with a right knee contusion and knee strain. He was subsequently taken off work and referred for an MRI for his right knee.

The November 9, 2011 MRI revealed tricompartmental osteoarthritis with a displaced medial meniscal tear (PX #1). A low grade MCL sprain and low grade tibial collateral ligament sprain were also noted. Petitioner was then referred to Dr. Michael Maday at Midland Orthopedics for further treatment.

On December 7, 2011 Petitioner was examined by Dr. Michael Maday. Dr. Maday noted that Petitioner was asymptomatic before his work-related accident. Dr. Maday diagnosed a right medial meniscus tear which was displaced with degenerative changes and recommended physical therapy (PX #2). On January 25, 2012, after a course of physical therapy, Dr. Maday, recommended surgery for Petitioner's right knee. Dr. Maday performed an arthroscopic partial right medial meniscectomy April 2, 2012. Petitioner then followed with post-operative physical therapy through July 2012.

On July 31, 2012, Dr. Maday recommended transition from physical therapy to work conditioning (PX #2). After six weeks of work conditioning/work hardening,

authorization for further treatment was withheld. Due to Petitioner's continuing symptoms Dr. Maday injected Petitioner's right knee with DepoMedrol and Lidocaine on November 2, 2012. When Petitioner did not improve, he was referred to Dr. Robert Strugala for PRP (Platelet-Rich-Plasma) injections (PX #2). The PRP injections provided with little benefit. Dr. Strugala then administered a series of Supartz injections which also provided limited relief. After the injections, Dr. Strugala recommended a Functional Capacity Evaluation.

Petitioner had an FCE at Accelerated Rehab February 8, 2013 (PX #2). The results were noted as valid. Petitioner was found to be able to perform 66.2% of the physical demands of his job as a laborer. It notes he is unable to occasionally squat or lift. Petitioner exhibited consistent effort but it was noted that his reported pain rating was questionable. Petitioner was found to be capable of performing medium-heavy demand work but that his job was heavy demand work. The FCE found a high probability that Petitioner could not return to work as a laborer.

On February 15, 2013, Dr. Maday Petitioner had reached MMI with restrictions which would not allow his return to work. Dr. Strugala noted that Petitioner could only occasionally squat and walk. He noted that petitioner should avoid climbing ladders. He also noted Petitioner's ability to stand, shovel, and do ground work do not match the requirements of Petitioner's job. He further noted that Petitioner could work but within the restrictions outlined in his FCE (PX #2). Petitioner saw Dr. Maday again April 17, 2013, when the doctor reiterated the FCE is an accurate representation of Petitioner's current abilities. He again noted that Petitioner was at MMI and that further surgery would not significantly improve Petitioner's condition (PX #2).

Petitioner was examined by orthopedic surgeon Dr. Samuel Chmell March 18, 2014 (PX #3). Dr. Chmell also reviewed Petitioner's prior medical records. Dr. Chmell found reduced muscle strength about the right knee and signs of instability. The right knee was swollen. There was also reduced right knee range of motion. Dr. Chmell diagnosed right knee medial collateral ligament and lateral collateral ligament sprains and torn medial meniscus followed by partial medial meniscectomy. He also diagnosed a traumatic aggravation of tricompartmental osteoarthritis of the right knee. Dr. Chmell concluded that Petitioner's right knee injury and current condition were related to the November 2, 2011 work accident. He opined that Petitioner is at MMI with significant permanent impairment and disability. He opined that Petitioner was Dr. Mel unable to return to work as a cement mixer/construction worker.

Dr. Chmell also opined that Petitioner would require a total knee replacement within 5 years. Dr. Chmell reviewed his past report dated July 16, 2003 relating to Petitioner's October 8, 2001 injury.

Dr. Chmell prepared a supplemental report November 28, 2014 (PX #4). Dr. Chmell reviewed additional medical records, including Dr. Maday's April 17, 2013 note that Petitioner had achieved MMI. Based on his previous examination of Petitioner and review of medical records, Dr. Chmell performed an AMA impairment rating of Petitioner's right leg. Dr. Chmell opined that Petitioner sustained a 31% permanent partial impairment of the right lower extremity as a result of his work-related injury.

Steven Blumenthal conducted a vocational assessment of Petitioner April 25, 2014 (PX #5). Mr. Blumenthal is a Certified Rehabilitation Counselor, Certified Vocational Evaluation Specialist, and Licensed Clinical Professional Counselor. Mr. Blumenthal reviewed Petitioner's medical records from MercyWorks, DR. Maday/Midland Orthopedic Associates, and Accelerated Rehabilitations FCE, as well as Labor's Union Benefit fund records and Dr. Chmell's March 8, 2014 report. Mr. Blumenthal noted that Petitioner's current restrictions limited him to sedentary work.

After review of Petitioner's work history, educational level, and physical abilities, Mr. Blumenthal concluded Petitioner does have some transferrable skills but would require him to obtain a GED and computer literacy training. With a GED and computer literacy Petitioner would be able to earn an entry level wage of $9.76 to $10.36 per hour in a stable labor market. Without such training, he concluded Petitioner does not have the requisite education, physical abilities, or transferable skills to be able to obtain employment in a stable labor market.

Lisa Helma of Vocamotive conducted a vocational assessment of Petitioner July 21, 2015 (PX #6). The report, dated January 10, 2017, confirms Petitioner's testimony the initial evaluation interview was conducted on July 21, 2015. Ms. Helma reviewed Petitioner's educational history and prior work history. Petitioner's difficulties with both standing and walking were noted. Ms. Helma noted he would not be able to perform a majority of the light and medium duty occupations. Ms. Helma concluded Petitioner might only be considered for sedentary occupations. She commented that Petitioner's level of education and previous work experience do not provide him with any transferable skills. Ms. Helma opined that for Petitioner to be qualified for any sedentary occupations, he would need a minimum of a GED and marketable computer skills. Given Petitioner's advanced age obtaining a GED was not recommended. Ms. Helma concluded that, given the Petitioner's age, level of education, previous work experience, and lack of transferable skills along with his physical capabilities, he has lost access to any stable labor market and, therefore, is totally disabled.

At hearing, Petitioner testified that he has not attempted to earn a GED. Petitioner testified that he did attend some high school and that he was not in any special education classes nor diagnosed with any learning disabilities. Petitioner further testified that there was nothing specifically impeding his ability to earn a GED in order to increase his employability. When cross-examined regarding Mr. Blumenthal's recommendation that

Petitioner obtain a GED, Petitioner stated that he "wasn't counting on that" because he "already had a job."

Further, Petitioner testified that he has not participated in any formal vocational rehabilitation services or independent job search since the conclusion of his medical treatment. He testified that he hasn't been seeking new employment, and "never really felt the need."

CONCLUSIONS OF LAW

F: Is Petitioner's current condition of ill-being causally related to the accident?

There was no dispute that Petitioner sustained a compensable injury to his right knee November2, 2011. Petitioner began medical care and treatment for his right knee that same day. All subsequent medical treatment related to Petitioner's right knee. Dr. Chmell opined Petitioner sustained the injuries he assessed in the November 2, 2011 work accident.

This issue was not genuinely disputed. The circumstantial chain of events evidence clearly established a causal connection between the accident and Petitioner's current condition of ill-being in his right knee. Respondent has offered no evidence to refute or rebut a causal connection. Therefore, the Arbitrator finds that Petitioner proved that his right knee condition of ill-being is causally related to his work accident on November 21, 2001.

L: What is the nature and extent of the injury?

Petitioner's permanent partial disability was assessed in accord with §8.1b(b):

(i) Dr. Chmell found a 31% AMA Impairment Rating of Petitioner's right lower extremity. The Arbitrator gives great weight to this factor

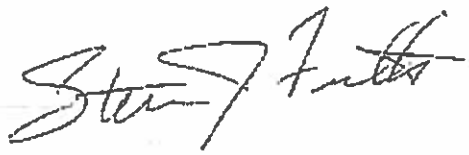
(ii) Petitioner was a cement laborer. It is a job that requires heavy physical labor but little other skills. Petitioner demonstrated little inclination to acquire skills that may make him employable. Petitioner's disinterest in acquiring marketable skills impaired his future earning capacity. The Arbitrator gives great weight to this factor.

(iii) Petitioner was 57 years old at the time of his accident. He had a statistical lift expectancy of 24.1 years. He had a statistical worklife expectancy of 6.7 years. The Arbitrator gives great weight to this factor.

(iv) Petitioner has not returned to work since his accident. Various physicians opined that Petitioner was at MMI but was unable to return to his laborer's job with petitioner. He underwent vocational assessment twice. Both assessments found Petitioner unemployable with his current work skillset and education. Petitioner's testimony at hearing revealed little interest in obtaining marketable work skills that would enhance his employability. The Arbitrator notes Petitioner's prior right knee injury in 2001 but also

notes he was able to work full duty up to his November 2, 2011 accident. The Arbitrator gives great weight to this factor.

The Arbitrator finds that Petitioner has sustained a significant injury to his right knee that prevents him from returning to work for Respondent as a concrete laborer. However, the arbitrator takes note of petitioner's disinterest in acquiring skills that may assist his return to light duty are sedentary work. In light of all the evidence, including the above five factors, the Arbitrator finds that Petitioner sustained a permanent partial disability of 50% loss of a person-as-a-whole, 250 weeks, at $695.78 per week.



February 12, 2018

Steven J. Fruth, 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 up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Brian Fagerland,

Petitioner,

vs. NO: 11 WC 38770

State of IL, Pinckneyville Correctional Center,

18IWCC0667

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 nature and extent, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Background

In the interest of efficiency, the Commission primarily relies on the Arbitrator's recitation of the facts. Petitioner has been a correctional officer at Pinckneyville Correctional Center since 1998. In a May 19, 2015, 19(b) Decision, the Arbitrator determined Petitioner sustained bilateral cubital tunnel syndrome as a result of work-related repetitive trauma. The Commission affirmed this Decision on April 7, 2016 (case number 16 IWCC 248).

Following the Commission's April 2016 Decision, Petitioner returned to Dr. Paletta with continued complaints. Further conservative treatment failed to improve Petitioner's condition. On July 26, 2016, Dr. Paletta performed a right subcutaneous ulnar nerve transposition. Dr. Paletta performed a left subcutaneous ulnar nerve transposition on October 4, 2016. On November 21, 2016, the doctor placed Petitioner at MMI and cleared him to resume full unrestricted recreational and work activities.

Conclusions of Law

After carefully considering the totality of the evidence, the Commission modifies the Arbitrator's nature and extent award. As the date of accident occurred after the effective date of the amendment, an analysis pursuant to §8.1b of the Act is necessary. The Act states that "… [n]o

single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order." §8.1b(b). The Arbitrator weighed all five factors and determined Petitioner sustained a 10% loss of use of the right arm and a 7.5% loss of use of the left arm due to the work accident. After closely reviewing the evidence, the Commission affirms the Arbitrator's award of 10% loss of use of the right arm and finds Petitioner sustained a 10% loss of use of the left arm as a result of the work injury.

(i) The reported level of impairment pursuant to subsection (a)

Neither party produced an AMA impairment rating. Thus, the Commission assigns no weight to this factor.

(ii) The occupation of the injured employee

Petitioner works as a correctional officer. His duties include turning keys in locks and pulling on heavy doors and gates. He testified that he works the busiest shift and he must use his arms and hands continuously during his shift. He returned to his position without any restrictions and continues to perform all assigned work duties. Given the physical nature of Petitioner's occupation, the Commission assigns greater weight to this factor.

(iii) The age of the employee at the time of the injury

Petitioner was 38 years old on the date of accident. Although Petitioner is fairly young, he is near the end of his career as a correctional officer. Petitioner testified that he will be eligible for retirement in 6.5 years. Petitioner's condition could improve, stay the same, or worsen over the years. Thus, the Commission assigns some weight to this factor.

(iv) The employee's future earning capacity

Neither party offered evidence that the work injuries have affected Petitioner's future earning capacity in any way. Thus, the Commission assigns some weight to this factor.

(v) Evidence of disability corroborated by the treating medical records

Petitioner underwent bilateral subcutaneous ulnar nerve transposition surgeries due to work-related repetitive trauma. He testified that the surgeries eliminated his pain and he only had residual numbness in both pinkies. Petitioner testified that the constant use of his hands and arms at work caused symptoms. He testified that he believes he has less endurance and less strength; however, there is no evidence of reduced strength and/or endurance in Dr. Paletta's records. Additionally, Petitioner takes no prescription medication for his ongoing complaints and does not even use over the counter medicine. During his final examination, Dr. Paletta determined Petitioner was doing extremely well and "basically has no residual symptoms" other than the numbness along his pinkies. Dr. Paletta also told Petitioner he expected the numbness to resolve, but the healing process could take up to a year due to the ulnar nerve's slow rate of healing. Petitioner has sought no further medical treatment relating to the work injuries since his November

18IWCC0667

21, 2016, visit with Dr. Paletta. While Petitioner is right hand dominant, there is no evidence that his residual symptoms are worse on the right arm compared to the left arm.

After carefully weighing all the evidence, the Commission modifies the Decision of the Arbitrator and finds Petitioner suffered a 10% loss of use of both arms.

The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 2, 2017, is modified as stated herein.

IT IS FURTHER ORDERED that Respondent shall pay to Petitioner permanent partial disability benefits of $665.86 for 50.6 weeks, because Petitioner's injuries caused a 10% loss of use of the right arm and a 10% loss of use of the left arm, as provided for in §8(e) of the Act.

IT IS FURTHER ORDERED 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 that Respondent pay to Petitioner interest pursuant to §19(n) of the Act, if any.

DATED: OCT 31 2018

o: 10/16/18
TJT/jds
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

FAGERLAND, BRIAN
Employee/Petitioner

Case# **11WC038770**

SOI/PINCKNEYVILLE CORRECTIONAL CENTER
Employer/Respondent

18IWCC0667

On 5/2/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.97% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0969 RICH RICH & COOKSEY PC
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6 EXECUTIVE DR SUITE 3
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0558 ASSISTANT ATTORNEY GENERAL
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CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
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CHICAGO, IL 60601-3227

1350 CENTRAL MANAGEMENT SERVICES
BUREAU OF RISK MANAGEMENT
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SPRINGFIELD, IL 62794-9208

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

MAY 2 - 2017

RONALD A. RICCI, Acting Secretary
Illinois Workers' Compensation Commission

18IWCC0667

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

BRIAN FAGERLAND
Employee/Petitioner

v.

STATE OF ILLINOIS/PINCKNEYVILLE CORRECTIONAL CENTER
Employer/Respondent

Case # 11 WC 38770

Consolidated cases: _____

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christina Hemenway**, Arbitrator of the Commission, in the city of **Herrin**, on **February 7, 2017**. By stipulation, the parties agree:

On the date of accident, **September 26, 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 **$57,708.00**, and the average weekly wage was **$1,109.77**.

At the time of injury, Petitioner was **38** years of age, ***single*** with **4** dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

Respondent shall be given a credit of **$all paid** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$all paid**.

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner the sum of **$665.86**/week for a further period of **44.28** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **10% loss of use of the right arm (25.3 weeks) and 7.5% loss of use of the left arm (18.98 weeks).**

Respondent shall pay Petitioner compensation that has accrued from **November 21, 2016,** through **February 7, 2017**, and shall pay the remainder of the award, if any, in weekly payments.

RULES REGARDING APPEALS Unless a Petition for Review is filed within 30 days after receipt of this decision, and a review is perfected in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

April 28, 2017
Date

MAY 2 - 2017

18IWCC0667

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT

BRIAN FAGERLAND
Employee/Petitioner

v. Case #: 11 WC 38770

STATE OF ILLINOIS/PINCKNEYVILLE CORRECTIONAL CENTER
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

This case was previously tried before a different Arbitrator on March 24, 2015, pursuant to Section 19(b) of the Act on several issues, including accident, notice, causation, and liability for medical benefits. Findings were in favor of Petitioner and the Commission affirmed with changes. PX8. The Arbitrator hereby acknowledges and incorporates herein the prior Arbitration Decision and the Commission Decision and Opinion on Review.

The parties stipulated that the only issue currently in dispute is the nature and extent of Petitioner's permanent partial disability.

On September 26, 2011, the date of accident, Petitioner was 38 years old, married, and had four dependent children. He was a Correctional Officer at Respondent's Pinckneyville Correctional Center, and had been so employed since 1998. By way of background only, Petitioner sustained repetitive trauma to both arms as a result of his work-related duties and was diagnosed with bilateral cubital tunnel syndrome.

Following the Decision, Petitioner returned to Dr. Daniel Phillips on May 2, 2016, and underwent a new EMG/NCS, given the elapsed time since his initial positive test results. PX4. On May 5, 2016, he followed up with his treating physician, Dr. George Paletta, who advised that the new testing was within normal limits. He noted Petitioner's clinical symptoms and physical exam findings were suggestive of ulnar neuritis, but there was no evidence of underlying ulnar neuropathy. As such, Dr. Paletta recommended additional conservative care consisting of a tapered course of Prednisone followed by a course of Naprosyn. PX3.

On June 20, 2016, Petitioner returned to Dr. Paletta and reported the oral medications helped temporarily but did not resolve the situation fully. He continued to have bilateral elbow pain and intermittent numbness and tingling into the fourth and fifth fingers. He denied any fixed or permanent numbness. On examination, he had a positive ulnar nerve compression test

and positive Tinel's sign bilaterally. Dr. Paletta noted Petitioner's symptoms and physical findings were consistent with ulnar neuritis, even though the nerve conduction studies showed no evidence of underlying ulnar neuropathy. He believed Petitioner may be getting intermittent ulnar nerve irritation. In that he had remained symptomatic for several years, it was decided to proceed with a subcutaneous ulnar nerve transposition. PX3.

On July 26, 2016, Petitioner underwent right elbow subcutaneous ulnar nerve transposition. Intraoperative findings demonstrated some evidence of focal compression of the nerve as it dove between the two heads of the flexor carpi ulnaris. There was a mild constriction of the fascia at that level with small hourglass deformity, which resulted in some bulbous swelling of the nerve at the proximal side of the area. On October 4, 2016, Petitioner underwent the same procedure on his left elbow. Intraoperative findings demonstrated some mild compression of the ulnar nerve with mild flattening. There was no evidence of instability and no hourglass deformity of the ulnar nerve. PX5.

On November 21, 2016, Petitioner returned to Dr. Paletta for his final visit. He reported he was doing extremely well and that virtually all of his preoperative symptoms had resolved. He denied any recurrent pain. He noted he still had a little bit of numbness along the lateral border of the fifth digit of the right hand, which was present preoperatively. Other than that, he had no residual symptoms and was extremely pleased with how he felt. He advised he was ready to return to full activities. PX3.

On examination of the right elbow, the surgical incisions were healed, there was no soft tissue swelling or effusion, and he had full elbow range of motion. The ulnar nerve was easily palpable in the anteriorly transposed position and was non-tender. Petitioner had normal wrist flexion and forearm pronation strength, with no pain on resisted manual testing. Ligament exam was unremarkable. Ulnar nerve motor and sensory function was intact with the exception of slight decreased sensation along the ulnar border of the fifth finger. PX3.

On examination of the left elbow, the surgical incisions were healed, there was no soft tissue swelling or effusion, and he had full elbow range of motion. The ulnar nerve was easily palpable and was non-tender. He had normal wrist flexion and forearm pronation strength, with no pain on resisted manual testing. Ligament exam was unremarkable, and ulnar motor and sensory function was intact. PX3.

Dr. Paletta opined that Petitioner had had an excellent outcome. He advised Petitioner that the preexisting numbness at the lateral border of the fifth finger would likely resolve, but may take upwards of a year given the slow recovery of the ulnar nerve. He released Petitioner to full unrestricted activities, with no restrictions or limitations and opined he was at maximum medical improvement. Petitioner was released from care at that time. PX3.

CONCLUSIONS OF LAW

The Arbitrator hereby incorporates by reference the above Findings of Facts, and the Arbitrator's and parties' exhibits are made a part of the Commission's file. The parties stipulated to all issues, including average weekly wage. The only issue in dispute at the time of

hearing was the nature and extent of permanent partial disability. With regard to the nature and extent of disability, for accidents occurring on or after September 1, 2011, pursuant to Section 8.1b of the Act, in determining the level of permanent partial disability the Arbitrator must look at the following five factors.

In regard to factor **(i) the reported level of impairment pursuant to Subsection (a)**, although Petitioner's date of accident was after the effective date of Section 8.1b of the Act, neither party offered into evidence a reported level of impairment pursuant to Subsection (1). As such, the Arbitrator gives no weight to this factor.

In regard to factor **(ii) the occupation of the injured employee**, the record reveals Petitioner was employed as a Correctional Officer at the time of the accident and that he was able to return to work in that capacity without any restrictions or limitations as a result of said injury. The Arbitrator notes the physical nature of Petitioner's occupation and places significant weight on this factor.

In regard to factor **(iii) the age of the employee at the time of the injury**, Petitioner was 38 years old at the time of the accident. He has been able to return to his prior position without limitation, although testified he continued to have symptoms that are aggravated by his work activities. He testified he is eligible to retire in six and a half years. Over time his condition could improve, stay the same, or get worse. The Arbitrator gives greater weight to this factor.

In regard to factor **(iv) the employee's future earning capacity**, Petitioner has returned to his prior position full duty. Neither party offered any evidence to show that Petitioner's future earning capacity has been impacted, and the Arbitrator has no basis to expect he will have any decreased capacity in the future. The Arbitrator gives no weight to this factor.

In regard to factor **(v) evidence of disability corroborated by the treating medical records**, the Arbitrator notes that Petitioner underwent bilateral subcutaneous ulnar nerve transposition. He testified that he has lost strength and endurance in his elbows and hands, but his medical records do not corroborate that testimony. Dr. Paletta's note following Petitioner's final visit of November 21, 2016, documents he was "doing extremely well". He did complain of a little numbness along the lateral border of the right fifth finger, which Dr. Paletta indicated would likely resolve over time. Dr. Paletta performed extensive testing of both elbows, including strength. All tests were normal and unremarkable. Petitioner testified he uses his arms and hands continuously throughout his shift and activities such as turning keys and pulling heavy doors and gates bring on symptoms. The Arbitrator places significant weight on this factor.

The Arbitrator notes that consideration of the factors enumerated in Section 8.1b does not simply require a calculation, but rather a measured evaluation of all five factors, of which no single factor is the sole determinant on the issue of permanency. Taking the above five factors into consideration and based on the record in its entirety, the Arbitrator finds that Petitioner has sustained 10% loss of use of the right arm (25.3 weeks) and 7.5% loss of use of the left arm (18.98 weeks) pursuant to Section 8(e) of the Act. The parties stipulated that Petitioner's average weekly wage was $1,109.77. The Arbitrator finds his permanent partial disability rate is $665.86.