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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Donald Antonsen,

Petitioner,

vs. NO: 15 WC 23082

19IWCC0477

Loyola University,

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 causal connection and nature and extent, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

In the interest of efficiency, the Commission primarily relies on the Arbitrator's detailed recitation of facts. Petitioner sustained a serious injury to his left shoulder and permanent disabilities due to the June 24, 2014, work incident. A left shoulder MRI taken a few weeks after the accident revealed numerous significant findings, including a massive full-thickness and almost full width tear of the infraspinatus and supraspinatus tendons with resultant proximal retraction of the torn fibers to the level of the glenoid rim, a high-grade partial-thickness component of the infraspinatus tear seen at the level of its myotendinous junction with suggestion of low grade partial-thickness tearing of the superior fibers of the subscapularis, and, moderate to severe arthrosis of the acromioclavicular joint with resultant subchondral edema and joint fluid. On August 7, 2014, Petitioner underwent left shoulder arthroscopy with subacromial decompression and a mini open rotator cuff repair. The postoperative diagnoses include a left shoulder large retracted supraspinatus, and an infraspinatus tear with no visible long head biceps tendon seen. He attended physical therapy for several months and saw some initial improvement in his strength.

On February 27, 2015, Petitioner returned to Dr. Desai and reported no major complications. Dr. Desai noted that Petitioner had excellent range of motion but reduced strength

with abduction/external rotation. The doctor discharged Petitioner from care and told Petitioner to continue with his home exercise program. Dr. Desai also warned Petitioner to watch his limitations with overhead lifting; however, he did not prescribe any lifting restrictions. The February 2015 physical therapy discharge summary reveals that Petitioner achieved all but one goal. At the time of discharge, Petitioner had not met the goal of increasing left shoulder strength to 4+/5 throughout. However, the therapist wrote that Petitioner had attained normal range of motion and left shoulder strength within functional limits.

Dr. Atluri examined Petitioner at Respondent's request on October 27, 2016. Petitioner complained of continued weakness in his left shoulder. He reported being unable to lift even 10 lbs. overhead but did not have trouble lifting below shoulder level. Petitioner reported minimal lingering pain. Petitioner complained of experiencing some difficulty with work activities but told Dr. Atluri that he was able to perform all his duties despite any difficulties. Dr. Atluri's physical examination of the left shoulder revealed composite flexion strength of 4/5, isolated supraspinatus strength of 3/5, infraspinatus strength of 4/5, and subscapularis strength of 4/5. Dr. Atluri performed an AMA impairment assessment and concluded that Petitioner had sustained an AMA impairment rating of 5% of the whole person.

Petitioner did not return to Dr. Desai until November 28, 2016, after falling down stairs in his home two weeks earlier. He reported landing on his back and left shoulder. Petitioner's complaints following the fall had already resolved. Dr. Desai interpreted a recent left shoulder MRI as showing a large retracted rotator cuff tear with atrophy of the supraspinatus and infraspinatus as well as moderate changes. Dr. Desai wrote that while Petitioner likely developed left rotator cuff arthropathy, Petitioner is not limited by range of motion, is able to perform his work duties, and reports only minimal pain. He told Petitioner that if his symptoms worsened Petitioner could undergo cortisone injections for pain relief or possibly a reverse shoulder replacement.

During the arbitration hearing, Petitioner complained of continued pain and weakness in his left shoulder and arm. He testified that he continues to work in his normal position, but now often uses a helper for tasks involving overhead work. He testified that when doing anything above shoulder level his left arm quickly tires. Petitioner performs the same activities, but now does them more carefully and slowly. He testified that he takes Aleve two or three days a week. He does not sleep comfortably on his left side. He has continued to perform his regular duties as a licensed plumber since his return to work in March 2015 and has sought no additional treatment regarding his left shoulder.

After carefully considering the evidence, including Petitioner's testimony of ongoing complaints, the Commission finds Petitioner sustained a 15% loss of use of the whole person. There is no question that Petitioner sustained a significant injury due to the work accident. He underwent a significant left shoulder surgery and testified that he continues to suffer from residual symptoms. Dr. Atluri examined Petitioner and determined he sustained an impairment rating of 5% of the whole body. Petitioner has continued to work in his normal job as a licensed plumber since March 2015. While Petitioner has some difficulty with some of his work tasks, he told both Drs. Atluri and Desai that despite any difficulty he can perform all his work duties. During his final examination of Petitioner, Dr. Desai wrote that despite his possible development of left

shoulder arthropathy, Petitioner is not limited by range of motion, can perform his work duties, and reports only minimal residual pain. Petitioner also testified that he performs all his regular activities but performs them more carefully. Although Dr. Desai wrote that Petitioner should be careful with overhead lifting, the doctor did not prescribe any permanent work or activity restrictions. Despite Petitioner's testimony that he continues to experience significant weakness in his left shoulder and arm, Petitioner has not sought any medical treatment for his residual complaints since Dr. Desai discharged him from care in February 2015. While Petitioner did return to Dr. Desai once in November 2016, it is clear this visit was only due to his fall down his stairs a few weeks earlier. The evidence supports a finding that absent his fall in November 2016, Petitioner would not have returned to Dr. Desai following his February 2015 release. After weighing the five factors pursuant to Section 8.1b of the Act, the Commission finds Petitioner sustained a 15% loss of use of the whole person.

As a final matter, the Commission corrects a scrivener's error on page six (6) of the Arbitrator's Decision. In the second full paragraph, the Decision reads, "The Petitioner saw Dr. Desai on November 28, 2015…" The Commission amends the date to November 28, **2016**, which conforms with the medical record. The sentence shall now read in relevant part, "The Petitioner saw Dr. Desai on November 28, 2016…"

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 March 31, 2017, is modified as stated herein.

IT IS FURTHER ORDERED that Respondent shall pay to Petitioner temporary total disability benefits of $**812.27**/week for **30** weeks, commencing **July15, 2014, July 18, 2014, July 23, 2014, and, August 8, 2014,** through **March 1, 2015**, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED that Respondent shall pay to Petitioner permanent partial disability benefits of **$721.66** for **75** weeks, because Petitioner's injuries caused **15%** loss of use of the whole person, as provided for in §8(d)2 of the Act.

IT IS FURTHER ORDERED that Respondent shall receive a credit of **$24,368.20** for TTD previously paid and **$1,443.32** for a PPD advance, for a total credit of **$25,811.52**.

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.

19IWCC0477

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $52,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: SEP 4 - 2019
TJT/jds
o: 7/23/19
51

Thomas J. Tyrrell

Maria E. Portela

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ANTONSEN, DONALD
Employee/Petitioner

Case# **15WC023082**

19IWCC0477

LOYOLA UNIVERSITY
Employer/Respondent

On 3/31/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.90% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0924 BLOCK, KLUKAS & MANZELLA PC
BRYAN SHELL
19 W JEFFERSON ST
JOLIET, IL 60432

0081 LORENZ & BERGIN PC
JOHN P BERGIN
120 N LASALLE ST SUITE 1402
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

Donald Antonsen
Employee/Petitioner

Case # **15** WC **23082**

v.

Consolidated cases: **N/A**

Loyola University
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Chicago**, on **March 8, 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. [ ] 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. [x] Is Respondent due any credit? For PPD Advance
O. [ ] Other

FINDINGS

On **June 24, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**63,357.32**; the average weekly wage was $**1,218.41**.

On the date of accident, Petitioner was **62** 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 $**24,368.20** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**1,443.32** for other benefits, for a total credit of $**25,811.52**.

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 $812.27/week for 30 weeks, for July 15, 2014, July 18, 2014, July 23, 2014 and commencing August 8, 2014 through March 1, 2015, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $721.66/week for 90 weeks, because the injuries sustained caused the 18% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall be given a credit of $**24,368.20** for TTD and $**1,443.32** for a PPD Advance, for a total credit of $**25,811.52**.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the 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 24, 2017
Date

MAR 31 2017

ICArbDec p. 2

Statement of Facts

Petitioner Donald Antonsen testified that he is employed by Respondent Loyola University as a licensed plumber at the medical campus. He is a high school graduate. He has worked as a sign painter, cabinet maker and has been a licensed plumber for the last 25 years. He has been employed by Respondent for 20 years. He is the only licensed plumber, responsible for anything related to water, drainage or sewage on the campus of 60 buildings. He has one helper.

On June 24, 2014 he was going to rod drains. He and the helper were carrying the large sewer rodding machine down stairs behind the building. The machine includes a 115 foot cable on a drum and including the cable weighs between 400 and 500 pounds. As they were going down the stairs, his helper took two steps at a time and got ahead of him. Petitioner flipped over the machine and his co worker and he fell down the stairs. He testified he scraped his chest and eye on the top of the machine and landed on his left shoulder and side. He reported the accident to Mike Jurewitch. He finished the day and continued to work for the remainder of the week before seeking medical attention. During this time, he noticed pain in his shoulder.

He contacted his personal doctor Dr. Wollner and first sought treatment on June 30, 2014. He provided Dr. Wollner with a consistent history of accident and stated he injured his left shoulder. His left eye was black and blue and he had a scrape on the left side of his ribs. Dr. Wollner noted an unspecified injury to the left shoulder with degenerative joint disease. He also noted a history of left 6th rib fracture and a 2005 rotator cuff tear. X-rays showed degenerative changes without evidence of fracture and osteopenia (PX 2, p 5-10). Petitioner testified that he continued to work full duty, but took it easy. He was referred to Dr. Desai's office. On July 10, 2014, he was seen there by Dr. Yousuf. The July 10, 2014 office note confirms the accident history with complaints in the left shoulder. He notes a prior injury to the same shoulder several years ago. It was diagnosed as a possible cuff tear and possible arthritis. This pain is worse. Dr. Yousuf was concerned about a rotator cuff tear and scheduled an MRI (PX 2, p 11-17).

The MRI performed July 15, 2014 found a massive full thickness and almost full width tear of the infraspinatus and supraspinatus tendons with proximal retraction, partial thickness component to the tear of the infraspinatus and a low grade partial thickness tear of the subscapularis. Possible partial thickness tear of the biceps tendon, degenerative tearing of the labrum, migration of the humeral head, and moderate to severe arthrosis of the acromioclavicular joint (PX 4). On July 18, 2014, Dr. Desai notes the MRI findings and diagnosed a complete rupture of the rotator cuff. He notes Petitioner's prior treatment in 2007 with a diagnosis of a small rotator cuff tear and a cortisone injection. He describes the problem as an acute on chronic type of tear. After discussing the options including a cortisone injection or shoulder replacement, Petitioner elected left shoulder arthroscopy with subacromial decompression, possible biceps tenodesis, possible arthroscopic/mini open rotator cuff repair (PX 4, p 22-26). Petitioner underwent surgery on August 7, 2014 consisting of a left shoulder arthroscopy with subacromial decompression and mini open rotator cuff repair. The operative findings were large retracted supraspinatus, infraspinatus tear, no visible long head of the biceps tendon seen, Os acromiale with high riding humeral head, chondromalacia (PX 5).

Petitioner began his post operative care on August 22, 2014. Dr. Desai scheduled a physical therapy evaluation. He also advised Petitioner that the rotator cuff reattachment was successful, but that there was some tension because of the chronicity (PX 2, p 56-59). Petitioner underwent physical therapy for range of motion and strengthening through February 27, 2015 (PX 3). Dr. Desai's follow up visits note progress, but Petitioner was continued off work (PX 2, p 88). On January 30, 2015, Dr. Desai notes Petitioner made some

improvement with strengthening, but seems to be plateauing with physical therapy. He notes excellent range of motion but continued weakness. Petitioner was given one more month of therapy (PX 2, p 93-98). Petitioner's discharge note from physical therapy on February 27, 2015 reflects range of motion within normal limits, strength was diminished but within functional limits. All short term goals were met. Increasing strength to 4+/5 on the long term goals was not met. Petitioner was instructed in a home exercise program to continue left shoulder strengthening (PX 3, p 36-37). Petitioner was discharged from care by Dr. Desai on February 27, 2015. Dr. Desai noted some weakness and advised Petitioner to watch his limitations with overhead lifting. He stated it does seem that the rotator cuff repair may not be providing adequate strength. He advised that this could result in rotator cuff arthropathy which may require a reverse shoulder replacement (PX 2, p 109-110).

Petitioner testified that he returned to regular work for Respondent on March 2, 2015. He noticed pain and weakness in his shoulder, especially with overhead work. He used his helper more that before the accident. He does all of his prior duties, just more slowly and carefully. At home, he notices the weakness if he is putting plates away in a high cabinet. He has difficulty cutting his own hair. He still does his home exercises. He will medicate with Aleve or Advil two to three times per week. Petitioner testified that he had no treatment for his left shoulder between February 27, 2015 and November 28, 2016.

Petitioner testified that he had a home injury when he fell on the stairs and hit his back and shoulder. He went to the emergency room for x-rays. His personal doctor recommended a new MRI. He saw Dr. Desai one time. Dr. Desai's November 28, 2016 office note states that Petitioner reported the recent fall with soreness and bruising for a few days, but now states he does not have any pain or decreased range of motion. He is not taking any pain medication. Dr. Desai notes that the x-rays confirm no fracture. The MRI demonstrates a large retracted rotator cuff tear. Dr. Desai assesses a complete tear of the rotator cuff. He states that he feels the rotator cuff repair was not successful as Petitioner continues to demonstrate retraction of the tear with muscle atrophy. He is likely developing rotator cuff arthropathy. However, he is not limited in range of motion and is able to do his work. He reports minimal pain. Pain is improving since his fall. Dr. Desai discussed a cortisone injection for pain relief and the possibility of a reverse shoulder replacement in the future. This will be reserved until after he retires. Petitioner was released to return as needed (RX 4) He was released to full duty work without restrictions (RX 5).

Petitioner was examined at Respondent's request by Dr. Prasant Atluri on October 27, 2016 (RX 2). Dr. Atluri testified by evidence deposition taken February 10, 2017 (RX 3). Dr. Atluri testified that Petitioner reported weakness in his left shoulder with overhead activity. He had minimal pain. Petitioner prepared a Quick Dash Disability Questionnaire. He noted no difficulty or minimal difficulty with all activities except work activities, which he rated as moderate difficulty (RX 2). On physical examination of the left shoulder, Dr. Atluri notes some tenderness over the AC joint and subacromial space. He noted crepitus. He notes loss of range of motion on external and internal rotation. He notes an abnormal contour to the biceps muscle. He notes loss of strength. Dr. Atluri testified that he found Petitioner at MMI and in need of no further treatment. He opined that the need for a shoulder replacement would not be causally related to the accident on June 24, 2014 (RX 3).

Dr. Atluri performed an impairment rating. He has been certified to perform impairment ratings. He used the methodology outlined in the 6th Edition of the AMA Guides. He testified to the tables and calculations utilized. He testified that Petitioner's degenerative joint disease is primarily chronic but that there is a contribution from the massive rotator cuff tear. The altered mechanics in the shoulder results in changes. He opined that the impairment rating was 9% of the upper extremity which converts to 5% impairment to the whole person (RX 2, RX 3).

Dr. Atluri agreed that the accident injured or aggravated Petitioner's shoulder condition. The accident caused the need for surgical repair. He agreed with the treatment options offered to Petitioner prior to surgery. The option for a reverse shoulder replacement at that time would have been related to the accident. He agreed that Petitioner may require a shoulder replacement in the future. He testified that he was not recommending a shoulder replacement for Petitioner at the time of his examination (RX 3).

Conclusions of Law

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). 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. at 205. "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." Id.

The Commission may find a causal relationship based on a medical expert's opinion that the injury "could have" or "might have" been caused by an accident. *Mason & Dixon Lines, Inc. v. Industrial Comm'n*, 99 Ill. 2d 174, 182, 457 N.E.2d 1222, 1226, 75 Ill. Dec. 663 (1983). However, expert medical evidence is not essential to support the Commission's conclusion that a causal relationship exists between a claimant's work duties and his condition of ill-being. *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63, 442 N.E.2d 908, 911, 66 Ill. Dec. 347 (1982). A chain of events suggesting a causal connection may suffice to prove causation. *Consolidation Coal Co. v. Industrial Comm'n*, 265 Ill. App. 3d 830, 839, 639 N.E.2d 886, 892, 203 Ill. Dec. 327 (1994).

Petitioner had a preexisting condition in the left shoulder prior to June 24, 2014. Petitioner's medical records include history of prior left shoulder treatment with a diagnosis of a small rotator cuff tear and cortisone injection in 2007. The MRI performed July 15, 2014 notes significant degenerative changes. However the unrebutted and credible testimony of the Petitioner was that, for many years prior to the June 24, 2014 accident, he was able to perform the heavy, strenuous job as the only journeyman plumber for Respondent. In fact, at the time of the accident, Petitioner was carrying a 400-500 pound machine with his helper. Following the accident, he had significant symptoms in the left shoulder including pain, weakness and loss of motion. He sought treatment shortly thereafter, was diagnosed with a massive rotator cuff tear and began his course of treatment including surgery.

After the accident, Dr. Desai described Petitioner's problem as an acute on chronic type of tear. Dr. Atluri agreed that the accident injured or aggravated Petitioner's shoulder condition. The accident caused the need for surgical repair.

Either under the theory of chain of events or based upon all of the medical expert opinions, Petitioner's condition of ill being in the left shoulder was caused or aggravated by the accident on June 24, 2014.

Subsequent to Petitioner's release from care by Dr. Desai on February 27, 2015 and his return to regular work on March 2, 2015, Petitioner suffered a non-work-related accident in November, 2016 when he fell on his stairs at home. Every natural consequence that flows from an injury that arose out of and in the course of one's employment is compensable under the Act absent the occurrence of an independent intervening accident that breaks the chain of causation between the work-related injury and an ensuing disability or injury. *National Freight Industries v. Illinois Workers' Compensation Comm'n*, 2013 IL App (5th) 120043WC, 993 N.E.2d 473. Under an independent intervening cause analysis, compensability for an ultimate injury or disability is based upon a finding that the employee's condition was caused by an event that would not have occurred 'but for' the original injury. For an employer to be relieved of liability by virtue of an intervening cause, the intervening cause must completely break the causal chain between the original work related injury and the ensuing condition.

The Petitioner saw Dr. Desai on November 28, 2015 described soreness and bruising for a few days, but now states he does not have any pain or decreased range of motion. He testified that the increased symptoms subsided within a week or two. While Dr. Desai read the new MRI as showing a complete tear of the rotator cuff, he states that he feels the rotator cuff repair was not successful as Petitioner continues to demonstrate retraction of the tear with muscle atrophy. Dr. Desai notes Petitioner is not limited in range of motion and is able to do his work. He released him to return to unrestricted work. Dr. Desai's discussion of the possibility of a shoulder replacement surgery is no different that his opinion on July 18, 2014 or February 27, 2015. The Arbitrator does not find that the home injury when Petitioner fell on his stairs rises to an intervening accident which would break causal connection.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proved by a preponderance of the evidence that his condition of ill being in the left shoulder is causally connected to the accidental injuries sustained on June 24, 2014.

In support of the Arbitrator's decision with respect to (L) Nature & Extent, and (N) Credit, 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 9% of upper extremity or 5% of the whole person as determined by Dr. Atluri, pursuant to the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment (RX 2, RX 3). 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 a diagnosis of a massive left shoulder rotator cuff tear as well as degenerative arthritis and rotator cuff pathology. Petitioner underwent surgery with resultant significant loss of range of motion and loss of strength on physical examination. Petitioner reported moderate difficulty with work assignments. Because of these facts, 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 plumber at the time of the accident and that he has been able to return to work in his prior capacity as a result of said injury. The Arbitrator notes that Petitioner described his job as heavy and physically demanding. He has been able to return to his regular job but has an assistant to help with activities such as overhead work. Petitioner identified moderate difficulty with his work activities on the Quick Dash report he prepared for Dr. Atluri. Because of these facts, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 62 years old at the time of the accident. Petitioner would be considered an older worker. The medical records and Petitioner's testimony discuss his interest in working only until his expected retirement in a few years. Because of this, 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 Petitioner has returned to his regular job since March, 2015 and has been able to perform his duties with the assistance of a helper. He has been employed by Respondent for over 20 years. He continues to earn his full wages and expects to work until a planned retirement age. The Arbitrator notes that Petitioner is limited in certain functions, particularly overhead activities. If he were not employed by Respondent, there would be portions of his regular occupation as a licensed plumber that he would have difficulty with or be unable to perform. Because of these facts, 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 as a result of the accident, Petitioner was diagnosed with a massive rotator cuff tear. He underwent surgery on August 7, 2014. After six months of therapy, he was released to his regular work as a journeyman plumber but cautioned with respect to overhead work. Petitioner testified that he made greater use of his helper following his return to work on March 2, 2015. Both the final therapy discharge and Dr. Desai's February 27, 2015 office note confirm loss of strength in the left shoulder. Dr. Desai discussed the possible need for a future shoulder replacement. Dr. Atluri's examination confirmed loss of strength as well as loss of range of motion in the left shoulder. The Quick Dash report documented moderate difficulty in performing work activities. Because of these facts, the Arbitrator therefore gives greater weight to this factor.

In assessing the extent of disability the Arbitrator finds the Commission decisions of *Robert Nation v. City of Springfield*, 16 IWCC 0495 (Full thickness rotator cuff tear on 59 year old mechanic with 2 surgeries, return to full duty but continued pain and difficulty with overhead activities), and *Terina Green v. PPG Industries, Inc.*, 14 IWCC 0912 (Rotator cuff repair on 39 year old Petitioner with Dr. Atluri impairment rating of 9% upper extremity and 5% whole person) applicable to the facts herein.

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 18% loss of use of person as a whole pursuant to §8(d)2 of the Act. Respondent shall receive credit of $1,443.32 for the stipulated PPD advance made.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mike Ipema,

Petitioner,

vs. NO: 15 WC 15955

Cimarron Construction,

19IWCC0478

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 13, 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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $4,400.00. 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: SEP 4 - 2019
TJT:yl
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51

Thomas J. Tyrrell

Maria E. Portela

L. Elizabeth Coppoletti

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

IPEMA, MIKE
Employee/Petitioner

Case# **15WC015955**

CIMARRON CONSTRUCTION
Employer/Respondent

19IWCC0478

On 3/13/2018, 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 1.85% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0274 HORWITZ & HORWITZ & ASSOC LTD
TYLER BERBERICH
25 E WASHINGTON ST SUITE 900
CHICAGO, IL 60602

0358 QUINN JOHNSTON HENDERSON ET AL
CHRISTOPHER CRAWFORD
227 N E JEFFERSON ST
PEORIA, IL 61602

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
19(b)

Mike Ipema
Employee/Petitioner

v.

Cimarron Construction
Employer/Respondent

Case # **15** WC **15955**

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 **Kankakee, Illinois**, on **January 19, 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 **Vocational Rehabilitation**

FINDINGS

On the date of accident, **April 17, 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 $**70,948.80**; the average weekly wage was $**1364.40**.

On the date of accident, Petitioner was **43** years of age, *married* with **1** dependent child.

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

Respondent shall be given a credit of $**98,496.69** for TTD, $**0** for TPD, $**30,666.51** for maintenance, and $**0** for other benefits, for a total credit of $**129,163.20**.

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 $918.00/week for 144 weeks, commencing April 18, 2015 through January 19, 2018, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $10,214.64, as provided in Section 8(a) and 8.2 of the Act.

Respondent shall pay costs of vocational services in the amount of $1,309.77, as provided in Section 8(a) of the Act.

Respondent shall authorize the prescribed L5-S1 lumbar fusion surgery, as recommended by Dr. Templin, including any necessary updated imaging, testing, and post-surgical care.

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

3/7/18
Date

ICArbDec19(b)

MAR 13 2018

FINDINGS OF FACT

On April 17, 2015, Petitioner, Mike Ipema, was employed as a carpenter by Respondent, Cimarron Construction. Petitioner testified that he had worked as a union carpenter since 1990 when he graduated from high school. At the time of his April 17, 2015 accident, Petitioner was a member of Carpenters' Local 434.

Petitioner's work as a carpenter consisted primarily of residential carpentry work, framing houses. In performing these duties, Petitioner was required to lift materials weighing up to approximately 75 pounds. Petitioner described this as very heavy work. Petitioner was also required to constantly bend and kneel, nail down sheeting or pick things up off the ground. He used ladders on a frequent basis and worked on rough graded surfaces. Finally, Petitioner also described that he often worked on steep pitched surfaces while sheeting roofs.

On April 17, 2015, Petitioner was standing on a sheet of plywood, which was laid across two saw horses on the second floor of a residence under construction. Petitioner testified that the rack failed and he fell 10 to 12 feet with legs outstretched, first striking the ground with his right foot, and then falling flat on his back. Petitioner testified that he immediately experienced extreme pain in the right ankle, as well as buttock pain and pain on the left side of his lower back.

Following the accident, Petitioner was taken to Riverside Medical Center and seen in the Emergency Room. There, Dr. Steven Decker examined Petitioner and noted that he had fallen while at work from a height of approximately 10 feet, injuring his right foot, ankle, and heel. Swelling and tenderness were noted in the foot and ankle. Petitioner underwent a CT scan and X-rays, which revealed an acute comminuted fracture of the calcaneus and a nondisplaced comminuted fracture of the lateral malleolus. (PX 4)

While in the emergency room, Petitioner was also evaluated by Dr. Tomasz Antkowiak, an orthopedic surgeon. Dr. Antkowiak noted that Petitioner had fallen at work after losing his balance while on scaffolding, falling between 10 and 15 feet to the ground below. Dr. Antkowiak noted the calcaneus fracture found on x-ray, and additionally noted a distal fibula fracture was present in the right leg. Dr. Antkowiak also noted the presence of buttock pain and Petitioner's inability to bear weight with the right foot. Dr. Antkowiak noted that Petitioner's calcaneus fracture involved all three facets of the calcaneus, with "significant collapse and widening" of the bone. Petitioner was discharged later that same day and told to follow up with Dr. Rajeev Puri, a foot and ankle specialist at Oak Orthopedics, to evaluate both surgical and nonsurgical treatment options for his foot. (PX 4)

Petitioner followed up with Dr. Puri on April 21, 2015. At that visit, Petitioner reported "burning; sharp; constant" ankle pain which he rated at an 8/10 pain level. Dr. Puri noted the history of a fall from height at work 4 days earlier with a resulting foot and ankle injury. Dr. Puri diagnosed Petitioner with a calcaneus fracture, a lateral malleolus fracture, peroneal tendon instability, and neuropathy. Dr. Puri discussed surgical options but noted that Petitioner's foot was to swollen to consider surgery at that time. Petitioner was advised to ice and elevate the foot, no weight bearing, and to follow up in one week. Dr. Puri also referred Petitioner for a second orthopedic opinion regarding treatment options. (PX 7)

Petitioner was evaluated on April 27, 2015 by Dr. George Holmes, an orthopedic surgeon at Midwest Orthopedics at Rush. Dr. Holmes noted the history of injury, and reviewed the imaging from Riverside Medical Center. Dr. Holmes assessed moderate to severe comminuted fracture of the calcaneus. Dr. Holmes noted that due to the significant swelling, Petitioner was not surgical candidate at that time. Dr. Holmes recommended continued elevation in an attempt to reduce the swelling. He felt it prudent to get the foot in a neutral position

with a closed reduction and based upon his swelling the contemplation of an open reduction or possibly a late arthrodesis. Petitioner was continued off work at this visit. (PX 1)

Petitioner followed up with Dr. Holmes on May 1, 2015. In an attempt to place Petitioner's foot and ankle in neutral alignment, a right ankle manipulation under anesthesia was performed The foot was placed in neutral alignment without complication. Petitioner followed up with Dr. Holmes again on May 13, 2015 where he was referred to physical therapy and new x-rays were obtained, which showed stable alignment of the calcaneal fracture. At that visit, Dr. Holmes noted improvement in Petitioner's pain levels and reduced swelling, and recommended that he follow up again in 2 weeks. Dr. Holmes noted that Petitioner's cast would be reassessed at the next visit and depending on what his x-rays showed, potential advancement to light weight-bearing in a Cam boot or cast. Petitioner was continued off work. (PX 1)

Petitioner followed up with Dr. Holmes again on June 2 after being placed in a Cam boot. Dr. Holmes noted that it had been approximately 6-1/2 weeks since Petitioner's initial injury, and 5 weeks since his right ankle manipulation under anesthesia. Dr. Holmes noted that siginificant swelling was still present in the heel and ankle, and tenderness was present at the distal fibula. New x-rays were obtained which showed interval healing of the fracture sites. Dr. Holmes recommended that Petitioner be advanced to weight-bearing as tolerated. Petitioner was also cleared to begin physical therapy and was continued off work. (PX 1)

Petitioner continued physical therapy treatments and follow ups with Dr. Holmes through the remainder of 2015. (PX 1)

Petitioner continued with right foot complaints. Dr. Holmes recommended surgery. On January 7, 2016, Petitioner was seen for a pre-operative exam by Dr. Rhonda Sy. At that time it was noted that orthotics, casting, and physical therapy had failed to relieve Petitioner's symptoms. (PX 1)

On January 15, 2016 Dr. Holmes performed a right ankle subtalar arthodesis and lateral decompression. Petitioner was discharged that same day and continued to follow up with Dr. Holmes. (PX 1, PX 3)

Petitioner followed up again with Dr. Holmes on February 3, 2016. Dr. Holmes noted that overall, Petitioner was doing "quite well" and noted mild tenderness over the surgical site. At this visit, Dr. Holmes also noted that Petitioner reported ongoing pain in his lower back, which had been present prior to surgery on his right foot. Dr. Holmes noted that the pain was located in the left lower back, and that Petitioner first began to notice it after he broke his heel in the fall at work. Dr. Holmes provided Petitioner with the names of several spinal specialists for Petitioner to be evaluated by, and noted that Petitioner's back pain "may be secondary to over compensation for his injury on the right lower extremity." Petitioner was continued off work and told to follow up in three weeks. Dr. Holmes also provided Petitioner with a referral to a back doctor for his ongoing back pain. (PX 1)

Petitioner followed up with Dr. Holmes on February 25, 2016 where it was noted that there was moderate swelling still present in the ankle and that "excellent fusion" was demonstrated across the subtalar joint. Dr. Holmes also noted that Petitioner continued to report back and left hip pain during this visit. Dr. Holmes noted that Petitioner's back pain had been "significantly exacerbated" by his ability to only bear weight with the left foot and his prolonged immobility. Dr. Holmes also felt it was "very important" that Petitioner's back pain complaints be addressed, and "strongly recommend[ed]" evaluation and x-rays of Petitioner's lower back. (PX 1)

Petitioner again saw Dr. Holmes on March 10, 2016 where improvement in the pain levels in his foot and ankle were noted. Dr. Holmes noted that Petitioner continued to report more significant pain in the area of the left hip. Dr. Holmes again recommended that it was absolutely very important that Petitioner be evaluated

for his left hip pain, given its impact on his weight-bearing ability. Dr. Holmes also noted that the pain reported by Petitioner in his left hip was so severe that it might impact his recovery once he started back in physical therapy. Dr. Holmes again referred Petitioner for an evaluation of his left hip pain, and told him to follow up in 2 weeks. (PX 1)

Petitioner was seen again by Dr. Holmes on March 23, 2016 when he was placed in a walking boot. Dr. Holmes again noted that Petitioner reported low back, left hip, and left wrist pain at this visit, with numbness and tingling in the 4th and 5th digits. Dr. Holmes noted that despite the previous referrals, Petitioner had been unable to get authorization for evaluation of his low back and left hip pain. Dr. Holmes again "strongly recommend[ed]" evaluation of this problem in order to determine whether the back pain was coming from a preexisting condition, or was a new problem associated with his fall at work. Petitioner was advised to follow up in 2 weeks. (PX 1)

On April 6, 2016, Dr. Holmes prescribed physical therapy and an Aircast brace. At that time, the doctor noted Petitioner's complaint of persistent back pain and hip pain. Petitioner was continued off work. (PX 2)

On April 14, 2016, Petitioner saw Julie Morgan, a Physician's Assistant at Hinsdale Orthopedics for the recommended evaluation of his left hip pain. At that visit, PA Morgan noted the history of the fall at work, with Petitioner's treatment initially focusing on the foot injury. PA Morgan noted that although Petitioner did not initially notice pain in his hip at the time of the fall, he noticed bruising to the area immediately after the fall. PA Morgan also noted that Petitioner's hip pain had become more significant since January during the course of his treatment for the foot injury. X-rays were ordered during this visit, which showed calcification of the labrum which was deemed to indicate a probable labral tear. Petitioner was assessed with "left hip probable labral tear that is being aggravated by over compensation of wearing the boot on the right foot." Petitioner was prescribed physical therapy for the hip, and was told to follow up with Dr. Domb for an MRI if the physical therapy failed to provide relief of his symptoms. (PX 2)

Petitioner followed up with Dr. Holmes on May 5, 2016. Dr. Holmes noted improvement in Petitioner's foot and ankle condition. He also noted that Petitioner had very persistent low back pain that was severe and limiting his ability to progress in therapy and limiting his ability to increase his activities. Dr. Holmes noted that it was vital that Petitioner's lower back be evaluated, as it was getting worse, and was severe in limiting Petitioner's function. Dr. Holmes issued another referral for "evaluation of low back pain status post fall from height and calcaneal fracture." Dr. Holmes also ordered shoe modification in an attempt to address Petitioner's complaints of forefoot pain. (PX 1)

Petitioner saw Dr. Benjamin Domb on June 9, 2016. Dr. Domb noted Petitioner's ongoing hip and back pain complaints. Dr. Domb wrote that Petitioner presented with ongoing posterior left hip pain in the setting of FAI (Femoral acetabular impingement), likely hamstring pathology. The doctor stated, "He had no prior hip or back pain prior to his work-related injury. Based on the mechanism of injury, it is with reasonable medical certainty that the patient's current condition is causally related to the work-related injury in April 2015." Dr. Domb ordered physical therapy for both the hip and back as well as a hamstring injection which was completed on June 29, 2016. Petitioner was referred to Dr. Cary Templin. (PX 2)

On July 7, 2016, Dr. Holmes commented that Petitioner was approaching the end of what he could do for Petitioner with regard to the foot. Dr. Holmes also commented that Petitioner would never get back to normal with respect to the foot. He was given a continuing prescription for replacement orthotics. (PX 1)

Petitioner was seen by Dr. Cary Templin for his ongoing back pain on July 21, 2016. Dr. Templin noted the history of a fall occurring at work in April 2015, and continuing pain in Petitioner's lower back, which extended into his left leg. X-rays were reviewed, which showed L5-S1 spondylolisthesis with pars fracture, and

degenerative disc change with loss of disc height. Dr. Templin assessed status post a fall, with an axial load to the back with aggravation of the spondylolysis and spondylolisthesis in his back with low back pain and radicular complaints. The doctor ordered an MRI to evaluate the level of foraminal stenosis in the spine. (PX 2)

Petitioner's FCE ordered by Dr. Holmes was performed on July 23, 2016. Presenting complaints were noted as low back pain and left hamstring soreness. Petitioner was also using the shoe modifications that were previously prescribed to him. Petitioner's examining therapist noted that during the course of testing, Petitioner's low back, hamstring, and foot and ankle pain all became worse as the evaluation progressed over the course of 3 hours. Petitioner's therapist assessed his non-material handling activities to be limited to medium work levels, with medium heavy occasionally, and sedentary to light work capability constantly. Petitioner's back lift capability was not assessed however, secondary to his lumbar spondylolisthesis diagnosis. (PX 6)

Petitioner followed up with Dr. Holmes on August 4, 2016. The doctor recommended no further treatment for the foot and ankle. Petitioner was cleared to return to work with his foot and ankle per FCE restrictions. (PX 1)

Petitioner underwent the recommended lumbar MRI on August 5, 2016. The MRI results demonstrated Grade I anterolisthesis of L5 over S1, bilateral fractures of pars inter articularis at L5 bilaterally, and disc protrusions at L2-3, L4-5, and L5-S1. Additionally, bilateral neural foraminal stenosis was noted at L4, encroaching the left and right L4 nerve roots. Foraminal narrowing was also revealed over the left L5 exiting nerve root. (PX 2)

Following the MRI of his back, Petitioner saw PA Morgan again for follow up of his hip pain on August 10, 2016. PA Morgan noted that the hamstring injection did not provide any pain relief. She felt that Petitioner's hip pain "appears to be more pain coming from his lumbar spine" and noted that Petitioner would follow up per Dr. Templin's recommendation. (PX 2)

Petitioner followed up with Dr. Templin for his MRI results on August 17, 2016. He was seen by PA Kelly Burgess. Petitioner reported feeling "the same, if not worse, compared to his previous visit." Petitioner reported continued pain in his back, with radiating pain into his buttock and left hamstring. MRI results were read, which showed L5-S1 spondylolisthesis, disc degeneration, and foraminal narrowing. PA Burgess noted that Petitioner's back pain began after a fall at work, which resulted in a calcaneal fracture and ankle fusion. PA Burgess also noted that given the failure of physical therapy and injections to relieve his pain, Petitioner was a surgical candidate for an L5-S1 anterior lumbar interbody fusion with posterior instrumentation. PA Burgess noted she discussed this with Dr. Templin in detail. (PX 2)

At Respondent's request, Petitioner underwent a Section12 examination with Dr. Michael Pinzur on September 2, 2016. Dr. Pinzur noted that Petitioner had sustained a significant injury to his calcaneus and had undergone a well-performed subtalar fusion. Dr. Pinzur recommended no further surgery for the foot and ankle, and endorsed a return to work with restrictions on the foot and ankle consistent with the limits of his FCE, which he felt should not progress. Dr. Pinzur additionally noted that Petitioner should only be working on level surfaces with limited weight lifting and limited demands. (RX 2, Dep. Ex. 3)

At Respondent's request, Petitioner also underwent a Section12 examination with Dr. Steven Mather on November 6, 2016. Dr. Mather noted the history of injury as a fall from height, resulting in a fracture of the calcaneus. Dr. Mather opined that Petitioner had non-occupational symptomatic spondylolysis/spondylolisthesis at L5-S1 which was unrelated to his fall at work. The doctor reasoned that the medical records reviewed did not support that his back was injured in the fall at work. Dr. Mather indicated that the records did not indicate Petitioner had any back complaints until late 2015. He noted that Petitioner attended more than 50 visits to

physical therapy and never made a complaint of low back pain until late 2015. Dr. Mather indicated that he believed Petitioner's lumbar condition to be preexisting, and further disagreed with the notion that Petitioner's back had been aggravated by his foot and ankle treatment. However, Dr. Mather noted that his opinion was not final, as he did not have any imaging studies or records that would allow him to determine whether or not Petitioner had an acute lumbar spine injury. Dr. Mather also opined that the hamstring injection was not medically necessary, stating "I have never heard of a hamstring injection being injected for any reason." Dr. Mather did agree that he may require a fusion surgery at L5-S1. (RX 1, Dep. Ex. 2)

After reviewing additional records, Dr. Mather authored an addition report dated December 24, 2016. Dr. Mather reiterated his opinions that Petitioner's back condition was unrelated to both his fall at work and treatment thereafter. Dr. Mather noted that previously taken x-rays revealed old disk space collapse at L5-S1 with a 2mm inconsequential isthmic spondylolisthesis. The doctor noted that spondylolisthesis of 3mm or greater is considered to be significant, not less. Dr. Mather also noted that a reading of the August 2016 MRI indicated Petitioner had a 3mm disk bulge at L5-S1 with minimal insignificant disk bulges at other levels and some mild narrowing of the left L5-S1 foramen with spondylolysis of L5 bilaterally. Dr. Mather stated, "I do not believe that the lower back diagnosis of L5-S1 spondylolisthesis is in any way, shape or form related to the overcompensation from his foot injury." Dr. Mather also withdrew his opinion that Petitioner might require a L5-S1 fusion indicating that the disk space is essentially collapsed with no signs of ongoing instability despite the pars defects. (RX 1, Dep. Ex. 3)

Petitioner followed up with Dr. Templin on January of 2017. Dr. Templin noted that Petitioner's back pain began after his fall in 2015, and at the same time he reported that pain to Dr. Holmes. Dr. Templin disagreed with Dr. Mather's assessment that Petitioner's back pain was preexisting, noting that "it is certainly clear that there have been no symptoms relatable to his back prior to the injury and the injury has caused his symptoms to become clinically pronounced." Dr. Templin reiterated his recommendation that Petitioner undergo an L5-S1 fusion. (PX 2)

On February 22, 2017, Petitioner saw Dr. Samir Sharma, per Dr. Templin's referral, in consultation for a left L5 transforaminal epidural steroid injection. Dr. Sharma noted that the current complaints of back pain represented an acute episode with "no prior history of this type of pain." Dr. Sharma also noted that Petitioner reported the pain as having started after Petitioner's fall at work in 2015. Dr. Sharma also reviewed Petitioner's latest MRI, noting an L5 pars fracture bilaterally, multilevel disc protrusion, neural foraminal stenosis and left L5 nerve effacement. Dr. Sharma recommended that Petitioner undergo an epidural injection of the left L5 disk space. (PX 5)

At Petitioner's attorney's request, Dr. Holmes reviewed surveillance footage of Petitioner. Dr. Holmes was asked to opine whether or not the footage changed any of the doctor's opinions regarding Petitioner's foot and ankle condition, or his opinion regarding Petitioner's work restrictions with the foot. On April 10, 2017, Dr. Holmes authored a report opining that nothing in the footage changed his assessment, and that Petitioner could work within the restrictions of the FCE. The doctor noted that he observed Petitioner on the surveillance doing various activities such as walking, flying a drone, and going into a store. He noted Petitioner was seen walking on grass in several portions of the video and Petitioner walked with a slight but noticeable antalgic gait. Dr. Holmes noted that none of the footage suggested that Petitioner was able to return to full duty, full time carpentry work. Dr. Holmes also opined that Petitioner's restrictions were "[i]n all likelihood" permanent. (PX 10)

At arbitration, Petitioner testified that he is currently involved in a program of vocational rehabilitation with EPS Rehabilitation and vocational counselor Edward Steffen. Petitioner has also met with vocational counselor Kathleen Mueller of Independent Rehabilitation. The records from Petitioner's vocational counselors, as well as Petitioner's job search logs are contained in Petitioner's Exhibits 12, 13, 14, and 15.

Petitioner also testified concerning the current condition of his lower back and right foot. He explained that the more he uses his lower back, the more it hurts. Petitioner stated he has pain in the lower back with sitting for long periods and pain when bending over. Petitioner indicated that after sitting for 1 ½ to 2 hours, he experiences pain in the back that feels like he is "sitting on a rock," with dull, sharp nerve pain. Petitioner testified that he cannot kneel or crawl due to pain in his lower back.

Regarding his foot, Petitioner explained that the more he uses his foot, the more it hurts as well. His right foot is swollen at the end of the day and he has to stop to rest after being on his feet for an extended period of time. Petitioner specifically detailed that his foot hurts when he attempts to move it from side to side, as when he attempted to operate a trolling motor on his father's fishing boat. Petitioner provided that he continues to wear prescription shoes, as prescribed by Dr. Holmes and takes Gabapentin, as prescribed by Dr. Sharma.

Deposition of Dr. Cary Templin – May 23, 2017

Dr. Cary Templin is a board certified orthopedic surgeon, 99% of whose practice is focused on treatment of the spine. (PX 11, pp. 4-5) Dr. Templin is Petitioner's treating spinal surgeon.

Petitioner began treatment with Dr. Templin on July 21, 2016. At that time, Petitioner told Dr. Templin of his accident history and the treatment he received for his right foot and ankle, as well as his left hip prior to seeing Dr. Templin. Petitioner complained to Dr. Templin of lower back pain, extending into the left leg. (PX 11, pp. 5-6) At this first visit, Dr. Templin had the opportunity to review x-rays and MRI of Petitioner's lumbar spine, which showed a fracture at L5-S1 with spondylolisthesis and loss of disk space at that level. Dr. Templin diagnosed Petitioner with spondylolysis and spondylolisthesis with radiculopathy and recommended that Petitioner get an updated lumbar MRI. (PX 11, p. 7)

Petitioner did undergo an updated MRI on the lumbar spine and followed up with Dr. Templin's office on August 17, 2016. The updated MRI showed spondylolisthesis with degenerative disk changes and foraminal stenosis narrowing where the nerve exits the spine on the left side. At that time, Dr. Templin recommended L5-S1 fusion. Dr. Templin felt that injections would only treat the symptoms of Petitioner's problem, but surgical intervention would be a definitive fix. (PX 11, pp. 8-10) Dr. Templin explained that with a four millimeter spondylolisthesis, the goal of surgery would be to place a spacer between the two bones to open up the nerve that is being compressed and to stabilize that level of the spine so it does not move anymore. (PX 11, p. 10)

Dr. Templin also identified Deposition Exhibit 3, which is one of the x-rays from July 21, 2016, showing the four millimeter spondylolisthesis at L4-5. (PX 11, pp. 10-11, PX 11 Deposition Exhibit 3) Based on the images of Petitioner's lumbar spine, Dr. Templin disagreed with the opinion of Dr. Mather, Respondent's Section 12 examiner, who opined that Petitioner's L5-S1 disk space had collapsed. Dr. Templin pointed out that the disk space is clearly not collapsed in the x-ray images.

The last time Dr. Templin saw Petitioner was in January of 2017. (PX 11, p. 13) Dr. Templin testified that Petitioner walked with a limp and that an antalgic gait can cause pre-existing spondylolisthesis to become symptomatic. (PX 11, pp. 13-14) Dr. Templin explained that when an individual is constantly limping, they are shifting their weight more side-to-side rather than staying upright. He indicated that side-to-side shifting can cause the foraminal area to become more narrowed, especially in an unstable situation like spondylolisthesis. (PX 11, p. 15) Dr. Templin further opined that the timing of Petitioner's complaints beginning in December of 2015 was consistent with his symptoms being caused by an antalgic gait. He stated that as an individual alters their gait, the loading of the spine over time can progress to symptomatology sooner than it would have previously. (PX 11, pp. 14-15)

Dr. Templin opined that the current condition of Petitioner's lumbar spine is causally related to his April 17, 2015 work accident. Dr. Templin stated that with Petitioner's gait pattern, he more likely had onset of this symptom relatable to the gait patter at a sooner time in his life than he would have if he did not have the issue. (PX 11, p. 15) Dr. Templin recommended that Petitioner remain off work, pending lower back surgery. (PX 11, p. 16)

On cross-examination, Dr. Templin explained that it was his understanding that Petitioner had a foot injury, which required surgery. After surgery, Petitioner was non-weight bearing for a time, then transitioned into a walking boot and eventually full weight bearing. Dr. Templin felt that a layperson could notice Petitioner was ambulating with a difference to his gait than a normal person. (PX 11, p. 18) Dr. Templin did agree that Petitioner's pre-existing condition can become symptomatic without any inciting event. (PX 11, p. 19)

When asked again on cross-examination about Dr. Mather's opinion that Petitioner's L5-S1 disk space was collapsed, Dr. Templin disagreed. Based upon the diagnostic films, Dr. Templin opined that there was foraminal stenosis and a "fairly well preserved" disk space. (PX 11, p. 22) Dr. Templin agreed that the underlying conditions of spondylolysis and spondylolisthesis preexisted Petitioner's accident (PX 11 p. 23) and agreed that epidural injections can achieve significant relief for some patients and may help avoid surgery. Petitioner had not undergone any epidural injections. (PX 11, p. 25)

When asked whether getting further away from a particular event makes it less likely that symptoms are related to that event, Dr. Templin explained that in this case we have a Petitioner with an altered gait for months, so the farther you get away from the initial injury the more likely it was going to lead to symptoms. (PX 11, p. 26)

Regarding the need for surgery Dr. Templin opined that "In the situation of spondylolisthesis of this nature, I think fusion is extremely accepted option for somebody even with significant back pain as opposed to a patient with just degenerative disk disease, I think that you try to shy away from surgery, fusion surgery in that situation, but in a situation of this nature I think the patients have good back pain and leg pain outcomes." (PX 11, p. 29)

On re-direct examination, Dr. Templin agreed that the left leg pain Petitioner reported to him on July 21, 2016 and January 12, 2017 was consistent with the findings on his MRI. (PX 11, pp. 30-31)

Deposition of Dr. Steven Mather – June 22, 2017

Dr. Mather is an orthopedic surgeon who specializes in treatment of the adult spine. He performed a Section 12 examination on Petitioner on November 7, 2016. (RX 1, p. 6) Petitioner gave him a history of his April 17, 2015 work accident and right foot injury. (RX 1, pp. 7-8) According to Dr. Mather, Petitioner told him that his lower back pain started "about 8 months after the injury." (RX 1, p. 8). Dr. Mather further testified that Petitioner told him the pain simply came on without any unusual activity that would have caused it. (RX 1, p. 8) Dr. Mather confirmed that Petitioner told him he did not have any back problems prior to his accident. (RX 1, p. 10)

Dr. Mather testified that during his examination, Petitioner did not complain of any radicular pain and he had a negative straight leg raise. (RX 1, p. 11) Dr. Mather explained that the straight leg raise showed there was no disc herniation or significant nerve root compression present at L-4 through S-1. Dr. Mather further opined that normal reflexes found on exam ruled out compression of the L-2, 3, 4 and S-1 nerve roots. (RX 1, p. 11) According to Dr. Mather, x-rays that were taken in his office showed a L5-S1

spondylolisthesis of about 2 millimeters, which he said is measured using computer software. (RX 1, pp. 12-13)

Dr. Mather testified that when reviewing the provided medical records, he did not see complaints of back pain for 8 months after the accident and that the back pain did not seem to come on because of any documented altered gait. He also did not feel there were objective findings on physical examination by any physician to support Petitioner's complaints of back pain. (RX 1, p. 13)

Dr. Mather diagnosed Petitioner with non-occupational spondylolisthesis at L5-S1. Dr. Mather testified that it is well known that hip fusions will cause markedly abnormal gaits and can create significant back problems, as can knee fusions. However, Dr. Mather did not know of a study that showed the same for subtalar fusions. (RX 1, p. 14)

Dr. Mather opined that Petitioner's spondylolisthesis may or may not be the source of his pain, because it is a common finding in the asymptomatic population and fusion at L5-S1 does not relieve the pain of everyone who has spondylolisthesis. (RX 1, p. 15). Dr. Mather also felt that the left hamstring injection performed by Dr. Domb was unnecessary, as it caused a high risk of tendon rupture. (RX 1, p. 15)

Dr. Mather did not feel that the condition of Petitioner's back was in any way related to his work accident or the time period thereafter. Dr. Mather felt that Petitioner could return to work with regard to his lumbar spine. (RX 1, p. 17)

Dr. Mather testified that subsequent to his initial examination of Petitioner, he reviewed additional records including x-ray and MRI films. Dr. Mather stated that the MRI showed spondylolisthesis at L5-S1 which he measured around 2 millimeters. He did not feel Petitioner was a fusion candidate. (RX 1, pp.18-19) Dr. Mather stated he didn't really see any obvious signs of instability or nerve root compression. (RX 1, p. 21)

On cross-examination, Dr. Mather testified that he did not believe Petitioner had any radicular complaints and stated that he did not recall seeing radicular complaints in Petitioner's medical records. (RX 1, p. 25) Dr. Mather also testified that despite having said that lack of radicular symptoms was part of forming his opinions, the presence of radicular complaints would not change his opinions. He further testified that impingement of the left side of the L5-S1 nerve root could not correlate to left leg pain. (RX 1, pp. 25-26)

When asked whether an altered gait over a period of time can cause greater stress on the lumbar spine, the following transpired.

> Q. In both your reports, you indicated that you did not feel that any overcompensation due to Mr. Ipema's right ankle injury led to his symptoms in his lower back, correct?
>
> A. Correct.
>
> Q. Can an altered gait over a period of time cause greater stress on the lumbar spine?
>
> A. You are going to have to be a little bit less vague with your question. When you say altered, we've all seen – or older ones have seen the Monty Python funny walk. That's an altered gait. But when I walk around my house barefoot, that is altered compared to how I walk in shoes. So what

exactly – be more specific when you say altered gait, because that is so vague. Can you please be more specific?

Q. I can. Mr. Ipema had a subtalar fusion. Each physician he has other than you indicates that he walks with a limp. He has been walking with that limp for eight months prior to his symptoms beginning. Could having a mild to moderate limp cause greater stress on the lumbar spine?

A. I don't think so. I have – my office partner does foot and ankle full time, does a zillion subtalar fusions. He has never had the opportunity once to send me one patient even over the last 15 years for back pain after a subtalar fusion.

Q. So in your opinion is it impossible?

A. Within a reasonable degree of medical certainty.

Q. Can, in your opinion, having a mild to moderate limp over the course of months cause a condition such as the one in Mr. Ipema to become symptomatic sooner that it otherwise would have?

A. With his type of gait?

Q. Correct.

A. No.

(RX 1, pp 27-28)

Dr. Mather was of the opinion that the L5-S1 disc space had essentially collapsed. (RX 1, pp. 29-30) He believed that the disc had collapsed enough to auto stabilize. He further opined that there was enough arthritic change around it that if flexion and extension view of his lumbar spine were taken, it would not move more than 3 millimeters, adding "I guarantee you. Zero chance." (RX 1, p. 30)

On redirect examination, Dr. Mather testified that he performed an examination and during said examination, he concluded that there were no radicular complaints associated with any of the maneuvers. (RX 1, p. 31) During testimony, Dr. Mather was asked to review the August 2016 MRI report which stated Petitioner had L5-S1 foraminal stenosis to the left. Dr. Mather explained that with such a finding "you have to look for that particular nerve root distribution on his complaints and exam…He doesn't have any complaint of leg pain, so he doesn't have any radiculopathy." (RX 1, p. 34)

With respect to F.) Is Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

The parties in this matter have agreed that the current condition of ill-being in Petitioner's right foot and ankle is causally related to his April 17, 2015 work accident. This includes the comminuted intra-articular calcaneus fracture with Achilles contracture and distal fibula fracture, as well as the right ankle subtalar arthritis as diagnosed by Dr. Holmes. Due to these injuries, Petitioner underwent a right ankle subtalar arthrodesis and lateral decompression surgery. The parties further agree that Petitioner has permanent physical restrictions from his right foot and ankle injury which preclude him from returning to his previous occupation as a carpenter. Petitioner's permanent restrictions were assigned by Dr. Holmes, consistent with Petitioner's July 23, 2016 functional capacity evaluation.

The dispute in this case involves whether a causal relationship exists between Petitioner's lumbar condition of ill-being and the accident sustained.

At arbitration, Petitioner testified that immediately following his April 17, 2015 accident, he noticed extreme pain in his right ankle, in addition to buttock pain and pain in the left side of his back. Following the accident, Petitioner was taken to Riverside Medical Center and seen in the Emergency Room. Records show Petitioner had fallen while at work from a height of approximately 10 feet, injuring his right foot, ankle, and heel. While in the emergency room, Petitioner was also evaluated by an orthopedic surgeon, Dr. Antkowiak, who noted the presence of buttock pain and Petitioner's inability to bear weight with the right foot.

The records reflect that due to the condition of his right ankle and foot, Petitioner was non-weight bearing for approximately 6 weeks after the accident. On June 2, 2015, Dr. Holmes began weaning Petitioner back into weight-bearing activities and recommended that he begin physical therapy. At arbitration, Petitioner testified that it was during this course of physical therapy, in late 2015, that he began to notice increased symptoms in his lower back.

As detailed above, Petitioner underwent subtalar arthrodesis surgery, performed by Dr. Holmes, in January of 2016. Following surgery, Petitioner was seen by Dr. Holmes on February 3, 2016. At that time, the records reflect, "Of note, patient discussed today that he has been having ongoing left lower back issues. This has been present for quite some time. It was present prior to surgery."

During his subsequent visits with Dr. Holmes, Petitioner continued to describe symptoms in his lower back. Dr. Holmes noted that Petitioner was struggling to get approval from the workers' compensation insurance carrier to have his lower back evaluated and repeatedly stressed the importance of Petitioner being seen by a specialist for his back. Dr. Holmes made this recommendation after each of his visits with Petitioner in February, March and April of 2016, noting on February 25, 2016, that Petitioner's back pain had been "significantly exacerbated" by his ability to only bear weight with the left foot and his prolonged immobility. On March 23, 2016, Dr. Holmes explicitly stated that "we are reiterating that we strongly recommend further evaluation as this is possibly an aggravation of preexisting condition or a new problem associated with his injury for over compensation."

On April 14, 2016, Petitioner began treatment with Hinsdale Orthopedics. The records reflect that Petitioner was originally seen with complaints of left hip and lower back pain in the office of Dr. Benjamin Domb, a hip specialist, who attempted a left hamstring injection and physical therapy treatment. Thereafter, Petitioner began treating with Dr. Cary Templin, an orthopedic spine surgeon at Hinsdale Orthopedics, on July 21, 2016. After an examination, Dr. Templin assessed his condition as "status post a fall, with an axial load to the back with aggravation of the spondylolysis and spondylolisthesis in his back now with low back pain and radicular complaints."

On August 10, 2016, Dr. Domb's Physician Assistant, Julie Morgan, recommended that Petitioner follow up with Dr. Templin and only return to Dr. Domb if Dr. Templin felt it was necessary, as Petitioner's symptoms did not seem to be emanating from his left hip, but were coming from his lumbar spine with some sciatic symptoms.

Petitioner continue to follow up with Dr. Templin, who has opined that the current condition of ill-being in Petitioner's lumbar spine is causally related to his April 17, 2015 work accident and has recommended that Petitioner undergo a L5-S1 anterior lumbar interbody fusion with posterior instrumentation.

Relying on the opinion of Dr. Steven Mather, Respondent disputes the causal relationship between Petitioner's April 17, 2015 work accident and his current lumbar condition of ill-being. Both Dr. Templin and Dr. Mather testified to their opinions in this case. After reviewing all evidence and testimony in the record, the Arbitrator finds the opinions of Dr. Templin more persuasive than those of Dr. Mather.

Dr. Templin testified that Petitioner walks with a limp and that an antalgic gait can cause pre-existing spondylolisthesis to become symptomatic. Dr. Templin explained that when an individual is constantly limping, they are shifting their weight more side-to-side rather than staying upright. That side-to-side shifting can cause the foraminal area to become more narrowed, especially in an unstable situation like spondylolisthesis. Dr. Templin further opined that the timeline of Petitioner's complaints, beginning in December of 2015, was consistent with his symptoms being caused by an antalgic gait. He stated that as an individual alters their gait, the loading of the spine over time can progress to symptomatology sooner than it would have otherwise.

Dr. Templin opined that the current condition of Petitioner's lumbar spine is causally related to his April 17, 2015 work accident because the gait patterns after his foot injury likely caused his lower back to become symptomatic sooner than it would have without his foot injury. When asked whether getting further away from a particular event makes it less likely that symptoms are related to that event, Dr. Templin explained that since this case involves an aggravation of a condition caused by an altered gait, the farther you get away from the initial injury the more likely it was going to lead to symptoms.

Dr. Mather disagreed, opining that Petitioner's lower back condition was not caused by any altered gait, and further stating that Petitioner's spondylolisthesis may or may not even be the source of Petitioner's pain, because it is a common finding in the asymptomatic population. Dr. Mather agreed that surgeries to other parts of the body, causing abnormal gaits, could lead to back problems. He simply did not know of a specific study saying the same for subtalar fusions.

The Arbitrator finds the opinion of Dr. Templin regarding the aggravation of Petitioner's preexisting spondylolisthesis more credible than the opinion of Dr. Mather. It was the undisputed testimony of Petitioner that he had no medical treatment for his lower back, no history of work restrictions for his lower back and no symptoms in his lower back prior to his April 17, 2015 work injury. Petitioner further testified that his lower back pain became more prevalent during physical therapy after he was weaned back into weight-bearing on his right foot. This is consistent with the histories provided to Dr. Holmes and Dr. Templin.

While Dr. Mather disputed that Petitioner's lower back pain was caused by his antalgic gait aggravating a preexisting condition, he did not deny that antalgic gaits can in fact cause lower back issues. He was simply unaware of any specific literature tying subtalar arthrodesis to an increased risk of lower back injury due to altered gait. Dr. Mather also partially based his opinion on his belief that Petitioner's gait seemed normal. The Arbitrator notes that Dr. Mather both testified that he had little independent recollection of Petitioner and did not have an exact memory of his gait, yet claimed to remember that Petitioner's gait was normal.

Respondent entered into evidence a surveillance film, showing Petitioner performing a few different activities. In reviewing this film, the Arbitrator notes that Petitioner appeared to ambulate with a slight but noticeable limp. In one portion of the surveillance, Petitioner is flying a remote controlled drone that crashes in the lawn. Petitioner attempts to jog to the drone, what appears to be no more than 100 feet. While briskly moving toward the drone, Petitioner appears to ambulate with a noticeable antalgic gait. (RX 4) Based upon the review of the surveillance footage, review of Petitioner's treating

medical records, and review of the testimony from Petitioner, Dr. Holmes and Dr. Pinzur, the Arbitrator finds Dr. Mather's testimony that Petitioner's gait was normal to be not credible.

In contrast, Dr. Templin's causation opinion is consistent with Dr. Holmes' stated concern that Petitioner's lower back pain was "possibly an aggravation of preexisting condition or a new problem associated with his injury for over compensation." Dr. Templin's description of the foraminal area becoming more narrowed with side-to-side shifting while limping, especially in an unstable situation like spondylolisthesis, is consistent with Petitioner's history and the timeline of the onset of Petitioner's lower back symptoms.

It is also noteworthy that both Dr. Holmes and Dr. Pinzur, Respondent's Section 12 examiner on the right foot, watched the surveillance video and both physician's opinions concerning Petitioner's permanent physical restrictions were essentially unchanged by the footage.

Based upon the reasoning above, given all records and testimony in this matter, the Arbitrator finds that the current condition of Petitioner's lumbar spine, namely the symptomatic aggravation of preexisting spondylolisthesis, is causally related to his April 17, 2015 work injury. The Arbitrator further finds the current conditions of Petitioner's right foot is also causally related to his April 17, 2015 work accident.

With respect to J.) Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds the following:

As detailed above, the Arbitrator has found that the current conditions of Petitioner's right foot and lumbar spine are causally related to his April 17, 2015 work accident.

There is no dispute as to the reasonableness and necessity of treatment for Petitioner's right foot.

Based upon all evidence and testimony in this matter, the Arbitrator adopts the opinions of Dr. Holmes, Dr. Domb and Dr. Templin regarding the reasonableness and necessity of medical treatment for Petitioner. Therefore, the Arbitrator finds that all treatment as reflected in Petitioner's Exhibits 1-11 has been reasonable, necessary and causally related to Petitioner's April 17, 2015 work accident, and orders Respondent to pay outstanding medical charges as follows:

Provider	Start	End	Charge	WC Pay	WC Adjust	Balance
PAIN & SPINE INSTITUTE	3/14/2017	5/14/2017	$4,920.68	$0.00	$0.00	$4,920.68
DR.SHARMA (PAIN &SPINE)	2/22/2017	12/1/2017	$5,895.00	$2,488.53	$2,771.47	$635.00
PREMEMIUM HEALTHCARE SOLUTIONS	8/5/2016	8/5/2016	$3,105.00	$0.00	$0.00	$3,105.00
HINSDALE ORTHOPAEDICS	4/14/2016	5/10/2017	$4,198.00	$2,092.17	$671.83	$1,434.00
RIVERSIDE MEDICAL CENTER	4/17/2015	4/17/2015	$0.00	$0.00	$0.00	$0.00
OUT OF POCKET EXPENSE	2/25/2015	2/25/2015	$119.96	$0.00	$0.00	$0.00

Total			$18,238.64	$4,580.70	$3,443.30	$10,214.64

Therefore, the Arbitrator hereby orders Respondent to pay reasonable and necessary medical costs of $10,214.64 pursuant to Section 8(a) and Section 8.2 of the Act.

Furthermore, as detailed in the vocational rehabilitation section below, Petitioner is currently involved in a program of vocational rehabilitation with Edward Steffen of EPS Rehabilitation (PX 13, PX 14), but also had one vocational meeting with Kathleen Mueller of Independent Rehab. (PX 12) The bill from Independent Rehab in the amount of $1,309.77 remains outstanding and is included in Petitioner's Exhibit 18. There is no dispute in this case that the permanent restrictions related to Petitioner's right foot and ankle injury prevent him from returning to his previous occupation as a carpenter. The meeting with Independent Rehab was held to establish whether vocational rehabilitation was appropriate for Petitioner. Therefore, the Arbitrator finds Respondent is responsible for payment of the costs for that meeting, pursuant to Section 8(a) of the Act and hereby orders Respondent to pay the outstanding charge of $1,309.77 for the meeting and report from Independent Rehab.

With respect to K.) Is Petitioner entitled to prospective medical care, the Arbitrator finds as follows:

Due to the current condition of Petitioner's lumbar spine, Dr. Templin has recommended that Petitioner undergo a L5-S1 fusion. Dr. Templin explained that same would be a more definitive source of relief for Petitioner than possible treatment with epidural steroid injections because it would treat the instability associated with spondylolisthesis. Respondent's Section 12 examiner, Dr. Mather, opined that lumbar fusion was not necessary for Petitioner, as he believed that Petitioner's L5-S1 disc space had essentially collapsed. Dr. Mather stated that the disc had collapsed enough to auto stabilize. He further opined that there was enough arthritic change around it that if flexion and extension view of his lumbar spine were taken, it would not move more than 3 millimeters, adding "I guarantee you. Zero chance."

However, during his deposition testimony, Dr. Templin produced an x-ray from July 21, 2016, which showed Petitioner's L5-S1 disc space was not collapsed and that Petitioner has a 4.4 millimeter spondylolisthesis at L4-5. Based on the images of Petitioner's lumbar spine, Dr. Templin disagreed with the opinion of Dr. Mather, pointing out that the disk space is clearly not collapsed in the x-ray images. Furthermore, during his deposition testimony, Dr. Mather claimed that Petitioner's spondylolisthesis was only 2 millimeters, which he said can be measured using computer software. However, the x-ray produced by Dr. Templin actually had a computer software measurement on it, showing a 4.4 millimeter spondylolisthesis.

After reviewing the evidence and testimony in the record, the Arbitrator finds the opinion of Dr. Templin regarding the need for surgery more persuasive than the opinion of Dr. Mather. As of July 21, 2016, Petitioner's x-rays showed a 4.4 millimeter spondylolisthesis and a preserved disc space at L5-S1. This is consistent with Dr. Templin's opinion of a spondylolisthesis and an unstable condition at L5-S1 for which surgical treatment is appropriate. Dr. Mather's opinions are simply refuted by the evidence. Dr. Mather diagnosed only a 2 millimeter spondylolistheses, guaranteeing that Petitioner's spine would not move more than 3 millimeters under any conditions. Further, Dr. Mather opined that Petitioner's L5-S1 disc space had collapsed to a point where it was stabilized. Again, Dr. Templin disagreed with the opinion of Dr. Mather, pointing out that the disk space is clearly not collapsed in the x-ray images. The Arbitrator is not persuaded by the opinions of Dr. Mather.

Based upon all evidence and testimony in the records, the Arbitrator has found that the current conditions of Petitioner's right foot and lumbar spine are causally related to his April 17, 2015 work accident. The Arbitrator also finds that the need for surgical treatment of Petitioner's lumbar spine, as recommended by Dr. Templin, is reasonable, necessary and causally related to Petitioner's April 17, 2015 work accident. Therefore, the Arbitrator orders Respondent to authorize the treatment as recommended by Dr. Templin, specifically including the costs of L5-S1 fusion surgery and subsequent post-surgical care.

With respect to L.) What temporary benefits (TTD and maintenance) are in dispute and O.) Vocational Rehabilitation, the Arbitrator finds as follows:

The parties in this case agree that Petitioner has been unable to return to his previous profession as a carpenter, due to injuries arising out of his April 17, 2015 work accident, from April 18, 2015 through the date of arbitration, January 19, 2018. The dispute is simply whether Petitioner's benefits should be labeled as temporary total disability benefits or maintenance benefits.

As detailed in the sections above, Petitioner was released by Dr. Holmes to return to work with permanent restrictions related to his right foot injury on August 4, 2016. However, Dr. Templin continued to recommend that Petitioner remain completely off work due to the condition of his lumbar spine. At no time since his first meeting with Petitioner has Dr. Templin released Petitioner to return to work.

Despite having an off-work recommendation from Dr. Templin, Petitioner first met with vocational counselor Edward Steffen of EPS Rehabilitation on September 6, 2016. (PX 13) Based upon his meeting with Petitioner and review of medical records, Mr. Steffen opined that formal vocational rehabilitation was appropriate for Petitioner using the restrictions outlined by Dr. Holmes and Petitioner's FCE. (PX 13) After meeting with Mr. Steffen, Petitioner began performing a self-directed job search within the restrictions outlined by his FCE. That job search has been recorded by Petitioner and was entered into evidence as Petitioner's Exhibit 15.

In July of 2017, Petitioner met with Kathleen Mueller, a vocational rehabilitation counselor at Independent Rehab. Ms. Mueller reviewed Petitioner's FCE restrictions and his job search to date and recommended that Petitioner undergo formal vocational rehabilitation with assistance from a vocational counselor. (PX 12)

On September 13, 2017, Petitioner began meeting regularly with Mr. Steffen and has continued to meet with Mr. Steffen and perform a job search through the date of arbitration. (PX 13)

Respondent has paid Petitioner temporary total disability benefits from April 18, 2015 through September 3, 2016 and maintenance benefits from September 4, 2016 through January 19, 2018.

In making the determination of what benefits should be paid to Petitioner, the Arbitrator notes that Petitioner's treating physician for his lumbar spine, Dr. Templin, recommended that Petitioner remain off work until he undergoes L5-S1 fusion surgery. As detailed in the sections above, the Arbitrator has adopted the opinions of Dr. Templin with regard to causal connection and the reasonableness and necessity of Petitioners medical treatment. The Arbitrator also adopts the opinion of Dr. Templin regarding the Petitioner's work status.

The reports from Mr. Steffen and Ms. Mueller make clear that the vocational rehabilitation program only utilized the restrictions given to Petitioner for his right foot. (PX 13) Petitioner's permanent restrictions for the right foot are based upon his July 23, 2016 FCE. In reviewing the FCE report, the Arbitrator notes that "back lifting and spine hyperextension was eliminated from testing" due to Petitioner's diagnosis of lumbar spondylolisthesis. Despite this, Petitioner still reported lower back pain, in addition to right foot and ankle pain, during testing. (PX 6)

Petitioner testified that he is currently enrolled to begin truck driving school, seeking a CDL license. This is confirmed in Mr. Steffen's reports. (PX 13) However, Petitioner testified that he is unsure of his ability to perform the duties of a truck driver. While studying to get his CDL permit, Petitioner learned of the physical requirements of truck driving, including the bending, kneeling, crawling and climbing needed to perform the pre-trip inspection on the truck, as well as the sitting for long periods. Petitioner testified that these activities cause pain in his lower back. When testifying about the current condition of his lower back, Petitioner explained that he has pain in the lower back with sitting for long periods and pain when bending over. After sitting for 1 ½ to 2 hours, Petitioner experiences pain in the back that feels like he is "sitting on a rock," with dull, sharp nerve pain. Petitioner testified that he cannot kneel or crawl due to pain in his lower back.

Petitioner further testified that he has pain in his right foot when he attempts to move it side to side, as is required when operating a clutch. Petitioner specifically detailed that his foot hurts when he attempts to move it from side to side, as when he attempted to operate a trolling motor on his father's fishing boat.

The Arbitrator finds Petitioner's testimony concerning the symptoms in his right foot and lower back to be credible.

It is clear Petitioner has performed an extensive job search and participated diligently in vocational rehabilitation, even though the disability associated with his lower back was in dispute by the parties and was not being considered by his vocational counselor. However, based upon all evidence and testimony in the record, the Arbitrator adopts the opinion of Dr. Templin that Petitioner should be off work pending his L5-S1 fusion surgery. The opinions of Dr. Templin were reasonable and in line with Petitioner's credible testimony regarding the continued symptoms in his lower back.

After reviewing all evidence and testimony in the record, the Arbitrator hereby orders Respondent to pay temporary total disability benefits from April 18, 2015 through January 19, 2018 pursuant to Section 8(b) of the Act. Respondent is due credit for $129,163.20 in benefits paid to date. The Arbitrator also adopts the opinion of Dr. Templin that Petitioner should be on an off-work status until after his L5-S1 fusion surgery, during which time Petitioner shall also be due temporary total disability benefits.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Elizabeth Smith,

Petitioner,

vs. NO: 10 WC 08482

Morris Hospital,

Respondent.

19IWCC0479

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by both the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of average weekly wage and corresponding benefit rates, 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.

I. FINDINGS OF FACT

The decision of the Arbitrator delineates the facts relating to Petitioner's accident and subsequent medical treatment in detail. As relevant to the issues on review, the Commission notes that Petitioner worked as an Operating Room ("O.R.") Nurse since 1978. She was hired to work by Respondent as a full-time nurse in May of 2008. In the weeks prior to the accident date, Petitioner worked less than 40 hours per week due to light surgical schedules and her lack of seniority. However, Petitioner was never informed by Respondent that full time work could be less than 40 hours per week.

On Saturday, November 22, 2008, Petitioner injured her right wrist while opening a door in response to an emergency room call. After the busy weekend, Petitioner went to Morris Hospital & Healthcare Occupation Health Services and x-rays revealed a nondisplaced fracture over the tip of the ulnar styloid. Petitioner was referred to Dr. Huberty at Castle Orthopaedics for further care.

She underwent an MRI that revealed a longitudinal tear in at the carpi-radialis and a rotary dorsal displacement of her distal ulna relative to her radius, in addition to the fracture. Due to ongoing complaints, Petitioner was referred to Dr. Velagapudi who provided further conservative treatment, including injections.

Petitioner was examined at Respondent's request by Dr. Charles Carroll on September 16, 2009. Although he placed Petitioner at maximum medical improvement, Respondent did not allow Petitioner back in the operating room. Petitioner was then terminated by Respondent on November 8, 2009 after a disagreement with one of the staff physicians.

Petitioner returned to Dr. Velagapudi on March 10, 2010. Petitioner was prescribed Voltaren gel and placed on 20-pound weight restrictions.

Petitioner underwent additional treatment with Dr. John Fernandez beginning July 27, 2010. Conservative care, injections and surgery were all discussed, and she was placed on light duty restrictions.

Petitioner underwent a second Section 12 examination with Dr. Carroll at Respondent's request on September 22, 2010. Dr. Carroll revised his maximum medical improvement date to three months after this visit, and opined that Petitioner's complaints were work-related. Dr. Carroll released Petitioner to work but placed her on 30-pound weight restrictions.

In the interim Petitioner sought light duty work and secured a part-time position with Cortland Animal Clinic ("Cortland"). Petitioner worked at Cortland from November 15, 2010 to June 24, 2011, but usually worked less than 15 hours per week. She testified that she still experienced symptoms and was unable to do certain things, such as type on the computer for long periods. Petitioner could not do much lifting either and stated that she basically answered phones.

Petitioner returned to Dr. Fernandez on December 16, 2010. At that time surgery was recommended.

Petitioner underwent a third Section 12 examination with Dr. Carroll at Respondent's request on March 30, 2011. Due to persistent symptoms, Dr. Carroll agreed with the surgical recommendation.

On July 25, 2011, Dr. Fernandez performed a right wrist arthroscopy with partial synovectomy and debridement of central triangular fibrocartilage, debridement of chondromalacia and chondral defect along the lunate, and an open ECU tendon debridement and repair of split tear. Petitioner underwent post-operative care with Dr. Fernandez through March 8, 2012, when a radioscapholunate fusion was discussed and a Functional Capacity Evaluation ("FCE") was recommended[1].

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1 Dr. Fernandez also recommended an injection and treatment for Petitioner's left wrist complaints. Petitioner's claim regarding the left wrist was addressed at the arbitration hearing. Specifically, the Arbitrator relied on the opinions of Respondent's Section 12 examiner, Dr. Carroll, in concluding that her left wrist condition was not causally related to the accident at work. No review was taken related to Petitioner's alleged left wrist injury.

Petitioner saw Dr. Carroll for a fourth exam on May 25, 2012 at which time he continued to opine that Petitioner's right wrist condition was causally related to the accident, and he stated the FCE would be determinative of her ongoing condition. Petitioner underwent the FCE on June 7, 2012. The evaluating therapist found that Petitioner was capable of light to medium duty work, which is below the level necessary to be a Registered Nurse at the heavy demand level.

Petitioner began a vocational rehabilitation program with Respondent on July 26, 2012. Petitioner met with the Counselor weekly for ten months spending eight hours every Sunday applying for jobs online. She also applied for 25 to 30 jobs per week on her own time. Initially, Petitioner's vocational efforts were unsatisfactory. On October 12, 2012 she admitted that she was assisting her sister with health issues, which took up a lot of her time. However, by January of 2013, Petitioner gradually began putting forth more effort in her job search. She applied for numerous jobs within the medical field but was unable to secure employment. In some cases, additional certification or training was required. Petitioner was interested in pursuing a Bachelor of Science in Nursing ("BSN") degree but was told that no further authorization would be granted by Respondent.

A final vocational rehabilitation report dated May 28, 2013 noted that Petitioner was making good faith efforts to complete her vocational assignments and was adhering to requests for action. The report also indicated that Petitioner had secured a written job offer from Cortland as a part-time Office Assistant. The report indicated that Cortland anticipated "that the position will become full time (32-40 hours/week) in September." Petitioner's testimony disputes that the foregoing job offer contemplated full-time employment. Petitioner accepted the position, but did not graduate to full-time employment.

Petitioner resumed treatment, now with Dr. Carroll, on June 26, 2013. He recommended a repeat right wrist arthroscopy. As of April 8, 2016, Dr. Carroll continued to recommend surgery. Petitioner was hesitant to agree since the initial surgery was unsuccessful. Ultimately, Petitioner declined to undergo additional surgery.

Respondent submitted a Labor Market Survey ("Survey") dated May 30, 2017 into evidence. The survey recommended qualified employment for Petitioner such as Nurse Case Manager and Clinic receptionist/clerk and indicated an average annual salary range for these jobs of $32,000 to $72,300. The survey also identified hourly wages offered by employers ranging from $8.50 per hour to $16.00 per hour. The record also reflects a July 27, 2017 email from Respondent's Counsel to Petitioner's Counsel indicating the current pay rate for an operating room nurse was $40.51 per hour.

Petitioner indicated through testimony that she has not sought employment as a Nurse Case Manager because she does not have the necessary qualifications. She testified that, due to her specialized training and age, it would be difficult for her to transition into any other type of Nursing. She went further to state that most hospitals are not willing to train someone whom they believe may retire shortly. Petitioner was two months shy of 58 years old at the start of vocational rehabilitation in 2012 and 62 at the time of the labor market survey in 2017.

Petitioner was still employed with Cortland at the time of the arbitration hearing. She

testified that, since being hired by Cortland, she has not sought additional employment on her own, although a couple of recruiters have contacted her. Petitioner testified that she works 15 hours per week on average. She answers phones, greets customers, and does filing. Petitioner earns $9.00 per hour and has requested more hours but has not received any. Between October 2016 and October 2017 Petitioner was paid bi-weekly.

At the time of the arbitration hearing, Petitioner testified that she had swelling and increased pain over the styloid bone and more pain radiating from the back of her hand up through two bones in her arm. She still wears a splint frequently and uses Voltaren gel and Tylenol with codeine when necessary. Petitioner testified that she is no longer treating with any physician, and no physician has released Petitioner to return to full duty work since the July 25, 2011 surgery.

II. CONCLUSIONS OF LAW

The parties' cross appeals center on the method of calculating Petitioner's wage differential award. In calculating the award, the Arbitrator found that Petitioner would be able earn $1,286.60 working 31.76 hours per week in her employment for Respondent. The Arbitrator also found that Petitioner would be capable of earning $16.00 per hour working 40 hours per week according to Respondent's labor market survey, not Petitioner's work at Cortland. Thus, the Arbitrator calculated Petitioner's wage differential award by subtracting $640.00 from $1,286.60 multiplied by 66 & 2/3% totaling $431.07. The Commission finds that Petitioner's wage differential award must be based on what she would have been able to earn in the full performance of her duties at the time of her accident and her actual earnings for her new employer as reflected in the record.

Section 8(d)(1) of the Illinois Workers' Compensation Act ("Act") addresses the factors that must be considered in calculating a wage differential award. The Section states, in pertinent part:

> If, after the accidental injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall, except in cases compensated under the specific schedule set forth in paragraph (e) of this Section, receive compensation for the duration of his disability, subject to the limitations as to maximum amounts fixed in paragraph (b) of this Section, *equal to 66-⅔% of the difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident.* For accidental injuries that occur on or after September 1, 2011, an award for wage differential under this subsection shall be effective only until the employee reaches the age of 67 or 5 years from the date the award becomes final, whichever is later.

820 ILCS 305/8(d)(1) (LEXIS 2011) (*emphasis* added).

"To qualify for a wage differential under section 8(d)(1) of the Act, a claimant must prove (1) partial incapacity which prevents him from pursuing his 'usual and customary line of

employment' and (2) an impairment of earnings." *Gallianetti v. Illinois Industrial Comm'n*, 315 Ill. App. 3d 721, 730, 734 N.E.2d 482, 489 (3rd Dist. 2000). It has long been held that "[t]he award should be calculated based on the amount the claimant would have been able to earn at the time of the arbitration hearing if he were able to fully perform the duties of the occupation in which he was engaged at the time of his injury. *Greaney v. Indus. Comm'n*, 358 Ill. App. 3d 1002, 1021 (1st Dist. 2005) (citing *Old Ben Coal Co. v. Industrial Comm'n*, 198 Ill. App. 3d 485, 493 (5th Dist. 1990)). Moreover, "[a] wage differential award should be calculated based on the number of hours constituting 'full performance' of the claimant's particular occupation." *Greaney*, 358 Ill. App. 3d at 1021 (citing *Forest City Erectors v. Industrial Comm'n*, 264 Ill. App. 3d 436, 440 (1st Dist. 1994)).

Petitioner was hired by Respondent to work as a full-time operating room nurse. The record reflects that she did work 40 hours per week when required by Respondent between her date of hire and accident. Petitioner was then injured in an undisputed accident. Eventually she was released back to work with permanent restrictions that prevented her from continuing her work as an operating room nurse. Based on the foregoing, the Commission finds that Petitioner has been partially incapacitated from pursuing her usual and customary line of employment as a full-time operating room nurse. The Commission further finds that the full performance of Petitioner's particular occupation should be based on a 40-hour work week in keeping with *Gallianetti* and *Greaney*. 315 Ill. App. 3d at 730; 358 Ill. App. 3d at 1021.

Petitioner has also sustained an impairment of earnings that should be calculated based on the average amount that she is earning with Cortland taking into account the expectation that the job would become full time and the evidence in the labor market survey relating to full time receptionist work. After Petitioner's release to work with permanent restrictions, Petitioner found part-time work with Cortland earning less than she had while working full-time for Respondent. The record reflects that Petitioner is earning $9.00/hr. in her employment with Cortland, but a vocational rehabilitation report indicated that she expected her receptionist position would become full-time between 32 and 40 hours per week. However, the Commission notes the Arbitrator's assessment of Petitioner's less than earnest efforts during vocational rehabilitation suggesting that she could have obtained the full-time employment that was contemplated with Cortland. Respondent's labor market survey supports the proposition that full time employment is readily available in similar jobs ranging from $8.50 per hour to $16.00 per hour. Thus, the Commission finds that an hourly rate average of $12.25 is appropriate utilizing Respondent's labor market survey range and a full-time work average is also appropriate based on the 32 to 40 hours per week that Petitioner would be able to earn with Cortland.

Accordingly, the Commission finds that Petitioner's average weekly wage as of the arbitration hearing as an operating room nurse is $40.51 per hour multiplied by 40 hours per week which equals $1,620.40. The Commission further finds that Petitioner would be able to earn $12.25 per hour multiplied by 36 hours per week which equals $441.00.

Based on the totality of the record, the Commission finds that Petitioner has established her entitlement to a Section 8(d)(1) wage differential benefit based on 66-⅔% of the difference between what Petitioner would be able to earn in the full performance of her duties as a full-time operating room nurse at the time of her injury ($1,620.40) and the average amount she would be

able to earn in a full-time position with Cortland ($441.00). Thus, the Commission, herein, modifies the arbitration decision to reflect a wage differential of $786.27 per week.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $786.27 per week, beginning on November 13, 2017, in accordance with §8(d)(1) 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 Petitioner's 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: SEP 6 - 2019
O: 8/1/19
BNF/wde
45

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SMITH, ELIZABETH
Employee/Petitioner

Case# **10WC008482**

MORRIS HOSPITAL
Employer/Respondent

19IWCC0479

On 11/5/2018, 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 2.43% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4227 EDWARD M PFISTER LLC
349 RESERVE CIRCLE
CLARENDON HILLS, IL 60514

1109 GAROFALO SCHREIBER HART ETAL
DAVID HANSON
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS	)	☐ Injured Workers' Benefit Fund (§4(d))
	)SS.	☐ Rate Adjustment Fund (§8(g))
COUNTY OF WILL	)	☐ Second Injury Fund (§8(e)18)
		☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Elizabeth Smith Case # **10** WC **8482**

Employee/Petitioner

v.

Morris Hospital

Employer/Respondent

19IWCC0479

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christine M. Ory**, Arbitrator of the Commission, in the city of **New Lenox** , on **November 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. X Is Petitioner's current condition of ill-being causally related to the injury?

G. X What were Petitioner's earnings?

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

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

J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has respondent paid for all reasonable and necessary medical services?

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

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

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

N. ☐ Is Respondent due any credit?

O. ☐ Other _______________

FINDINGS

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

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

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

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

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

In the year preceding the injury, Petitioner earned **$34,392.00 in the five months before the accident**; the average weekly wage was **$1,404.00,** calculated pursuant to §10.

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

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

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

To date, Respondent has paid in **$101,803.10** 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 **$101,803.10** for TTD **$208,752.00 for** maintenance, and $**0** for other benefits, for a total credit of $310,555.10.

Respondent is entitled to a credit of **$3,406.00** under Section 8(j) of the Act.
Respondent stipulated it waives any overpayment, if any, of temporary disability benefits.

ORDER

Permanent Disability
Respondent shall pay petitioner the sum of $**431.07 per week as of November 13, 2017** in accordance with § 8 (d) 1 of the Act.

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

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

Christine M Ory
Signature of Arbitrator

October 30, 2018
Date

NOV 5 2019

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Elizabeth Smith	)
Petitioner,	)
vs.	) **No. 10 WC 8482**
Morris Hospital	)
Respondent.	)
	) **19IWCC0479**

ADDENDUM TO ARBITRATOR'S DECISION
FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This matter proceeded to hearing in New Lenox on November 13, 2017. The parties agree that on September 19, 2007 petitioner and respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer. They agree Petitioner sustained accidental injuries that arose out of and in the course of her employment with respondent and petitioner gave notice to respondent of the accident within the time limits stated in the Act. The parties agree all temporary total, temporary partial and maintenance benefits, as well as all medical bills, were paid.

At issue in this hearing is as follows:

1. Whether petitioner's current condition of ill-being is causally connected to the claimed injury.
2. Petitioner's earnings.
3. The nature and extent of petitioner's injury.

STATEMENT OF FACTS

Petitioner testified she began working for respondent in May, 2008 as a staff nurse in the operating room. She testified she was guaranteed full-time, forty hours a week plus on call time; she was to be paid for 80 hours per pay period (PX.1). She was to be paid at $35.10 per hour (PX.2) Respondent's wage statement shows petitioner's pay for the hours worked, which was less than forty hours per week except for the two weeks before her injury (RX.11). She never turned down work. Respondent's employees with higher seniority were given the overtime jobs.

Her resume reflects her experience and education as a nurse; specifically, an OR nurse (PX.3). An operating room nurse is very specialized. As such, petitioner was required to help lift patients that average from 240 to 500 pounds. She prepped patients for surgery, which required use of her hands; including pinching, pushing, and gripping.

On November 22, 2008, petitioner injured her right hand when her hand slipped and twisted behind the handle of the door as she was responding to an emergency. She received her first treatment in respondent's emergency room November 24, 2008. Her hand was examined, X-rayed and splinted. The splint gave her too much mobility.

On January 19, 2009, petitioner was referred to Castle Orthopaedics. Petitioner was seen by Dr. Huberty of Castle Orthopaedics on January 27, 2009. An MRI was done at Castle. In April, 2009, petitioner was referred to Dr. Velagapudi; whom she saw on May 7, 2009. Dr. Velagapudi injected the wrist, which only brought a few hours' relief. On June 29, 2009, reconstructive surgery was discussed. Petitioner asked to be released to try regular duty.

She was examined by Dr. Carroll at respondent's request on September16, 2009. On October 20, 2009, petitioner's pain was intolerable. She returned to Dr. Velagapudi, who again injected the wrist.

Petitioner was officially terminated by respondent on November 8, 2009. She had not been released by any doctor to return to work since her termination.

Petitioner returned to Dr. Velagapudi on March 10, 2010; Voltaren cream was prescribed and she was placed on a 20-pound weight restriction. The Voltaren cream helped a little, but did not help with function.

On her own, she saw Dr. Fernandez on July 27, 2010. Surgery was discussed, she was splinted and received physical therapy. She returned to Dr. Carroll who agreed with the splinting. She received physical therapy from Kaiser. The pain has never gone away.

Her job search resulted in a part-time job offer by Dr. Askew of Cortland Animal Hospital. She worked from November 15, 2010 to June 24, 2011.

Petitioner returned to Dr. Fernandez on December 16, 2010. Dr. Fernandez recommended surgery. Dr. Carroll agreed with the surgery. Arthroscopic surgery was performed by Dr. Fernandez in July, 2011. She received physical therapy starting in August, 2011. She wore day and night splints. In 2012, Dr. Fernandez recommended an FCE. She saw Dr. Carroll again on May 31, 2012 before undergoing the FCE. The physical therapist wanted petitioner to crawl on the floor with her hands at right angles.

She worked with vocational counselor, Charlotte Bishop, with Creative Case Management. Vocational rehabilitation lasted approximately one year. She completed 25 to 35 applications her week. Petitioner identified, as Petitioner's Exhibit 4, a list of all the places she applied. They number numbered 100 per month. (Petitioner's Exhibit 4 was withdrawn). On May 21, 2013, she was advised to take the job offered by Dr. Askew (PX. 5 and PX.6).

At the time of hearing, petitioner was working part-time for Cortland; sometimes less than 15 hours a week, and was being paid at $9.00 an hour. Her rate of pay has not changed since May, 2013. She has received no further offer for vocational rehabilitation; however, she has submitted other applications.

She returned to Dr. Carroll on June 26, 2013, he recommended surgery. Again on April 8, 2016, Dr. Carroll recommended surgery.

On cross-examination, petitioner confirmed she once held nursing licenses in New Mexico, California and Illinois.

A job recruiter contacted petitioner once. Upon hearing her restrictions, the recruiter never called again. She does not have a Bachelor's Degree in nursing; only an Associates' Degree.

In May, 2013 it was reported petitioner would be working 32 to 40 hours a week for Dr. Askew. She got to know Dr. Askew by taking her cat to him. Her job with Dr. Askew consists of pulling and organizing files, answering phones, doing intakes, lifting only prescriptions, and answering phones.

From 1977 to 2008 she was an operating room nurse and loved it. The vocational counselor had tried directing petitioner into a nursing positon, but she couldn't do it.

Petitioner confirmed she had not been offered any further vocational rehabilitation assistance after she became employed at Cortland. However, she also indicated she did not want to participate in further vocational rehabilitation. Since May, 2013, petitioner has not sought out full-time reception work. The only job she was offered since November, 2012, was from Cortland.

Petitioner's Employee File Maintenance Personal Data (PX.1)

Petitioner was hired as an RN on May 5, 2008. She was to be paid at $35.10 per hour and work eighty hours per pay period.

Petitioner's Payroll Change Notice for Petitioner (PX.2)

This confirmed the rate of pay as stated in Petitioner's Exhibit 1.

Petitioner's Resume (PX.3)

Petitioner's resume detailed her education and her occupation as a surgical nurse since 1980.

Email from C. Charlotte Bishop (PX.5)

An email was sent from Ms. Bishop, President of CCM, to petitioner on May 21, 2013 confirming Ms. Bishop had been advised to close her file as petitioner had accepted a position with Dr. Askew.

Emails by Petitioner's and Respondent's Attorneys (PX.6)

Emails between petitioner's attorney and respondent's attorney indicate petitioner had a job offer paying her only $9.00 per hour. There was a discussion as to whether petitioner could find a position that would pay her more if she continued job search; but they would explore settlement with the assumption petitioner could be earning more money than the job she accepted.

Respondent's Attorney Email (PX.7)

July 27, 2017 email form Attorney David Hanson confirming petitioner's present rate of pay would be paid $40.51 per hour.

Payroll Summary November 8, 2016 to October 24, 2017 (PX.8)

Petitioner claimed she earned $7,104.50 for the 54-week period; averaging $131.56 per week.

Morris Hospital Records (PX.9)

Petitioner was seen at Morris Hospital & Healthcare Occupation Health Services on November 24, 2008 for right wrist pain. X-ray showed a subtle nondisplaced fracture over the tip of the ulnar styloid. Diagnosis was right wrist sprain. She was released to return to work with restrictions.

She followed up on November 28, 2008. Diagnosis was right ulnar styloid fracture. She was released to restricted work and advised to wear the brace. She followed up on December 12, 2008 and was again released to return to restricted work and advised to wear the brace.

On December 29, 2008 she was advised to wear the splint and released to regular work. On January 19, 2009 petitioner was referred to Castle Orthopaedics.

Castle Orthopaedics Records (PX.10)

Petitioner was examined by Dr. Thomas Huberty. Dr. Huberty reviewed the two sets of X-rays and confirmed petitioner had a small fracture of the styloid process of the ulna. Dr. Huberty relaxed the restriction to lifting up to 25 pounds and advised petitioner to wear the splint as needed.

On February 23, 2009, petitioner reported an increase in pain after trying to discontinue wearing the forearm and wrist splint. An MRI was ordered. The March 5, 2009 right wrist MRI showed a minimally displaced fracture of the ulnar styloid with adjacent moderate extension carpi ulnaris tendinosis and longitudinal split as well as moderate to severe first CMC arthrosis with reactive marrow edema.

On March 10, 2009, Dr. Huberty recommended a long arm cast. Dr. Huberty administered the long arm cast on March 13, 2009. She was restricted to limited use of the right arm. On April 9, 2009, petitioner still had pain and was re-casted. On April 23, 2009, she was put in a cockup splint. On April 29, 2009, petitioner reported soreness, snapping and crepitus. She was referred to a hand specialist.

On May 7, 2009, petitioner was seen by hand specialist, Dr. Suresh Velagapudi. Diagnosis was right distal radioulnar joint instability and synovitis with associated pain. She was injected, splinted and placed on restrictions. Petitioner returned on June 12, 2009 and reported some improvement. She had a flare-up of some arthritis of the first CMC. She was to return to regular work on June 29, 2009.

On July 2, 2009, petitioner called and advised of increased pain; she was placed back on restrictions. At the August 4, 2009 visit, she was given another injection and possible fusion surgery was discussed. On October 20, 2009, petitioner called with intolerable pain. She received an injection on October 22, 2009. She was released to return to work as tolerated. Again, a fusion was discussed.

Petitioner did not return to Dr. Velagapudi until March 16, 2010 with continued pain. She was prescribed Voltaren cream and placed restricted work. X-rays showed only evidence of some calcification in the area of the tip of the ulnar styloid; the remaining X-ray was normal.

Midwest Orthopaedics at Rush Records (PX.11)

Petitioner was first seen by Dr. John Fernandez on July 27, 2010. Dr. Fernandez diagnosis was right wrist ulnar-sided pain, probable ECU subluxation with tendinosis and possible TFCC pain. Therapy and a Munster splint was prescribed; she was placed on light duty. Further injections and surgery were discussed.

She returned to Dr. Fernandez on December 16, 2010. Dr. Fernandez believed petitioner would require surgery as all other conservative measures had failed.

Petitioner returned to Dr. Fernandez on May 10, 2011 after seeing Dr. Carroll on March 30, 2011 and undergoing a functional capacity evaluation. Petitioner believed her condition was worsening. Surgery was again proposed. The preoperative process was started.

On July 25, 2011, petitioner underwent right arthroscopy with partial synovectomy and debridement of central triangular fibrocartilage, debridement of chondromalacia, chondral defect along the lunate and open ECU tendon debridement and repair of split tear for a right wrist triangular fibrocartilage complex tear, lunate chondromalacia with chondral defect and extensor carpi ulnaris split tear.

Petitioner followed up with Dr. Fernandez postoperatively on August 1, 2011 and August 23, 2011. At the September 20, 2011, petitioner had complaints of pain in the TFCC of her right wrist. On October 25, 2011, petitioner reported her condition as fair. She was to continue with formal physical therapy and released to light duty. On December 20, 2011, petitioner reported she could not even use her arm. An injection was prescribed and administered.

On February 2, 2012, petitioner reported her right wrist was doing a little better. However, she had left wrist complaints which she attributed to overuse. A Munster splint was prescribed for

her left wrist. On March 8, 2012 fusion surgery to her right wrist was discussed. A left wrist injection was prescribed. In April, 2012 petitioner was still having problems with her right wrist.

Rush Surgicenter Records (PX.12)

The records of the July 25, 2011 surgery performed by Dr. Fernandez.

Kleiser Therapy Records (PX.13)

Petitioner received physical therapy from October 26, 2010 to December 15, 2010 and from August 9, 2011 through March 7, 2012.

ATI Physical Therapy Records (PX.14)

Petitioner underwent a valid functional capacity evaluation on July 7, 2012 which indicated she was at the light to medium level capacity. Petitioner's physical capabilities do not meet the heavy capacity level as a nurse. The therapist recommended work hardening.

Cortland Animal Hospital Records (PX.15)

The payroll records for petitioner from Cortland Animal Hospital shows petitioner was paid a total of $28.053.35 for pay periods from November 30, 2010 to July 26, 2011 and June 25, 2013 to October 24, 2017.

North Shore University Health System/Dr. Charles Carroll Records (PX.16)

Petitioner was seen by Dr. Charles Carroll on June 26, 2013 for right wrist pain. Dr. Carroll suggestions ranged from observation to right wrist arthroscopic debridement; with the repeat arthroscopy making the most sense. Dr. Carrol also suggested considering left wrist arthroscopy in the future.

North Shore University Health System/Dr. Charles Carroll Records (PX.17)

Petitioner was seen again on April 8, 2016 by Dr. Carroll; who again recommended right wrist revision surgery. Dr. Carroll also needed approval to provide treatment on the left.

Dr. Charles Carroll September 16, 2009 Report (RX.1)

Dr. Carroll examined petitioner on September 16, 2009, at respondent's request. Dr. Carroll's diagnosis was right ulnar styloid fracture and some right thumb carpal metacarpal arthritis. Dr. Carroll believed the styloid fracture was caused by the work accident of November 23 2008 (sic); the carpal metacarpal arthritis was not related.

Dr. Carroll found the treatment to date was reasonable and petitioner should reach maximum medical improvement within three to six months.

Dr. Charles Carroll May 31, 2012 Report (RX.2)

Petitioner was examined again by Dr. Carroll on May 25, 2012. Dr. Carroll noted petitioner had residual pain in her right wrist and triangular fibrocartilage complex and pain at the triangular fibrocartilage complex. Dr. Carroll believed petitioner's right wrist problem was related. He could not determine, without knowing petitioner's outside activities, as to whether there was any relationship of the left wrist problem to the work injury.

Dr. Carroll agreed with the established work restrictions. He believed the functional capacity evaluation would provide a determination of maximum medical improvement and petitioner's long-term restrictions.

Dr. Charles Carroll September 22, 2010 Report (RX.3)

Petitioner was reevaluated by Dr. Carroll on September 22, 2010. She reportedly was working as a receptionist for a veterinary clinic and was having increased pain on the right. He revised his opinion regarding maximum medical improvement. He found the ongoing problems with petitioner's right wrist was related to her work injury. He recommended six weeks of therapy.

Dr. Charles Carroll March 30, 2011 Report (RX.4)

Dr. Carroll performed another exam of petitioner on March 30, 2011. Dr. Carroll believed surgery was now appropriate due to petitioner's persistent complaints. He believed she would be at maximum medical improvement within six months of the surgery.

Creative Case Management Inc. May 30, 2017 Labor Market Survey (PX.5)

A labor market survey was completed using petitioner's transferable skills, education and physical limitations and concluded petitioner could be employed as a nurse case manager, a utilization nurse, MDS coordinator, or a clinic receptionist/clerk. Without identifying any specific job, the preparer concluded petitioner's potential annual salary range as a nurse would be from $32,000 to $72,300. The only jobs listed with actually wages were receptionist jobs that paid anywhere from $8.50 per hour to $16.00 per hour.

Creative Case Management, Inc. June 10, 2017 Labor Market Survey (PX.6)

This appears to be a duplicate of the Labor Market Survey dated May 30, 2017 and introduced as Respondent's Exhibit 5.

Petitioner's Registered Professional Nurse Illinois Certificate (RX.7).

Petitioner is a registered as a nurse with the State of Illinois through May 30, 2018.

Creative Case Management July 5, 2012 Transferrable Skills Analysis (RX.8)

The preparer of the report opined petitioner could be employed at a salary starting at $14,00 an hour, and up to $72,000.00 annually. The report outlined a case manager could earn $72,081 annually; home care nurse case manager $65,612.00 annually; utilization review $70,420 annually; pharmaceutical sales $64,195 annually and clinic receptionist $31,860.00 annually.

Creative Case Management, Inc. June 18, 2014 Labor Market Survey (PX.9)

According to salary.com, the nursing positions identified are from $79,000 to $84,000 and office administrative assistant's salary as $35,000 annually.

Creative Case Management Vocational Reports (RX.10)

Creative Case Management was hired to provide vocational rehabilitation services to petitioner. According to the vocational counselor's first report, that was dated August 10, 2012, and all reports thereafter until January, 2013, the counselor reported petitioner put forth minimal to little effort in her vocational rehabilitation efforts.

In report number 15, petitioner discussed a possible position with Dr. Askew in a position that would pay $12 per hour and she would work 32-40 hours per week.

According to the closing report on May 28, 2013, petitioner was offered a position and the vocational counselor was advised to close the file.

Wage Statement (RX.11)

According to the wage statement, petitioner was paid a total of $32,363.60 for the 910.5 hours worked for respondent, excluding overtime, before her accident. The actual number of days worked during that period were not listed on the wage statement.

CONCLUSIONS OF LAW

The Arbitrator adopts the Finding of Facts in support of the Conclusions of Law.

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:

The Arbitrator finds petitioner's right wrist injury, which included: triangular fibrocartilage complex tear; lunate chondromalacia with chondral defect; extensor carpi ulnaris split tear, for which she underwent surgical repair on July 25, 2011 and will likely require additional surgery according to respondent's doctor, Dr. Carroll; and has left her physically unable to return her usual employment as a surgical nurse, was caused by the work accident of November 22, 2008.

The Arbitrator notes petitioner had prior bilateral carpal tunnel surgery in 1999.

The Arbitrator specifically finds petitioner failed to prove that her left wrist complaints are related to the work accident. The Arbitrator notes petitioner related to Dr. Fernandez on February 2, 2012 that her left wrist was painful which she related to overuse. However, neither Dr. Fernandez, nor any other doctor, related the left wrist complaints directly or indirectly to her work accident of November 22, 2008. In fact, Dr. Carroll specifically concluded he could not relate petitioner's left hand condition to the work accident.

G. In support of the Arbitrator's decision with regard to petitioner's wages, the Arbitrator makes the following conclusions of law:

The wage statement, identified as Respondent's Exhibit 11, does not contain the number of days petitioner worked in each pay period. Petitioner introduced Petitioner's Exhibit 1 and 2 which indicated petitioner was hired to work 80 hours in the two-week pay period and was to be paid $35.10 per hour.

The Arbitrator could not determine from the wage statement the number of weeks, or part thereof, petitioner worked in order to calculate petitioner's average weekly wage pursuant to §10. Therefore, the Arbitrator had to rely upon the information contained in Petitioner's Exhibits 1 & 2, to determine petitioner's average weekly wage in the period she worked for respondent pre-dating the accident.

Accordingly, the Arbitrator finds petitioner's average weekly wage was $1,404.00, which was 80 hours multiplied by $35.10 per hour for a two-week pay period divided by two.

L. In support of the Arbitrator's decision with regard to the nature and extent of injury, the Arbitrator makes the following conclusions of law:

Petitioner claims she is entitled to an award for a wage differential under §8 (d) 1 of the Act, which provides: "If, after the accidental injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall…receive compensation for the duration of his disability…equal to 66-2/3% of the difference between the **average amount which he would be able to earn in full performance of his duties in the occupation in which he was engaged at the time of the accident** and the average amount which he is earning **or is able to earn in some suitable employment** or business after the accident," 820 ILCS 305/8(d)1 **[Emphasis Added]**

Petitioner claims, she would be entitled to 66-2/3rds% of the difference between $1,620.40 ($40.51 per hour x 40 hours per week) less $131.56 (the average amount per week she has averaged per week over the past year at her position with Cortland), which equals $992.56 per week pursuant to §8 (d) 1 of the Act.

Respondent claims petitioner is under-employed at her job with Cortland Animal Hospital. A review of the vocational rehabilitation records from Creative Case Management, the email discussions between petitioner's and respondent's counsel, petitioner's testimony and the medical evidence, supports respondent's argument that petitioner is underemployed in her present position.

The records from Creative Case Management indicate petitioner, for the first several months, was not earnest in her vocational rehabilitation efforts. Petitioner was advised accept the receptionist position with Cortland Animal Hospital, which, according to Creative Case Management report was to be at a full time position of 32 to 40 hours a week and paid $12.00 per hour. The position was only part-time and only paid $9.00 per hour. She remained at that rate of pay and remained part-time. The only explanation for her not to receive an increase in pay or to work full-time was to keep her wages low and her wage-differential high.

In an email discussion between the petitioner's and respondent's attorneys, there appears to be an acknowledgement that petitioner would be accepting a position for which she was underemployed (PX.6). It is unfortunate the vocational counselor was instructed to close the file once petitioner was offered the position with the assumption petitioner's true earning capacity could be determined and a settlement could be reached. Respondent could have re-engaged vocational rehabilitation, but failed to do so. However, petitioner testified she was not interested in pursuing further vocational rehabilitation.

There is no evidence petitioner was qualified to be employed in the nursing positions identified. In fact, petitioner indicated the only recruiter who contacted her did not call again upon hearing her restrictions. Furthermore, the pharmaceutical sales position required a Bachelors' Degree, which petitioner does not have.

However, the evidence supports a finding that petitioner could be working full time as a receptionist. The labor market survey identified such a position paying as much as $16.00 an hour. The Arbitrator, therefore, finds petitioner is capable of earning $640.00 per week, which is $16.00 per hour for a forty-hour week.

For purposes of determining the amount due under §8 (d) 1, unlike §10, the Arbitrator can look to the wage statement to determine what petitioner would actually be earning now in full performance of the duties she was performing at the time she was hurt. The Arbitrator finds petitioner would now be earning $1,286.60 per week in her position as an operating room nurse. This calculation was based upon petitioner working a total of 889.25 for the period from May 25,

19IWCC0479

2008 to November 22, 2008, which is 28 weeks, for an average of 31.76 hours per week; multiplied by the $40.51 per hour rate she would now be paid.

The sum of $1,286.60 minus $640.00 and multiplied by 66-2/3% is $431.07 per week. The Arbitrator, therefore, finds petitioner is entitled to an award of $431.07 per week pursuant to the provisions of §8 (d) 1 of the Act.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Carole,

Petitioner,

vs. NO: 12 WC 13604

Vital Enterprises, Inc. and "State Treasurer and Ex-Officio Custodian of the Injured Workers' Benefit Fund." ,

19IWCC0480

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 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.

The Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund was named as a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under §4(d) of the Act, in the event of the failure of Respondent-Employer to pay the benefits due and owing the Petitioner. Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 29, 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.

19IWCC0480

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

SEP 6 - 2019

DATED:
o8/27/2019
MEP/jp
049

Maria E. Portela

L. Elizabeth Coppoletti

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CAROLE, DAVID
Employee/Petitioner

Case# **12WC013604**

19IWCC0480

VITAL ENTERPRISES INC AND "STATE TREASURER AND EX-OFFICIO CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND"
Employer/Respondent

On 11/29/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.43% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0544 LOSS & PAVONE PC
JOSEPH L LOSS
1920 S HIGHLAND AVE SUITE 293
LOMBARD, IL 60148

0000 VITAL ENTERPRISES INC
5463 FOREST TRAIL DR
ROCKFORD, IL 61109

5782 ASSISTANT ATTORNEY GENERAL
KELLY KAMSTRA
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF **LAKE**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

David Carole
Employee/Petitioner

Case # **2012** WC **13604**

v.

Consolidated cases: ____

Vital Enterprises, Inc. and "State Treasurer and Ex-Officio Custodian of the Injured Workers' Benefit Fund."
Employer/Respondent

19IWCC0480

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Waukegan**, on **9/19/2017**. 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. [x] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [x] What were Petitioner's earnings?
H. [x] What was Petitioner's age at the time of the accident?
I. [x] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [x] Is Respondent due any credit?
O. [x] Other **Non-Insurance**

FINDINGS

On **January 27, 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 $**3,322.08**; the average weekly wage was $**628.47**.

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

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

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

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

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

ORDER

Medical benefits

Respondent shall pay reasonable and necessary medical services of $137,955.30, as provided in Sections 8(a) and 8.2 of the Act.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $418.98/week for 212 and 5/7 weeks, commencing 1/27/2012 through 2/24/2016 as provided in Section 8(b) of the Act.

Permanent Partial Disability

The Arbitrator finds that the Petitioner suffered the total and permanent loss of use of the Person-as-a-Whole to the extent of 45% (225 weeks) under Section 8(d)2 of the Act.

The Arbitrator further finds that Petitioner suffered:

- 50% loss of use of his left middle finger (19 weeks) under Section 8(e)(3);
- 25% loss of use of his ring finger (6.75 weeks) under Section 8(e)(4), and;
- 25% loss of use of his small finger (5.5 weeks) under Section 8(e)(5) of the Act.

Accordingly, Respondent-Employer shall pay Petitioner Permanent Partial Disability benefits of $377.08 for 256.25 weeks, given the Petitioner's AWW of $628.47. Respondent-Employer shall pay to Petitioner the sum of $96,626.75

PLEASE SEE THE ATTACHED ADDENDUM FOR THE ARBITRATOR'S ANALYSIS OF THE NATURE AND EXTENT OF PETITIONER'S INJURIES PURSUANT TO §8.1(b) of the Act

Injured Workers' Benefit Fund **19IWCC0480**

The Illinois State Treasurer, ex-officio custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act.

In the event the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act.

Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

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

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

Signature of Arbitrator

11/27/16
Date

NOV 29 2017

ILLINOIS WORKERS' COMPENSATION COMMISSION

19IWCC0480

DAVID CAROLE, Employee/Petitioner, v. VITAL ENTERPRISES, INC., and THE ILLINOIS STATE TREASURER as EX-OFFICIO CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND Employer/Respondent-Employer	)))))))))))	Case No. 12 WC 13604

ADDENDUM TO THE DECISION OF THE ARBITRATOR

FINDINGS OF FACT

This action was pursued under the Workers' Compensation Act by David Carole ("Petitioner") who is seeking relief from the Respondent-Employer, Vital Enterprises, Inc., and the Illinois State Treasurer as ex-officio custodian of the Injured Workers' Benefit Fund ("IWBF") as Petitioner alleges Respondent-Employer did not maintain workers' compensation insurance. (Arbitrator's Exhibit "AX" 1.)

Petitioner testified that on January 27, 2012 he was 50 years old, unmarried with no dependent children under the age of 18.

The Petitioner testified that on December 19, 2011, he contacted Respondent-Employer, Vital Enterprises, Inc., a trucking company, after obtaining a job lead from Eagle Training Services, the school where he obtained his Commercial Drivers' License.

Petitioner testified that on December 20, 2011, he met and interviewed for a job as a truck driver with the President and owner of Vital Enterprises, Inc., Mr. Victor Chuverov. After the meeting, Petitioner was offered a position as a truck driver with Respondent-Employer, Vital Enterprises, Inc. which was based in Rockford, Illinois.

Petitioner testified that on December 21, 2011, he began working for Respondent-Employer, Vital Enterprises and was paid $.30 a mile. Petitioner further testified that Victor Chuverov dictated the routes to take on each job, that he drove a truck that was owned and maintained by Vital Enterprises and that he paid for gas with a Vital Enterprises credit card. The semi-truck Petitioner drove also had Vital Enterprise logos on each side.

Petitioner testified he was working for Respondent-Employer on January 27, 2012 with his driving partner, Nick. At around 6:45 a.m. that morning, Petitioner was driving one of Respondent-Employers semi-trucks across the State of Montana when he lost control of the vehicle which crossed into the opposite lane of traffic. The truck then careened into a ditch and a creek bed before overturning onto its side. Petitioner testified the cab of the power unit of the vehicle dislodged from the frame. A refrigerator, located behind the driver's compartment in the truck's cabin, pinned Petitioner against the steering wheel where he remained trapped until the arrival of emergency responders.

Petitioner testified that approximately an hour to an hour-and-a-half following the crash, emergency responders utilized the "jaws of life" to cut Petitioner out of the cabin of the truck and transported him to a hospital in Forsyth, MT, via ambulance. While in route, Petitioner complained of stomach, left wrist and lumbar spine pain. Lacerations above his eye and forehead were noted. (PX6, Pg. 1). Morphine was administered to relieve his pain. (Id.)

While at Rosebud Health Center in Forsyth, MT, Petitioner was diagnosed with a lacerated spleen, multiple left lower rib fractures and multiple displaced transverse process fractures of the lumbar spine. (PX7, p. 1).

A CT scan of Petitioner's abdomen and pelvis revealed displaced fractures of the left transverse processes of L1, L2, L3, L4 and L5. (Id. P. 11) This scan also revealed free intraperitoneal air suggestive of perforated viscus in addition to free air and fluid under the diaphragm. (Id. p. 10-11).

A CT of Petitioner's chest revealed fractures of the left posterior 12th, 11th, 10th, 9th, and 8th ribs. (Id. p. 13) Petitioner's condition was stabilized and he was transported via ambulance to St. Vincent's Hospital in Billings, MT. (PX7, p. 14)

Upon arrival at St. Vincent's Hospital, trauma surgeon Dr. Kathryn Hatch, performed a splenectomy, sigmoid colon resection and facial laceration repair. (PX8, p. 13)

Post operatively, Dr. Hatch diagnosed Petitioner with having suffered an avulsion of the sigmoid mesentery with sigmoid perforation and a splenic laceration. Petitioner also required a repair of a complex 2.5 cm left eyebrow laceration, repair of a 3cm left wrist laceration and a repair of a 2cm scrotal laceration. (PX8, p. 34-35)

Sometime after the above surgery was performed, Petitioner suffered from acute respiratory failure and was transferred to the ICU where he was placed on mechanical ventilation support. (Id, p.13-14)

On February 6, 2012, "a purulent drainage" was noted in Petitioner's abdominal wound. Petitioner also developed abdominal pain and tachycardia. (PX8, p. 16) A second surgical procedure to his Petitioner's abdomen was performed that day. Intra-operatively, Dr. Hatch noted "extensive necrosis of the soft tissue". Dr. Hatch, felt that Petitioner would be best served by "creating a diverting ileostomy." (PX8, p. 24-25) Following this surgery, Petitioner remained intubated and was transported back to the ICU. (Id., p. 25)

After undergoing the above abdominal surgeries, Petitioner developed a large left pleural effusion which required placement of a left thoracostomy tube. (Id., p. 26)

While at St. Vincent's, it was confirmed that Petitioner also suffered multiple fractures in three fingers of his left hand. X-rays revealed fractures of the middle and ring fingers, to both distal phalanges and PIP joints, metacarpal neck fractures of the ring and small fingers as well as a medial collateral avulsion fracture of the middle MCP joint. (Id., p. 22)

On February 13, 2012, Petitioner underwent open reduction internal fixation of his left middle finger PIP joint. Intra-operatively, a displaced intra-articular fracture of the left middle finger PIP joint was noted which required a screw and K-wires to bring the shattered bone fragments in line. (Id., 27-28)

While Petitioner was under anesthesia for the above procedures, Dr. Hatch performed a VAC dressing change on his abdominal wound. (Id., p. 28)

Petitioner testified that he is a former member of the United States Military. As such, he was entitled to medical care within the system of the Veterans Administration.

On February 17, 2012, Petitioner was scheduled for transfer to a VA hospital, however, he experienced further abdominal wound complications that required extensive wound-care and "sharp debridement". His transfer to the VA was put on hold. (Id., p. 50)

On February 22, 2012, Petitioner was admitted to VA Fort Harrison whose records note that further wound care would be required. (PX9, p. 258-9)

On February 29, 2012, Petitioner underwent a third abdominal surgery to address a "chronically open anterior abdominal wound". (Id., p. 314) Debridement and closure of the anterior abdominal wound was performed with fascial component from Petitioner's left thigh. (Id.)

On March 7, 2012, Petitioner suffered further post-surgical complications when he was diagnosed with multiple perfusion defects in both lungs, consistent with pulmonary embolic disease. (Id. p. 275)

On March 8, 2012, Petitioner was discharged from VA Fort Harrison. (Id., 298-304) Petitioner testified that he was flown from Fort Harrison in Montana to VA North Chicago/James Lovell Federal Health Care Center on a military flight. The purpose of his transfer was for continued wound care. (Id., p. 304)

On March 9, 2012, Petitioner was admitted to VA North Chicago/James Lovell Federal Health Care Center. (PX10, P. 735)

On March 12, 2012, Petitioner underwent a psychiatric consultation and was subsequently diagnosed with Post Traumatic Stress Disorder due to nightmares and insomnia. (PX10, p. 272-273)

On December 5, 2012, Petitioner underwent a fourth abdominal surgery noted as "reversal of ileostomy and the establishment of continuity of the terminal ileum." (Id., p. 837-838).

Presently, Petitioner continues to treat with physicians at VA North Chicago/James Lovell Federal Health Care Center. On February 24, 2016, it was noted that he has a 30-pound lifting restriction due to risk of tearing in anastomosis in his colon. (Id., p. 284)

Petitioner testified that he has been unable to return to work as a truck driver since the date of the accident. He testified that he had worked as a carpenter prior becoming a truck driver. Petitioner also testified that at the time of the accident he did not have any health problems which made him unable to work. He further testified that he has not had any accidents since the accident of January 27, 2012.

Petitioner testified that he is unable to drive more than one to two hours due to pain in his back. He testified that that he can no longer bowl due to the pain and that he has trouble performing what he considered "light or small" construction projects. Petitioner further testified that he has difficulty sleeping through the night because his back pain wakes him up. He can no longer sleep in bed due to discomfort and must instead sleep on his couch.

Petitioner's fiancé, Sally Strazzanti, testified that Petitioner was in regular phone contact with her when on the road. She testified that she became concerned when Petitioner did not call her on January 27, 2012

Ms. Strazzanti testified that on January 28, 2012, she obtained the phone number for Vital Enterprises, Inc. from an internet search and called the number associated with the company. When the phone was answered, the responding individual identified himself as Victor Chuverov, owner and president of Vital Enterprises, Inc. Ms. Strazzanti testified that she inquired of Victor Chuverov whether her fiancé, Petitioner, David Carole, was "OK" because she had not heard from him. Mr. Chuverov then informed Ms. Strazzanti of the fact that Petitioner had been involved in the subject crash in Montana on January 27, 2012. Ms. Strazzanti also testified

that she called Mr. Victor Chuverov for a second time and, during that second conversation, he advised her of the exact location of the accident and the location of the hospital where Petitioner was being treated.

Petitioner's testimony and the testimony of his fiancé, Ms. Sally Strazzanti was uncontested.

Further, no documents or materials were offered into evidence which would dispute the Petitioner's testimony or position.

CONCLUSIONS OF LAW

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

The Arbitrator finds that Respondent-Employer was operating under and subject to the Illinois Workers' Compensation Act.

The Arbitrator relies on the unrebutted testimony of the Petitioner who testified that he was hired to be an over the road truck driver by Vital Enterprises, Inc. The Petitioner's work duties for the Respondent-Employer included the distribution of commodities by motor vehicle. Petitioner testified that on December 21, 2011, Respondent-Employer directed him to deliver beer to Denver and then to bring Pizzas back to Illinois. Petitioner further testified that on the day of the accident, he was in the process of delivering apples from the State of Washington to New York. Petitioner also testified that he was accompanied on the trips by another driver and that he and this other driver would take turns driving the trucks which belonged to the Respondent-Employer.

The Arbitrator further relies on the Montana Vehicle Crash report which documents that the truck driven by Petitioner at the time of the accident belonged to Vital Enterprises, Inc. and corroborates Petitioner's testimony that another driver had been with him at the time of the accident, namely Nathaniel Lee Stuckey. (PX2, p. 1-2).

The Arbitrator finds that Petitioner's testimony was credible and that the Respondent-Employer did not provide any rebutting testimony or evidence to the contrary. As such, the Arbitrator finds that Respondent-Employer was operating under and subject to the Illinois Workers' Compensation Act.

B. Was there an employee-employer relationship?

The Arbitrator finds that an employee-employer relationship existed between Petitioner and Respondent-Employer.

The Petitioner testified that his only job was to drive trucks belonging to Respondent-Employer to and from places dictated by the Respondent-Employer. Petitioner also testified that he took routes dictated by Respondent-Employer and that his employment could be terminated at any time. The Petitioner further testified that Respondent-Employer was responsible for all costs and expenses associated with operating the vehicles and that the vehicles carried the Respondent-Employer's logo as well as registration numbers with the United States Department of Transportation and the Illinois Department of Transportation.

On cross-examination, Petitioner testified that Respondent-Employer did not require him to wear a uniform and that, in theory, he could refuse to take on a driving assignment.

The Arbitrator finds that Petitioner's testimony was credible and that the Respondent-Employer did not provide any rebutting testimony or evidence to the contrary. Based on the totality of the circumstances, the

Arbitrator finds that Respondent-Employer had control of the manner of the work of the Petitioner, that Petitioner could be discharged at Respondent-Employer's will and that all materials and equipment used by Petitioner in order to complete his duties were supplied by the Respondent-Employer.

The Arbitrator finds that Respondent-Employer paid for all cost of maintenance associated with repairs on the trucks that belonged to the Respondent-Employer. Further, the Arbitrator finds that Respondent-Employer paid for all liability insurance on the trucks and that all licenses were held in the name of Vital Enterprises.

Further, the Arbitrator find that Respondent-Employer's general business—trucking—encompassed the Petitioner's work—driving the Respondent-Employer's trucks. As such, the Arbitrator finds that an employee-employer relationship existed between Petitioner and Respondent-Employer.

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

The Arbitrator finds that an accident did occur that arose out of and in the course of Petitioner's employment by Respondent-Employer.

Petitioner testified that on January 27, 2012, he was driving from Washington State to New York. He testified that Respondent-Employer had directed him to pick-up a load of apples in Washington and to deliver those apples to New York.

Petitioner also testified that around 6:45 a.m. on January 27, 2017, when driving east across the State of Montana, he lost control of the truck and trailer while traveling approximately 55 miles per hour. The truck and trailer being driven by Petitioner then crossed into the Westbound lane of traffic and continued into a ditch on the North side of the road. (PX2, p. 2) The truck then traveled through a creek bed which caused the vehicle to overturn onto its side. As the vehicle slid on its side, the cab of the power unit dislodged from the frame of the truck (Id.)

The Arbitrator finds that Petitioner's testimony was credible and that the Respondent-Employer did not provide any rebutting testimony or evidence to the contrary.

The Arbitrator finds Petitioner was driving Respondent-Employer's truck through the State of Montana, a place where he may reasonably be given the task of delivering apples from Washington State to New York. As such, the Arbitrator finds that an accident did occur that arose out of and in the course of Petitioner's employment by Respondent-Employer.

D. What was the date of the accident?

The Arbitrator finds that the date of the accident was January 27, 2012. The Arbitrator's finding is based on the Petitioner's testimony, the testimony of the Petitioner's fiancé, Ms. Sally Strazzanti, as well as the Montana Vehicle Crash Report (PX2) which was introduced into evidence by Petitioner.

The Arbitrator finds that the testimony of the Petitioner and that of Ms. Stazzanti was credible and that the Respondent-Employer did not provide any rebutting testimony or evidence to the contrary.

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

The Arbitrator finds the Respondent-Employer received timely notice of the accident.

The Arbitrator relies on the testimony of Petitioner's fiancé, Ms. Sally Strazzanti, who testified that on January 28, 2012, she obtained the phone number for Vital Enterprises, Inc. from an internet search and that she called the number associated with the company. When the phone was answered, the responding individual identified himself as Victor Chuverov, owner and president of Vital Enterprises, Inc.

Ms. Strazzanti testified that she inquired of Victor Chuverov whether her fiancé, Petitioner David Carole, was "OK" because she had not heard from him. Mr. Chuverov then informed Ms. Strazzanti of the fact that Petitioner had been involved in an accident in Montana on January 27, 2012. Ms. Strazzanti also testified that she called Mr. Victor Chuverov for a second time and, during that second conversation, he advised her of the exact location of the accident and the location of the hospital where Petitioner was being treated.

The Arbitrator finds the testimony of Petitioner's fiancé, Ms. Sally Strazzanti, credible. The Respondent-Employer did not provide any rebutting testimony or evidence to the contrary.

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

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to the injuries that he suffered because of the accident of January 27, 2012.

The Arbitrator finds the opinions of Petitioner's treating physicians are credible. The Arbitrator also finds Petitioner's testimony as to the facts leading up to the injuries is credible.

Petitioner testified that on the morning of January 27, 2012, he was in a good state of health and feeling just fine. Petitioner testified that he was then involved in a major accident during which the truck that he was driving crashed and overturned in a ditch. (PX2, p. 2).

Petitioner's treating records note that he suffered acute trauma to his abdomen, pelvis, back, ribs, left hand, middle finger as well as lacerations to his face and lacerations to his scrotum. (PX6, p. 1) (PX7, p. 11, 13)

The Arbitrator further finds that Petitioner subsequently required multiple surgeries to alleviate and treat the conditions which were caused by the initial acute injuries as described above.

Respondent-Employer provided no testimony or evidence to dispute causation.

G. What were Petitioner's earnings?

The Arbitrator finds that the Petitioner's Average Weekly Wage was $628.47 which is based on the Petitioner having earned $3,322.08 in the 5 and 2/7 weeks during which he worked for Respondent-Employer prior to the accident.

The Petitioner testified that he earned thirty cents ($0.30) per mile and that he would receive payment after each trip. The Petitioner also testified that his first day of work for the Respondent-Employer was on December 21, 2011 and that his last day of work was on the date of the accident, which was January 27, 2012.

The Petitioner offered into evidence all the paychecks which he received from the Respondent-Employer for the time during which he worked for the Respondent-Employer. (PX 1) A review of these paychecks shows that Petitioner earned $3,322.08 during the time that he was employed by Respondent-Employer.

The Arbitrator finds that Petitioner's testimony was credible. The Respondent-Employer did not provide any rebutting testimony or evidence to the contrary. Further, the Arbitrator also relies on the paychecks from Respondent-Employer which the Petitioner submitted into evidence and which were not rebutted or otherwise questioned by the Respondent-Employer.

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

The Arbitrator finds that the Petitioner was 50 years of age at the time of the accident. In finding so, the Arbitrator relies on the testimony of the Petitioner who testified that he was 50 years of age at the time of the accident.

The Arbitrator finds that Petitioner's testimony was credible and that the Respondent-Employer did not provide any rebutting testimony or evidence to the contrary.

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

Relying on Petitioner's unrebutted testimony, the Arbitrator finds that the Petitioner was single and not married at the time of the accident.

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

The Arbitrator finds the medical services that were provided to Petitioner were reasonable and necessary. The Arbitrator further finds that Respondent-Employer has not paid for any of the reasonable and necessary medical services.

The Arbitrator finds that the Petitioner's testimony was credible with regard to the seriousness of his injuries and the medical services which he received. Respondent-Employer presented no evidence to challenge the reasonableness or necessity of the medical services provided to Petitioner.

The Arbitrator finds that the medical expenses in the amount of $243,299.63 were reasonable and necessary as well as related to the Petitioner's injuries. The Arbitrator further finds that after review of these bills under the Medical Fee Schedule, the Petitioner is entitled to $137,955.30 as reasonable and necessary medical charges. See "List of Petitioner's Medical Providers" which is attached to Arbitrator's Exhibit 1. The Arbitrator further relies on Petitioner's Exhibit 4 in support of her finding that $137,955.30 in medical expenses was reasonable and necessary.

K. What temporary benefits are in dispute?

The Arbitrator finds that the Petitioner was Temporarily Totally Disabled from January 27, 2012 until February 24, 2016, representing a period of 212 and 5/7 weeks. The Arbitrator finds that based on the Average Weekly Wage of $628.47, the applicable TTD rate is $418.98 and, therefore, Petitioner is entitled to $89,122.91 of temporary benefits.

In support of the Arbitrator's decision, the Arbitrator relies upon the medical opinions of Petitioner's treating doctors as represented in Petitioner's Exhibits 6 through 10.

Respondent-Employer presented no evidence to dispute Petitioner's entitlement to TTD for this time period.

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

Analysis of the Nature & extent of the injury pursuant to §8.1(b) of the Act

With regard to subsection (i) of §8.1b(b), the record contains no impairment rating. Accordingly, the Arbitrator shall give no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, Petitioner was employed as a long-haul truck driver at the time of the accident. Presently, Petitioner continues to treat with physicians at VA North Chicago/James Lovell Federal Health Care Center. On February 24, 2016, it was noted that he has a 30-pound lifting restriction due to risk of tearing in anastomosis in his colon. (Id., p. 284). Petitioner testified that he has been unable to return to work as a truck driver since the date of the accident. Petitioner testified that he is unable to drive more than one to two hours due to pain in his back. Because Petitioner cannot return to his job as a long-haul truck driver, the Arbitrator will give more weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 50 years old at the time of the accident. The Arbitrator gives greater weight to this factor noting the Petitioner has many years left in his life to live with the pain and injuries resulting from the work-related accident at issue.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner testified that he has been unable to return to work as a truck driver since the date of the accident. He testified that he had worked as a carpenter prior becoming a truck driver but that he now has trouble performing what he considered "light or small" construction projects. The Arbitrator finds sufficient evidence that Petitioner's future earning capacity has been diminished as a result of the subject accident. Accordingly, the Arbitrator gives more 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:

- A CT scan of the abdomen and pelvis on the date of the accident confirmed that Petitioner suffered multiple displaced fractures of the transverse process in his lumbar spine, specifically at levels L1, L2, L3, L4 and L5. (PX7, p. 11) This scan also revealed free intraperitoneal air suggestive of perforated viscus in addition to free air and fluid under the diaphragm. (Id., 10-11) A CT of the chest revealed fractures of the left posterior 12th, 11th, 10th, 9th, and 8th ribs. (Id. p. 13)

- On the day after the accident, Petitioner underwent emergency surgery to alleviate traumatic injuries to his abdomen. Petitioner was post operatively diagnosed with having suffered an avulsion of the sigmoid mesentery with sigmoid perforation and a splenic laceration. The Arbitrator finds that Petitioner suffered a complex 2.5 cm left eyebrow laceration, a 3cm left wrist laceration and a 2cm scrotal laceration, all of which required surgical attention. (PX8, p. 34-35)

- Petitioner required a total of four surgeries for his abdominal injuries. The Arbitrator finds that Petitioner has his spleen removed during the first surgery. Petitioner was required to use a colostomy bag from the time of his second surgical procedure on February 6, 2012 to the time of the last surgical procedure on December 5, 2012.

- Petitioner suffered multiple fractures to fingers of his left hand. X-rays revealed fractures of the middle and ring fingers, to both distal phalanges and PIP joints as well as metacarpal neck fractures of the ring

and small fingers and a medial collateral evulsion fracture of the middle MCP joint. (PX8, Pg. 22).

- Petitioner underwent open reduction internal fixation of his left middle finger PIP joint on February 13, 2012. The surgery revealed a displaced intraarticular fracture of the left middle finger PIP joint which required a screw and K-wires to bring the shattered bone fragments in line. (PX8, p. 27-28)

- On March 12, 2012, Petitioner underwent a psychiatric consultation and was subsequently diagnosed with Post Traumatic Stress Disorder due to nightmares and insomnia. (PX10, p. 272-273)

The medical records in evidence confirm that Petitioner suffered a lacerated spleen, multiple left lower rib fractures and multiple displaced transverse process fractures of the lumbar spine. The Petitioner also suffered multiple fractures to his left middle finger, left ring finger and left small finger. In addition, Petitioner suffered lacerations to his face and scrotum.

Presently, Petitioner continues to treat with physicians at VA North Chicago/James Lovell Federal Health Care Center. On February 24, 2016, it was noted that he has a 30-pound lifting restriction due to risk of tearing in anastomosis in his colon. (Id., p. 284)

Petitioner testified that he is unable to drive more than one to two hours due to pain in his back. He testified that that he can no longer bowl due to the pain and that he has trouble performing what he considered "light or small" construction projects. Petitioner further testified that he has difficulty sleeping through the night because his back pain wakes him up. He can no longer sleep in bed due to discomfort and must instead sleep on his couch.

Based upon the Petitioner's testimony and the difficulties he continues to suffer in trying to perform the normal and customary physical activities of life, which are supported by the medical records, and considering Petitioner's age and his physical limitations, the Arbitrator finds that the Petitioner suffered the total and permanent loss of use of the Person-as-a-Whole to the extent of 45% (225 weeks) under Section 8(d)2 of the Act.

In addition, the Arbitrator finds that the Petitioner compensable injuries to three fingers in in his left hand. The Arbitrator finds that Petitioner suffered 50% loss of use of his left middle finger, or 19 weeks under Section 8(e)(3); 25% loss of use of his ring finger, or 6.75 weeks under Section 8(e)(4), and; 25% loss of use of his small finger, or 5.5 weeks under Section 8(e)(5) of the Act.

Accordingly, Respondent-Employer shall pay Petitioner Permanent Partial Disability benefits of $377.08 for 256.25 weeks, given the Petitioner's AWW of $628.47. Respondent-Employer shall pay to Petitioner the sum of $96,626.75.

M. Should penalties or fees be imposed upon Respondent-Employer?

The Arbitrator finds that Petitioner is not seeking any penalties against the Respondent-Employer and, therefore, finds that penalties should not be imposed upon Respondent-Employer.

N. Is Respondent-Employer due any credit?

The Arbitrator finds that Respondent-Employer is not seeking any credit and, therefore, Respondent-Employer is not due any credit.

O. Other: Non- Insurance.

The Arbitrator finds that Respondent-Employer did not have workers' compensation insurance on the date of January 27, 2012.

The Arbitrator relies upon the research conducted by the National Council on Compensation Insurance and the Certification and proof of non-insurance provided by said entity in response to Subpoena issued by Petitioner. (PX11, p. 1-4).

The Arbitrator further finds that Respondent-Employer failed to present any evidence of having workers' compensation insurance on the day of the accident. In addition, Respondent-Employer did not rebut or otherwise challenge the Petitioner's position that Respondent-Employer was uninsured.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MIGUEL RIOS,

Petitioner,

vs. NO: 15 WC 00904

STAFFING NETWORK COMPANY,

19IWCC0481

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 causation, medical expenses, temporary total disability, permanent partial disability, and clerical error 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 the decision of the Arbitrator. However, the Commission corrects the clerical error in the tenth paragraph of the "Findings" section of the Arbitrator's decision to reflect that Respondent is issued a credit of $1,791.44 for temporary total disability benefits already paid.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $220.00 per week for a period of 7 1/7 weeks, commencing December 2, 2014, through January 20, 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 $220.00 per week for a period of 8.35 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 5% loss of use of the right foot.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner reasonable and necessary medical expenses related to the right foot injury, under §8(a) of the Act, subject to the fee schedule in §8.2 of the Act: 1) Herron Medical Center treatment from December 2, 2014 through February 23, 2015; 2) the medical bills of Dr. Mazarella from December 2, 2014 through January 19, 2015; 3) the December 2, 2014 MRIs of Petitioner's right foot and ankle; 4) Alivio Physical Therapy bills from January 26, 2015 through February 27, 2015.

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, including $1,791.44, 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 $6,338.00. 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: SEP 6 - 2019

MEP/dmm
O:072319
49

Maria E. Portela

Thomas J. Tyrrell

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RIOS, MIGUEL
Employee/Petitioner

Case# **15WC000904**

19IWCC0481

STAFFING NETWORK COMPANY
Employer/Respondent

On 9/12/2017, 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 1.14% 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:

2234 CHEPOV & SCOTT LLC
NICHOLAS CLIFFORD
5440 N CUMBERLAND AVE STE 150
CHICAGO, IL 60656

1505 SLAVIN & SLAVIN
DAVID VANOVERLOOP
100 N LASALLE ST 25TH FL
CHICAGO, IL 60602

19IWCC0481

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

Miguel Rios
Employee/Petitioner

v.

Staffing Network Company
Employer/Respondent

Case # **15** WC **00904**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Glaub**, Arbitrator of the Commission, in the city of **Chicago**, on **June 23, 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 ______

19IWCC0481

FINDINGS

On **November 24, 2014**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current right knee condition of ill-being *is not* causally related to the accident.
Petitioner's current right foot and ankle condition are causally related to the accident.

In the year preceding the injury, Petitioner earned **$17,160.00**; the average weekly wage was **$330.00**.

On the date of accident, Petitioner was **24** 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 **$1,791.44** 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 temporary total disability benefits of $220.00/week for 7-1/7 weeks, commencing December 2, 2014 through January 20, 2015, as provided in Section 8(b) of the Act.

Respondent shall pay the following reasonable and necessary medical expenses, related to the right foot injury suffered by Petitioner, subject to the fee schedule: 1) Herron Medical Center treatment from December 2, 2014 through February 23, 2015; 2) the medical bills of Dr. Mazarella from December 3, 2014 through January 19, 2015; 3) the December 2, 2014 MRI's of Petitioner's right foot and ankle; 4) Alivio Physical Therapy bills from January 26, 2015 through February 27, 2015. See further details in the attached decision.

For the reasons set forth in the attached decision, the Arbitrator finds that Petitioner established permanency equivalent to 5% loss of use of the right foot under Section 8(e), equivalent to 8.35 weeks. The Arbitrator awards permanency at the weekly rate of $220.00 based on the stipulated average weekly wage.

Respondent shall receive a credit of $1,791.44 for benefits paid.

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

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

Signature of Arbitrator

9/8/17
Date

SEP 12 2017

Miguel Rios v. Staffing Network
15 WC 000904

Findings of Fact

Petitioner, Miguel Rios, worked for Respondent, Staffing Network, for 3 months prior to being involved in an undisputed work accident on November 24, 2014. On that date, he was working for Respondent at Rapid Display as a materials handler.

On November 24, 2014, Petitioner was dragging a pallet backwards into a stockpile when the pallet slipped and fell onto his foot as he was walking away. The pallet that fell onto Petitioner's foot weighed 50 to 60 pounds. Petitioner provided notice of the accident to Staffing Network, and was sent to Concentra for medical treatment that same day.

Petitioner presented to Concentra and provided a consistent history of accident in that he dropped a 50 pound wooden pallet on his right foot. He immediately felt sudden onset of sharp pain, rating his pain 10/10. His associated symptoms included altered gait and limping. He denied any ankle pain at that time. Furthermore, Petitioner did not mention any knee pain. Skin trauma was noted on the dorsal aspect of the right foot, but there was no observed bleeding or localized bruising. The right ankle appeared normal with no deformity or tenderness. Petitioner was instructed to remain off work for the rest of his shift, and returned to modified work the next day. The modified duty included not driving company car, no climbing stairs or ladders, and use of crutches and splint on foot. (Px 1)

Petitioner testified that he returned to work for Respondent within the restrictions provided by Concentra. On November 25, 2014, Petitioner presented to Concentra for follow up. Petitioner again described his pain as 10/10, and as a constant aching and throbbing feeling. Petitioner was prescribed medication and instructed to take the medication as directed and to follow up in 1 week. Petitioner's anticipated MMI was noted to be in 4-6 weeks. (Px 1)

On December 2, 2014, Petitioner presented to Dr. Barnabas at Herron Medical Center. The intake form of Herron Medical Center identifies Petitioner's sole complaint to be "...pallet fell on my right foot and for the past week my right foot has been hurting." Objective findings included limited range of motion and swelling. Petitioner continued to complain of severe pain with no improvement, and stated that his foot was tender and symptoms were exacerbated when

walking. There was no mention of right knee pain in the record. Dr. Barnabas ordered an MRI for both the Petitioner's right ankle and right foot, and completely restricted Petitioner from working. (Px 2)

The following day, December 3, 2014, Petitioner followed up with Dr. Barnabas to review both the MRI's performed the prior day. The MRIs showed posttraumatic bruising of the ankle and foot. Following Dr. Barnabas' review of the MRIs, Dr. Barnabas referred Petitioner to Dr. Mazzarella. (Px 2, 3)

On December 3, 2014, Petitioner saw Dr. Mazzarella, who also reviewed Petitioner's MRIs. Petitioner was also given an injection which temporarily relieved his symptoms in his foot. There was no mention of right knee pain in the medical records. After review of the MRIs and the Depomedrol injection, Dr. Mazzarella ordered Petitioner to begin therapy and remain off work completely. (Px 4)

Petitioner continued to follow up with Herron Medical Center and Dr. Mazzarella before beginning physical therapy at Alivio. On January 19, 2015, the Petitioner was released by Dr. Mazzarella to work with restrictions of sitting job only, minimum walking only. (Px 2, 4, 5)

Petitioner testified that he returned to work on January 20, 2015 in a position Respondent provided for him within his restrictions. After one day, he did not return. However, Petitioner testified the work within his restrictions remained available with Respondent. (Tx)

On January 26, 2015, the records of Alivio indicate Petitioner identified right foot and ankle pain rated 4/10 which radiated up the right calf and knee region at times. (Px 5)

The Petitioner continued to treat with Herron and Alivio through February of 2015, until a right knee MRI was performed on March 5th, 2015. The MRI was interpreted to reveal a subtle horizontal intrasubstance irregularity involving the midbody and anterior horn, probably an intrasubstance tear in Petitioner's right lateral meniscus. (Px 2, 3, 5)

Following the MRI, Petitioner was referred to Dr. Markarian. Petitioner first presented to Dr. Markarian on March 11th, 2015, and was documented to provide a history of "a pallet fell on his foot and he twisted his right knee at the same time experiencing the acute onset of knee and foot pain. The foot has resolved, but he is continuing to have difficulty with the knee." Dr. Markarian performed a physical examination and reviewed the right knee MRI. He diagnosed Petitioner with a lateral meniscus tear, recommended surgery, and took Petitioner off work completely. (Px 6)

Petitioner continued to treat with Dr. Markarian and perform physical therapy at Herron Medical Center until ultimately undergoing a right knee arthroscopy, partial lateral meniscectomy and debridement of synovitis on August 14, 2015 with Dr. Markarian at Lakeshore Surgery Center. (Px 2, 6, 7)

Petitioner followed up with Dr. Markarian postoperatively, and underwent postoperative therapy at Total Rehab. Petitioner described one flareup during his recovery, but was eventually released at maximum medical improvement by Dr. Markarian on November 11, 2015 without restrictions. (Px 6, 8)

Dr. Markarian provided a narrative report dated March 2, 2017. In his report, he provides a history of the Petitioner twisting his knee at the time of the November 24, 2014 work accident and experiencing an acute onset of knee and foot pain. When the foot pain resolved, Petitioner continued to have knee pain. He opined that the surgery performed was resaonable and necessary, and that it was related to the November 24, 2014 work injury because Petitioner's right knee symptoms manifested as a result of the accident that occurred on that date. (Px 6)

Petitioner testified that prior to November 24, 2014 he had never had right knee pain before. He further testified that he did not experience knee pain immediately following the undisputed work accident of November 24, 2014, and it was not until after he had begun physical therapy that he began to have pain and clicking in his knee. Petitioner testified that prior to surgery, his right knee pain was as high as 8/10 or 9/10 and it would fluctuate, causing him to walk with a limp on some days. After the surgery, his right knee had less pain, but would occasionally catch or lock for a few minutes at a time. The catching and locking continue to occur about once a month or three months apart, and Petitioner testified he had such an occasion the day before trial

Petitioner testified that as of trial, his right foot "is good". On cross-examination, he confirmed that his right foot pain had completely resolved by the time he started treating with Dr. Markarian, with no lingering shooting pains or bruises. Furthermore, as of the date of trial there was nothing about his right foot that prevented him from going about his daily activities or work that he was then performing.

Respondent introduced the Section 12 Independent Medical Examination of Dr. Alan Gegenheimer dated November 23, 2015 regarding the evaluation of Petitioner on October 7, 2015. Dr. Gegenheimer reviewed medical records and diagnostic films, and performed an

evaluation of the Petitioner which included taking Petitioner's history and subjective complaints, and completing a physical examination. Dr. Gegenheimer opined that Petitioner had not suffered any injury to his right ankle or knee in the November 24, 2014 work injury, and that the only injury sustained was a right foot contusion which had resolved prior to March 11, 2015. Dr. Gegenheimer further opined that while the right foot MRI was reasonable and necessary to rule out a fracture, the therapy provided was not reasonable and necessary, as the diagnosis of contusion only requires ice and rest. Dr. Gegenheimer also opined that petitioner's right knee complaints were not related to the November 24, 2014 injury and that his surgery was not necessary (Rx 1).

Respondent introduced into evidence surveillance footage of March 27, 2015 and April 1, 2015 showing Petitioner walking, standing, and ascending and descending stairs without any identifiable difficulty with respect to his right foot, ankle or knee (Rx 2).

Conclusions of Law

F. In support of the Arbitrator's decision regarding whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator concludes the following:

The Arbitrator finds that the Petitioner's right foot and right ankle injuries are causally related to the undisputed work accident of November 24, 2014. The Arbitrator further finds that the petitioner failed to prove his right knee condition was causally related to the November 24, 2014 accident

As it pertains to the foot and ankle injury, the records in evidence document immediate pain after a wooden pallet fell on the top of Petitioner's right foot. Petitioner underwent conservative treatment on November 24, 2014 at Concentra and complained of foot and toe injury after a 50 pound pallet fell on his foot. While the petitioner did not complain of right ankle pain at the initial treatment, petitioner did complain of right ankle pain on the following day on November 25, 2014. Specifically, on page 1 of the November 25, 2014 progress note, a complaint of pain radiating into the ankle noted. On top of page 2, of this progress note, there is a notation which reads "Associated symptoms include ankle pain……" (Px1). All parties agree that the petitioner's right foot condition is causally related to the November 24, 2104 accident. The petitioner continued to complain of right ankle pain when seen at Herron Medical Center December 2, 2014. An MRI of the right ankle was also ordered on this date. A contusion of right

ankle contusion and swelling was also made at that time (Px 2: p.22). The Arbitrator believes that a one day delay of complaints of pain to the right ankle would not preclude a finding of compensability. Therefore, the Arbitrator finds Petitioner's right foot and ankle injuries were causally related to the November 24, 2014 work accident.

The Arbitrator finds the petitioner failed to prove that his right knee condition is causally related to the November 24, 2014 accident.

The petitioner's initial medical care was at Concentra on November 24 and 25, 2014. These medical records of Concentra contain complaints of right foot and ankle pain but no complaints of right knee pain. There is no evidence that the petitioner received any treatment to his right knee at Concentra. The Arbitrator does note that Concentra documented the fact that petitioner was limping and as having an altered gait. The Arbitrator notes petitioner's argument that petitioner allegedly did not notice his right knee condition because he was always utilizing crutches to walk. This argument would appear to be rebutted by the progress notes. Specifically, Concentra could not have found the petitioner to be limping and having an altered gait if the petitioner was non-weight bearing as petitioner claims. (Px 1)

The petitioner was next seen at Herron Medical Center on December 2, 2014. The initial intake forms of Herron Medical Center make no reference to any right knee injury. The progress notes throughout December 2014 make no reference of any treatment to the right knee. The Arbitrator notes the January 21, 2015 progress note of Herron that indicates: "Petitioner is walking a little better" (Px 2; p.18). Again, this notation rebuts petitioner's argument that petitioner did not notice any right knee pain because he was non-weight bearing.

The petitioner was also seen at Goldcoast Orthopedics by Dr. Mazzarella on December 3, 2014. The intake form only references right foot and ankle pain and makes no mention of right knee pain. The medical records of Goldcoast (Dr. John Mazzarella) indicate petitioner never complained of any right knee pain or received treatment to his right knee in December 2014 (Px 4).

The first mention in any medical records of any reference to the right knee is on January 26, 2015, more than two months after the accident. Specifically, the records of Alivio Physical Therapy indicate, "Current pain level is approximately 4/10 as to the intensity level in the right foot and ankle at present with the pain radiating up into the right calf and knee region at times

especially when weight bearing and walking" (Px 5). The Arbitrator notes that the petitioner was not complaining of right knee pain at this time but rather that pain was radiating from the foot and ankle into the calf and knee area. It is not until the February 27, 2015 visit at Alivio, three months after the accident, that specific right knee pain is first identified. Specifically, the therapy note states "...the patient also noted more periods of right knee pain occurring over the past week" (Px 5; p.39).

Thereafter an MRI of the right knee was recommended and performed. The Petitioner presented to Dr. Markarian for the first time on March 11, 2015. Dr. Markarian ultimately diagnosed Petitioner with a right knee lateral meniscus tear, for which he performed surgery on August 14, 2015. Dr. Markarian provided the only opinion relating a right knee condition to the work accident of November 24, 2014, citing in his March 2, 2017 narrative that Petitioner "basically hit a pallet, and at the same time he twisted his right knee. That was part of his history. He experienced the acute onset of knee and foot pain." However, this history of mechanism of injury is wholly contradicted by not only the prior medical records of Concentra, Herron, Goldcoast and Alivio, but also by Petitioner's testimony at trial. Petitioner testified that he did not experience any knee pain or "clicking" in his knee until after he began treating at Alivio. As the Arbitrator notes above, the Petitioner did not begin treating at Alivio until more than two months after the accident. Clearly the symptoms cannot be said to be an "acute onset". Therefore, the Arbitrator finds the causal opinion provided by Dr. Markarian is not credible. No other opinions exist relating Petitioner's right knee condition to the November 24, 2014 work accident, nor is there even a contemporaneous relationship between the November 24, 2014 work accident and the February 27, 2015 first mention of specific right knee pain. Respondent's examining physician, Dr. Gegenheimer opined in his report that the petitioner's right knee complaints are not related to the November 24, 2014 injury. (Rx 1). Based on all of the above, the Arbitrator finds Petitioner failed to prove his right knee condition is causally related to the work accident of November 24, 2014.

J. In support of the Arbitrator's decision regarding whether the medical services provided to Petitioner were reasonable and necessary, and if Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator concludes the following:

Petitioner submitted medical bills totaling $62,281.95 from the following medical providers: (1) Herron Medical Center; (2) Dr. John Mazzarella; (3) Lakeshore Open MRI; (4) Alivio Physical Therapy; (5) Dr. Markarian; (6) Lakeshore Surgery Center; (7) Total Rehab. Pursuant to the ledger of payment, Respondent has paid for the Petitioner's following medical treatment: (1) Alivio PT (January 27 and 29, 2015, February 5 and 27, 2015); (2) Herron Medical Center (December 2, 3 and 17, 2014 and January 19, 2015); (3) Dr. Mazzarella (December 3 and 17, 2014).

With reference to the outstanding medical bills, the Arbitrator notes his conclusion that Petitioner failed to prove that his right knee injury was causally related to the work accident of November 24, 2014. Furthermore, the Arbitrator notes Petitioner's testimony consistent with the medical records in evidence that his right foot condition had completely resolved by March 11, 2015. As such, the Arbitrator finds Respondent is responsible to pay only for treatment rendered prior to March 11, 2015 and relating to the right foot and ankle injury.

Of the medical bills submitted, the Arbitrator finds only the following dates of service from medical providers to be reasonable and necessary to cure the right foot and right ankle injury, and unpaid by Respondent as evidenced by its payment ledger: (1) Herron Medical Center (December 2, 2014-February 23, 2015); (2) Dr. Mazzarella (December 3, 2014-Januray 19, 2015); (3) Lakeshore Open MRI (December 2, 2014, for the foot and for the ankle MRI's); (4) Alivio PT (January 26, 2015-February 27, 2015). The Respondent is ordered to pay to Petitioner the amount due after any reductions pursuant to the Illinois Fee Schedule are applied.

The Arbitrator finds that all other alleged medical bills relating to the petitioner's right knee condition are denied as that medical condition is not causally related to the November 24, 2014 work injury.

K. In support of the Arbitrator's decision regarding whether Petitioner is owed temporary disability benefits, the Arbitrator concluded the following:

The Arbitrator finds Petitioner is not entitled to any further temporary benefits. Petitioner testified that Respondent accommodated Petitioner's light duty work restrictions provided by Concentra beginning November 25, 2014. Petitioner was not taken off work completely until he was seen by Dr. Barnabas at Herron Medical Center on December 2, 2014 for his right foot injury and remained off work until January 19, 2015. The Petitioner returned to light duty work

again on January 22, 2015, after being off work for 7 weeks for his foot. Respondent paid TTD benefits for the time Petitioner was off work through January 21, 2015.

Petitioner further testified that from January 22, 2015 forward, the Respondent continued to make light duty work available for Petitioner. Pursuant to the work status note from Dr. Mazzarella on January 19, 2015, the Petitioner was capable of performing light duty work; however, the Petitioner only worked for one day, January 22, 2015, then failed to return to work again. As the light duty work remained available, no TTD is owed for this period.

Petitioner claims TTD benefits for March 11, 2015 through November 11, 2015. However, the testimony and medical evidence establishes that the right foot and ankle injury had reached MMI by March 11, 2015, and Petitioner was treating solely for his knee injury during this time. As the Arbitrator has found the alleged right knee condition to not be related to the November 24, 2014 work injury, Respondent is not responsible for payment of TTD for this period.

L. In support of the Arbitrator's decision regarding what is the nature and extent of the injury, the arbitrator concludes the following:

In determining the nature and extent of Petitioner's injury, the Arbitrator must analyze the five factors of Section 8.1b of the Act. In doing so, the Arbitrator again notes that there was no compensable injury to Petitioner's right knee and this condition will not be taken into account.

First, the Arbitrator notes there was no AMA impairment rating offered into evidence in this case; therefore, this factor is given no weight.

Second, the Arbitrator notes Petitioner's occupation can best be described as general labor. This factor is given some weight as injuries could impede Petitioner's ability to perform physically demanding general labor work.

Third, the Arbitrator notes Petitioner was 24 years old at the time of accident. The Arbitrator notes the petitioner has a relatively long work life and the Arbitrator takes this into account.

Fourth, the Arbitrator notes Petitioner has returned to general labor, and there is no evidence of any decrease in his future earning capacity.

Fifth, the Arbitrator finds there is evidence of disability corroborated by the treating records. The MRI of the petitioner's right foot and the MRI of the right ankle revealed soft tissue swelling and post-traumatic bruising. The diagnosis by Dr Mazzarella was post-traumatic bone bruising of the right foot and tenosynovitis of the right ankle joint. Respondent's examining physician, Dr. Gegenheimer diagnosed a bruise of the foot and neuraproxia to the deep peroneal nerve. Petitioner's conservative treatment included physical therapy and an injection of Depomedrol. The Petitioner testified at Arbitration that his "right foot is good". The March 11, 2015 treating medical records of Dr. Markarian also document that the right foot condition had resolved.

In weighing the factors, the Arbitrator finds Petitioner to have sustained permanent partial disability to the extent of 5% loss of use of the right foot. Respondent is thereby ordered to pay to the Petitioner permanent partial disability benefits in the amount of $1,837 (5% x 167 weeks x $220.00 permanent partial disability rate). No permanent partial disability benefits are awarded for the right knee condition which the Arbitrator has found to not be causally related to November 24, 2014 accident.

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

Stefano Maida,

Petitioner,

vs. NO: 16 WC 21878

Chicago Park District,

Respondent.

19IWCC0482

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

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

19IWCC0482

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: SEP 6 - 2019
o8/27/2019
MEP/jp
49

Maria E. Portela

L. Elizabeth Coppoletti

Thomas J. Tyrrell

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

MAIDA, STEFANO
Employee/Petitioner

Case# **16WC021878**

CHICAGO PARK DISTRICT
Employer/Respondent

19IWCC0482

On 1/24/2018, 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:

0154 KROL BONGIORNO & GIVEN LTD
MIKE BRANDENBERG
120 N LASALLE ST SUITE 1150
CHICAGO, IL 60602

1946 CHICAGO PARK DIST LAW DEPT
LEON W PAWLYCOWYCZ
541 N FAIRBANKS CT 3RD FL
CHICAGO, IL 60611

STATE OF ILLINOIS)
)SS.
COUNTY OF **COOK**)

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

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

19IWCC0482

STEFANO MAIDA
Employee/Petitioner

Case # **16** WC **21878**

v.

Consolidated cases: **n/a**

CHICAGO PARK DISTRICT
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **DOUGLAS S. STEFFENSON**, Arbitrator of the Commission, in the city of **CHICAGO**, on **OCTOBER 3, 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. [ ] 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. [x] Other: Admissibility of certain evidence

FINDINGS

On the date of accident, **JUNE 21, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On 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 $**97,754.28**; the average weekly wage was $**1,879.89**.

On the date of accident, Petitioner was **47** years of age, ***married*** with **3** dependent children.

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

Respondent shall be given a credit of $**30,436.44** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**30,436.44**.

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. Respondent shall pay TTD benefits of $1,253.26/week for 33 & 2/7 weeks, representing the periods from June 22, 2016 through December 8, 2016; May 8, 2017 through May 14, 2017; and May 24, 2017 through July 18, 2017.

2. Respondent shall pay reasonable and necessary medical services of $4,978.30 under Sections 8(a) and 8.2 of the Act for the following unpaid medical bills: Advanced Physical Therapy and Health Services— $1,749.00; Progressive Radiology—$2,420.00; Midwest Orthopedics at Rush –$725.00; University Pathology—$84.30.

3. Respondent shall pay for the prospective medical treatment recommended by Dr. Singh on July 26, 2017. Specifically, an L4 to S1 revision laminectomy and microdiscectomy procedure.

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

JANUARY 9, 2018
Date

ICArbDec19(b)

JAN 24 2018

STEFANO MADIA v. CHICAGO PARK DISTRICT

16 WC 21878

*****CORRECTED***** **19IWCC0482**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter was tried on the Petitioner's Section 19(b) Petition before Arbitrator Steffenson on October 3, 2017. The issues in dispute were causal connection, medical bills, TTD and prospective medical care. (*Arbitrator's Exhibit* 1). The parties agreed to receipt of this Arbitration Decision via e-mail and requested a written decision, including findings of fact and conclusions of law, pursuant to Section 19(b). (*Arbitrator's Exhibit* (hereinafter, *AX*) 1).

FINDINGS OF FACT

The Petitioner, a 47-year-old painter/foreman for the Respondent, alleges he lifted a power washer off a work truck with two other employees on June 21, 2016. He testified the washer weighed approximately 200-250 pounds. As the other two employees began to set up scaffolding, he pushed the power washer towards a building by himself. As he pushed the equipment, the Petitioner felt a "big pain" in his lower back that went down into his left leg. After about fifteen minutes, his entire left leg began to feel numb. The Petitioner reported the incident to his supervisor, who drove him back to the yard. He then was taken to Mercyworks that same day.

The Petitioner was examined by Dr. Homer Diadula at Mercyworks. During his examination, Dr. Diadual reported the Petitioner had tenderness in the cervical spine and the lumbosacral spine, including the paralumbar areas. Dr. Diadula diagnosed the Petitioner with a strain/sprain of the cervical, thoracic, and lumbar spine and left sciatica. He was to remain off of work and was "referred to a specialist," Dr. Wesley Yapor, for a spinal consult. (*Petitioner's Exhibit* 1).

The Petitioner then met with Dr. Yapor on July 12, 2016. Dr. Yapor obtained the Petitioner's history concerning his accident and medical symptoms and performed a physical examination. Dr. Yapor recommended the Petitioner remain off work and prescribed an MRI of the lumbar spine. The July 14, 2016, MRI study revealed degenerative changes in the lumbar spine with paraspinal muscle spasm, left laminectomy defects at the L4 and L5 levels with post-operative changes, disc disease at the L1-L2, L4-5, and L5-S1 levels causing varying degree of central canal and neural foraminal stenosis, L2-3 and L3-4 mild posterior disc bulges that indent

the thecal sac without neural compression, and bilateral facet and ligamentum flavum hypertrophy. (*Petitioner's Exhibit* (hereinafter, *PX*) 2).

The Petitioner returned to Dr. Yapor on August 16, 2016. Dr. Yapor reviewed the Petitioner's MRI films and noted prominent disc bulging at the L1-2 level and a new left L5-S1 herniation with a caudal extruded fragment that was not described on the MRI report. He rendered a diagnosis of lumbar herniated disc and lumbar radiculopathy. Dr. Yapor recommended an epidural steroid injection and continued the Petitioner's off work status. (*PX* 2). Thereafter, on September 8, 2016, Dr. Yapor referred the Petitioner for a pain clinic evaluation. (*PX* 2).

The Petitioner then met with Dr. Howard Konowitz on September 13, 2016. He reported pain in his tailbone and left lower back that radiated into his left posterior leg and calf with numbness. Dr. Konowitz reported his physical examination of the Petitioner's lumbosacral spine demonstrated tenderness at the midline spine, lumbar spine to the tailbone, and left sciatic notch. He indicated straight leg testing was positive on the left and positive for only the back on the right side. Dr. Konowitz also found paraspinal muscle spasms on the left. Dr. Konowitz rendered a diagnosis of a new lumbar disc herniation with radiculopathy, new left sciatica, and post-laminectomy syndrome. He urged the Petitioner to remain off work and undergo a caudal epidural steroid injection and a left L4/5 selective nerve root block. (*PX* 2).

On October 13, 2016, pursuant to the Respondent's Section 12 request, the Petitioner saw Dr. Michael Kornblatt. Dr. Kornblatt found the Petitioner exhibited tenderness to palpation at the lower lumbar spine, coccyx and sacral area. His straight leg raising was negative on the right, but caused pain on the left. Dr. Kornblatt then opined the Petitioner suffered a strain of his underlying degenerative disc disease and was not at MMI. He recommended the Petitioner undergo physical therapy and an injection. Dr. Kornblatt also noted the Petitioner could work at a medium physical demand level. (*Respondent's Exhibit* 1).

From October 25, 2016 through November 22, 2016, the Petitioner attended nine sessions of physical therapy at Advanced Physical Therapy and Health Services pursuant to an October 18, 2016, prescription from Dr. Konowitz. (*PX* 3 and *PX* 4). The Petitioner then returned to Dr. Konowitz on November 29, 2016, with decreased leg pain symptoms. During that visit, Dr. Konowitz noted the Petitioner's lumbar spine demonstrated tenderness at the lumbar sciatic notch and released him to return to work at the medium physical demand level. (*PX* 3). Subsequently, on December 9, 2016, the Respondent began accommodating the Petitioner's restrictions and he returned to work under those restrictions at that time.

On December 27, 2016, the Petitioner returned to Dr. Konowitz and reported increased pain in the tailbone region. Although Dr. Konowitz prescribed Tramadol for the Petitioner to use

after work or before bedtime as needed, the Petitioner deferred the option of an epidural steroid injection at that time to, instead, try medical management of his pain situation. (*PX* 3). During a January 24, 2017, visit with Dr. Konowitz, the Petitioner indicated he was experiencing bilateral anterior thigh numbness and pain localized over the left sacrum and PSIS area. Dr. Konowitz then referred the Petitioner back to Dr. Yapor for a reevaluation. (*PX* 3).

On February 8, 2017, the Petitioner was evaluated by Dr. Benson Yang at Northwestern Neurosurgical Associates.[1] Dr. Yang reviewed the July 14, 2016 lumbar spine MRI and noted L4-5 and L5-S1 degenerative disc disease with bilateral foraminal stenosis that was responsible for the left lumbar radiculopathy and possibly for the right leg occasionally giving out. Dr. Yang recommended a L4-5 and L5-S1 posterior lumbar interbody fusion surgery, if conservative treatment failed. Dr. Yang also recommended work restrictions of no lifting over 50 pounds and no standing, pushing, pulling, or squatting on a repetitive basis. (*PX* 2).

The Petitioner returned to Dr. Kornblatt on March 2, 2017, for a follow-up Section 12 examination. Dr. Kornblatt reported the Petitioner exhibited tenderness to palpation at the lower lumbar spine, coccyx and sacral area. Straight leg raising was negative on the right, but caused low back and tailbone pain on the left side. Dr. Kornblatt recommended the Petitioner remain working at the medium physical demand level restrictions, but did not believe he was a candidate for a two-level fusion procedure. Instead, he suggested the Petitioner undergo one or two caudal epidural steroid injections and plan for an MRI of the sacrum and coccyx with a bone scan. (*Respondent's Exhibit* (hereinafter, *RX*) 2).

Later that month, the Petitioner returned to Dr. Konowitz reporting pain localized at the tailbone area to the sciatic notch, some left thigh tightness, and mid-hamstring pain. Dr. Konowitz prescribed an MRI of the pelvis/sacrum/coccyx, but he did not agree a bone scan study was needed. (*PX* 3). The April 6, 2017, MRI study revealed mild degenerative changes of the sacroiliac joints, no fracture or sacroilitis, and partially imaged lower lumbar spondylosis. (*PX* 6). Thereafter, on April 11, 2017, Dr. Konowitz reviewed this study and prescribed a caudal epidural steroid injection that he performed on the Petitioner on May 5, 2017. (*PX* 3). He also kept the Petitioner off work due to pain from the injection effective May 8 to May 15, when he then returned him to work at a medium physical demand level. (*PX* 3). Dr. Konowitz then clarified these work restrictions in a May 18, 2017 letter to the Respondent. (*Id.*).

The Petitioner then returned to Dr. Yang on May 24, 2017. After that appointment, Dr. Yang opined the Petitioner had failed conservative measures and, again, prescribed a L4-5 and L5-S1 posterior lumbar interbody fusion with Smith-Petersen osteotomies to fully decompress

[1] The Petitioner testified he saw Dr. Yang because Dr. Yapor had died before that February 8, 2017 appointment. (*Transcript* at 23).

the exiting nerve roots. He also recommended the Petitioner refrain from working at that time. (*PX* 2).

On June 5, 2017, the Petitioner met with Dr. Kern Singh at Midwest Orthopedics at Rush. (*PX* 4). The Petitioner testified he saw Dr. Singh for a second opinion on his condition. (*Transcript* (hereinafter, *T.*) at 26-27). Dr. Singh reviewed the Petitioner's July 14, 2016 lumbar spine MRI and observed L4-5 and L5-S1 spinal stenosis, which correlated to the Petitioner's symptomology. He opined the Petitioner, having failed conservative management, was not at maximum medical improvement (MMI), and should undergo an L4-5, L5-S1 revision laminectomy and microdiscectomy procedure. He also issued work restrictions of no lifting, pushing or pulling over 10-pounds, and no bending, stooping, or kneeling. (*PX* 4). The Petitioner testified the Respondent did not accommodate these updated work restrictions. (*T.* at 27).

The Respondent then obtained a July 6, 2017, addendum report from Dr. Kornblatt. He opined there was no objective reason for surgical intervention, but also urged the Petitioner to undergo a new lumbar spine MRI and return to work at a medium physical demand level. (*RX* 3). This updated lumbar MRI took place on July 20, 2017, and revealed no significant change from the prior study. It showed multi-level disc bulges resulting in variable degrees of spinal canal and neural foramen stenosis, mild lumbar spondylosis with disc desiccation, and loss of lumbar lordosis likely due to muscle spasm. (*PX* 7).

Thereafter, on July 26, 2017, Dr. Kern Singh reviewed the new lumbar MRI and opined the Petitioner had an L1-2 left paracentral herniated nucleus pulpous, L4-5 and L5-S1 decreased disk signal intensity with height loss and lumbar stenosis, and a status-post L4-S1 laminectomy defect. Dr. Singh again recommended an L4-S1 revision lumbar laminectomy procedure, while also noting the L1-2 herniated nucleus pulpous was not contributing to the Petitioner's symptoms. (*PX* 4). Dr. Kornblatt indicated in an August 3, 2017, addendum report he, too, had reviewed the new lumbar MRI study and found no changes compared to the prior testing. Instead, he opined that when he examined the Petitioner in March of 2017, the Petitioner's symptoms were consistent with coccydynia rather than lumbar stenosis. Accordingly, he did not recommend further lumbar spine surgery and deemed the Petitioner to be at MMI. (*RX* 4).

The Petitioner testified he currently has constant discomfort in his low back and takes ibuprofen every morning before going to work. He has difficulty sleeping, and often will wake up to move into a reclining chair to continue sleeping. He takes Norco only before going to bed because it helps him sleep, but he does not feel comfortable driving a vehicle while on Norco. The Petitioner also testified he only drives up to forty-five minutes before his pain level increases. (*T.* at 32-33). He no longer coaches or plays soccer with his three boys because of pain and no longer walks his dog because the dog pulls on its leash, increasing both the Petitioner's pain and his concern that he might fall. (*T.* at 33-34). The Petitioner also noted his

full duty job responsibilities included setting up scaffolds, carrying pain buckets, mixing, and moving power washers. (*T.* at 34). Currently, he performs light duty work as a supervisor who does not set up scaffolds, climb ladders or moving heavy equipment. (*T.* at 35). He also uses ibuprofen throughout the day when his pain increases. (*T.* at 36).

The Petitioner testified he wants to undergo the lumbar surgery recommended by Dr. Singh because he wants relief from his pain, and wishes to undergo a safer procedure than a fusion surgery. (*T.* at 29). He acknowledged he had undergone previous back surgeries in 2004, performed by Dr. Stamelos, and 2009, performed by Dr. Yapor. After the 2009 procedure, the Petitioner completed his post-operative treatment and returned to work for Respondent in a full duty capacity. (*T.* at 30). He also indicated, immediately prior to the accident on June 21, 2016, he was working full duty and was not having any problems with his back, tailbone, or legs. (*T.* at 30-31).

Paul Rybicki testified he has been licensed for 12 years as an investigator and he works for a private company, Smith Surveillance, as a private investigator. (*T.* at 56-57). He noted the company was hired by the Respondent to perform surveillance of the Petitioner, which consisted of videotaping outside activity from June 24, 2016 through July 25, 2016. Mr. Rybicki testified he completed reports regarding those surveillance efforts on the same days that he had observed Petitioner, as was his usual practice. He also identified computer discs containing video surveillance of the Petitioner from June 24, 2016 through July 25, 2016. (*T.* at 59-60 and *RX* 7a and *RX* 7b).

Daniel Smith testified he has been a licensed investigator for 25 years and he, too, works for Smith Surveillance as a private investigator. (*T.* at 68-69). Mr. Smith noted the company also was hired by the Respondent to perform surveillance of the Petitioner from September 2, 2016 through September 5, 2016. He completed his reports regarding that surveillance one or two days after he observed the Petitioner, as was his usual practice, and identified a computer disc containing video surveillance of the Petitioner from September 2, 2016 through September 5, 2016. (*T.* at 70-71 and *RX* 7c).

CONCLUSIONS OF LAW

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

Issue F: *Causal connection*

The Petitioner credibly testified he was not having problems with his lower back and legs shortly before his June 21, 2016 work accident. He also confirmed he was working full duty for the Respondent at that time and had not received treatment for his lower back since

undergoing a lumbar laminectomy approximately seven years prior in 2009, from which he returned to full duty work. The Petitioner experienced a "big pain" running from his back down into his left leg while pushing a heavy power-washer on the date of accident. He then experienced numbness in his entire left leg approximately 15 minutes after the incident.

The Petitioner's medical records all are consistent with his history. On the same day of the accident, the Respondent sent the Petitioner to treat at Mercyworks. At that exam, Dr. Homer Diadula diagnosed him with a work-related strain/sprain of the neck, thoracic and lumbar spine, with left sciatica. (*PX* 1). On August 16, 2016, Dr. Yapor diagnosed the Petitioner with a new left disc herniation at L5-S1 and a caudal extruded fragment. (*PX* 2). On September 13, 2016, Dr. Konowitz also diagnosed the Petitioner with new lumbar disc herniation with radiculopathy, new left sciatica, and post-laminectomy syndrome. (*PX* 3). On May 24, 2017, Dr. Yang opined the Petitioner's disc disease and bilateral foraminal stenosis at L4-5 and L5-S1 were causing his lumbar radiculopathy and possible right leg giving-out. (*PX* 2).

On June 5, 2017, Dr. Singh diagnosed the Petitioner with spinal stenosis at L4-5, L5-S1 and status-post left L5-S1 laminectomy defect. He further opined the Petitioner's symptoms were correlated with the L4-5, L5-S1 spinal stenosis shown on his July 14, 2016 MRI, and he noted in his quick report that the diagnosis and recommended treatment are causally related to the alleged industrial accident. (*PX* 4).

The Respondent, on four separate occasions, sought the opinions of Dr. Michael Kornblatt. Dr. Kornblatt's first report, dated October 13, 2016, indicated he believed the Petitioner did injure his lower back resulting in a lumbosacral strain and exacerbation of preexisting lumbar degenerative disc disease. He then recommended an epidural steroid injection and physical therapy. (*RX* 1). After a March 2, 2017, session, Dr. Kornblatt again opined the Petitioner required additional treatment, including epidural injections, and physical work restrictions were appropriate. (*RX* 2). On June 6, 2017, Dr. Kornblatt stated the Petitioner was not a surgical candidate, but had ongoing coccydynia, needed further evaluation of his lumbar spine, and required ongoing work restrictions. (*RX* 3). Subsequently, on August 3, 3017, Dr. Kornblatt opined the Petitioner had reached MMI although the findings on the most recent MRI study had not changed from the prior study of July 14, 2016. Furthermore, it had been approximately five months since Dr. Kornblatt had physically examined Petitioner at the time of this addendum. (*RX* 4). When taken as a whole, Dr. Kornblatt's opinions regarding causal connection are not more persuasive than those of the Petitioner's treating physicians, especially when no objective findings have changed while the Petitioner's symptoms have continued and increased.

Accordingly, the Arbitrator finds a causal connection between Petitioner's present condition of ill-being and his work accident of June 21, 2016.

Issue J: *Medical bills*

The medical records reflect the Petitioner was prescribed physical therapy by Dr. Konowitz on October 18, 2016, and he attended therapy at Advanced Physical Therapy and Health Services from October 25, 2016 through November 22, 2016. (*PX* 3 and *PX* 5). Furthermore, the Respondent's Section 12 physician, Dr. Kornblatt, also had recommended that treatment plan. (*RX* 1). At the time of hearing, the Respondent stipulated that it should pay for those dates of service. (*T.* at 13-14 and 86).

On March 28, 2017, Dr. Konowitz prescribed an MRI of the Petitioner's sacrum/coccyx/pelvis, which he underwent at Progressive Radiology on April 6, 2017. (*PX* 3). Dr. Kornblatt also had recommended that diagnostic study. (*RX* 2).

On June 5, 2017, the Petitioner sought a second opinion evaluation from Dr. Kern Singh at Midwest Orthopedics at Rush. (*PX* 4). Under Section 8(a) of the Act, "the employee may at any time elect to secure his own physician, surgeon and hospital services at the employer's expense." In this instance, the Petitioner exercised his right to obtain Dr. Singh's opinion to see if there were any different treatment options. The Petitioner also underwent lab testing that same day via University Pathology. (*PX* 4 and *PX* 8). Interestingly, prior to this exam, Dr. Kornblatt had not found Petitioner to be at MMI and opined that he required further workup. (*RX* 2).

Accordingly, the Arbitrator finds all the medical treatment to be reasonable and necessary. The Petitioner presented medical bills as part of *PX* 8. Based on the Arbitrator's findings concerning this **Issue J** and **Issue F**, above, the Arbitrator orders the Respondent to pay the following medical bills, pursuant to the fee schedule:

1. Advanced Physical Therapy and Health Services—DOS 10/25/16-11/22/16: $1,749.00.
2. Progressive Radiology—DOS 4/6/17: $2,420.00.
3. Midwest Orthopedics at Rush – DOS 6/5/17: $725.00.
4. University Pathology—DOS 6/5/17: $84.30.

Issue K: *Prospective medical care*

Based on the Arbitrator's findings concerning **Issue F**, above, the Petitioner's current medical condition is related to his work accident. His treating physicians also have not found

him to be at MMI. On May 24, 2017, Dr. Yang recommended the Petitioner undergo an L4-5, L5-S1 posterior lumbar fusion surgery. (*PX* 2). However, the Petitioner voiced his concerns that a fusion could make his back worse and he wanted to see if there were any other treatment options available.

On June 5, 2017, and again on July 26, 2017, Dr. Singh recommended the Petitioner undergo an L4-5, L5-S1 revision laminectomy, microdiscectomy procedure. (*PX* 4). The Petitioner testified he wishes to proceed with the treatment recommended by Dr. Singh because he wants to resolve his back pain, but he also wants to undergo a safer procedure than a full lumbar fusion. (*T.* at 29-30).

The Respondent relies upon Dr. Kornblatt's reports in denying authorization for this recommended treatment. As the Arbitrator noted above, Dr. Kornblatt did not find the Petitioner to be at MMI for his back until issuing a fourth report on August 31, 2017, about five months after he had last physically examined the Petitioner. (*RX* 4). When he did examine the Petitioner on October 13, 2016 and March 2, 2017, he opined the Petitioner was not a surgical candidate. (*RX* 1 and *RX* 2). In reviewing the MRI's of the Petitioner's lumbar spine, Dr. Kornblatt did not observe significant lumbar stenosis at L4-5 and L5-S1 or any lesion, fracture or instability that would warrant surgery in his opinion. (*Id.*).

However, both MRI reports indicate that disc disease and disc bulging at L4-5 and L5-S1 are causing bilateral stenosis and moderate compression of nerve roots. (*PX* 2 and *PX* 7). Dr. Yapor additionally noted a disc herniation at L5-S1 that was not indicated on the report, causing radiculopathy into Petitioner's legs. (*PX* 2). Both Dr. Yang and Dr. Singh observed stenosis and opined that it was causing the Petitioner's ongoing symptoms, which need to be resolved by surgical intervention because he has failed conservative treatment in the form of physical therapy and an epidural injection. (*PX* 2 and *PX* 4). Dr. Yang and Dr. Singh only differ as to the extent of the procedure required to address the Petitioner's lumbar condition.

The Petitioner has tried to resolve his back pain through extensive conservative treatment and working within physical restrictions, but his symptoms persist. He testified he currently has constant discomfort with his lower back and takes ibuprofen daily, particularly when his pain increases at work. He takes Norco before going to bed at night because he has difficulty sleeping and often moves to a recliner to sleep more comfortably. He no longer walks his dog, plays soccer with his children, or drives for over 45 minutes without feeling increased pain in his back. He wants to undergo the procedure recommended by Dr. Singh to stop the pain in his back, which has not been resolved by injection or therapy.

The Arbitrator finds the opinions of the Petitioner's treating physicians, particularly Dr. Yang and Dr. Singh, to be more persuasive than the opinions of Dr. Kornblatt. The Arbitrator

specifically finds the treatment recommendations of Dr. Singh to be reasonable and necessary and orders the same. The Respondent shall pay for the prospective medical treatment recommended by Dr. Singh on July 26, 2017. Specifically, an L4 to S1 revision laminectomy and microdiscectomy procedure. (*PX* 4).

Issue L: *TTD*

The Petitioner claims he is entitled to TTD benefits for the periods between June 22, 2016 through December 8, 2016; May 8, 2017 through May 14, 2017; and May 24, 2017 through July 18, 2017, totaling 33 and 2/7 weeks. The Respondent claims the Petitioner is entitled to TTD from June 22, 2016 through December 8, 2016 only, a period totaling 24 and 2/7 weeks, and disputes liability for any other TTD benefits. (*AX* 1).

On May 8, 2017, Dr. Konowitz spoke with the Petitioner, who reported increased pain in his back after undergoing an epidural injection on May 5, 2017. Dr. Konowitz recommended that Petitioner remain off work until the next appointment on May 11, 2017. After examining Petitioner on that date, Dr. Konowitz recommended the Petitioner return to work as of May 15, 2017 at the medium physical demand level. (*PX* 3). The Petitioner then did return to work with those restrictions on May 15, 2017. The Respondent presented no contrary medical opinion stating the Petitioner was able to work for that specific period of time.

On May 24, 2017, Dr. Yang opined the Petitioner was to remain off work as of that date. (*PX* 2). Subsequently, on June 5, 2017, the Petitioner was examined by Dr. Singh, who opined the Petitioner could work with restrictions of no lifting, pushing or pulling over 10-pounds and no bending, stooping, or kneeling. (*PX* 4). The Respondent did not accommodate those restrictions and did not pay TTD benefits. Instead, the Respondent began accommodating the Petitioner at the medium physical demand level as of July 19, 2017, based on the recommendations of Dr. Kornblatt's addendum report of July 6, 2017. Dr. Kornblatt did not perform any examination of Petitioner subsequent to May 24, 2017. From May 24, 2017 through July 18, 2017, the only medical expert opinions stated the Petitioner could not work or could work only under restrictions that Respondent chose not to accommodate.

Based upon the foregoing, the Arbitrator finds the Petitioner is entitled to TTD benefits for 33 and 2/7 weeks, representing the periods from June 22, 2016 through December 8, 2016; May 8, 2017 through May 14, 2017; and May 24, 2017 through July 18, 2017.

19IWCC0482

Issue O: *Admissibility of certain evidence*

The Respondent offered into evidence surveillance reports dated July 15, 2016, August 12, 2016, and September 8, 2016. (*RX* 6). The Petitioner raised a hearsay objection to these documents. (*T.* at 93). The Respondent asserted the reports should be admissible under a business records exception. After reviewing the same, the Arbitrator finds the reports contained in *RX* 6 are admissible under the business records exception to hearsay and shall remain admitted into evidence and a part of the record of these proceedings.

Finally, 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.

Signature of Arbitrator

January 9, 2018
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 PEORIA	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

THAD ALTMAN,

Petitioner,

vs. NO: 14 WC 33282

KEYSTONE,

19IWCC0483

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, medical expenses, prospective medical treatment, temporary total disability, permanent partial disability, and Respondent 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, with the exception of the clerical error noted below.

In the Findings of Fact section, in paragraph 4 of page 2, the Arbitrator's decision states: "The record also stated Petitioner '...denies no new injury...'". The Commission hereby corrects the statement to read: "The record also stated Petitioner '...denies *known* new injury...'"

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 7, 2017, is hereby affirmed and adopted with the correction of the clerical error noted above.

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

19IWCC0483

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: SEP 6 - 2019

Maria E. Portela

Thomas J. Tyrrell

Deborah L. Simpson

MEP/dmm
O: 081319
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ALTMAN THAD
Employee/Petitioner

Case# **14WC033282**

KEYSTONE
Employer/Respondent

19IWCC0483

On 6/7/2017, 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 1.07% 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:

1824 STRONG LAW OFFICES
MICHAEL A BRANDOW
3100 N KNOXVILLE AVE
PEORIA, IL 61603

0507 RUSIN & MACIOROWSKI LTD
JOHN A MACIOROWSKI
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Thad Altman
Employee/Petitioner

Case # 14 WC 33282

v.

19IWCC0483

Consolidated cases: n/a

Keystone
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 William R. Gallagher, Arbitrator of the Commission, in the city of Peoria, on April 12, 2017. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On February 7, 2014, Respondent was operating under and subject to the provisions of the Act.

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

On this date, Petitioner did 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 $54,288.00; the average weekly wage was $1,044.00.

On the date of accident, Petitioner was 45 years of age, married with 2 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $18,792.60 for TTD, $0.00 for TPD, $0.00 for maintenance, and $23,260.71 for other benefits, for a total credit of $42,053.31.

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 27, in regard to Petitioner's right arm/elbow condition, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. All bills for medical services rendered in connection with Petitioner's low back, left shoulder and hernia are denied.

Respondent shall pay Petitioner temporary total disability benefits of $696.00 per week for 22 5/7 weeks commencing March 8, 2014, through March 19, 2014; and April 29, 2014, through September 22, 2014, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $626.40 per week for 12.65 weeks because the injury sustained caused the 22 1/2% loss of use of the right arm less the credit of 17 1/2% loss of use of the right arm (56.925 weeks – 44.275 weeks), as provided in Section 8(e) of the Act.

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

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

William R. Gallagher, Arbitrator

June 6, 2017
Date

JUN 7 - 2017

Petitioner filed an Amended Application for Adjustment of Claim which alleged he sustained a repetitive trauma injury arising out of and in the course of his employment for Respondent. The Application alleged a date of accident (manifestation) of February 7, 2014, and that Petitioner sustained "Repetitive trauma - excessive pounding with sledgehammer" and sustained an injury to "Both hands and arms" (Petitioner's Exhibit 1). Petitioner and Respondent stipulated that Petitioner sustained a repetitive trauma injury; however, Respondent disputed liability on the basis of causal relationship (Arbitrator's Exhibit 1).

Petitioner claimed he was entitled to temporary total disability benefits of 90 1/7 weeks commencing March 8, 2014, through March 19, 2014; April 29, 2014, through August 31, 2015; and February 5, 2016, through June 27, 2016. Respondent agreed that Petitioner was entitled to temporary total disability benefits of 22 5/7 weeks commencing March 8, 2014, through March 19, 2014; and April 29, 2014, through September 22, 2014, but disputed Petitioner's entitlement to any temporary total disability benefits thereafter (Arbitrator's Exhibit 1).

As noted herein, the Amended Application alleged Petitioner sustained an injury to both hands and arms. However, the evidence tendered at trial indicated that Petitioner sustained an injury to his right arm/elbow as a result of the repetitive trauma. Respondent did not dispute liability for Petitioner's right arm/elbow injury and authorized the medical treatment Petitioner received thereafter and paid Petitioner temporary total disability benefits for the time Petitioner was off work because of the right arm/elbow injury (the 22 5/7 weeks previously noted herein).

Petitioner alleged that while he was in work conditioning on August 18, 2014, for his right arm/elbow injury, he sustained injuries to his left shoulder and low back. Respondent disputed that Petitioner sustained injuries to his left shoulder and low back while in work conditioning. This was the basis of Respondent's denial of liability on the basis of causal relationship.

On February 10, 2014, Petitioner reported to Respondent that he had sustained a work-related injury on February 8, 2014. A report was prepared which stated Petitioner had sustained an injury to an elbow (the report did not specify whether it was the right or left elbow) as a result of swinging a sledgehammer (Petitioner's Exhibit 3).

Petitioner was initially seen by Dr. Homer Pena, on February 11, 2014. Dr. Pena ordered an x-ray of Petitioner's right elbow which was taken that day. The x-ray was negative for fractures. Dr. Pena then referred Petitioner to Dr. James Williams, an orthopedic surgeon.

Dr. Williams initially saw Petitioner on March 6, 2014. Dr. Williams noted that an MRI of the right elbow was performed on February 11, 2014, which had findings consistent with lateral epicondylitis. Dr. Williams examined Petitioner and confirmed the diagnosis of right lateral epicondylitis. He reviewed Petitioner's job duties and opined they were consistent with the injury Petitioner had sustained. He administered a cortisone injection to Petitioner's right elbow at that time. Dr. Williams stated that if the injection did not help, surgery might be indicated (Petitioner's Exhibit 24).

Petitioner was again seen by Dr. Williams on April 17, 2014, and Petitioner's right elbow symptoms had not improved. Dr. Williams recommended that Petitioner undergo surgery consisting of a right lateral epicondylectomy and debridement. On April 29, 2014, Dr. Williams performed that right elbow surgery (Petitioner's Exhibits 24 and 29).

Subsequent to surgery, Petitioner continued to be treated by Dr. Williams. In May, 2014, Dr. Williams ordered physical therapy. Petitioner received physical therapy at Accelerated Rehabilitation Centers from May 14, 2014, through August 15, 2014. When Dr. Williams evaluated Petitioner on August 11, 2014, he noted Petitioner had made significant progress and was pleased with the outcome of the surgery. At that time, Dr. Williams noted that Petitioner was going to proceed with work conditioning (Petitioner's Exhibit 24).

Petitioner began work conditioning at St. Francis Medical Center on August 18, 2014, and participated in work conditioning through August 20, 2014. When Petitioner went there on August 25, 2014, he advised that he had incurred back and leg symptoms since August 21, 2014, with occasional shooting pain with numbness/tingling. Petitioner also stated he had increased back/leg symptoms after working out and walking in the pool over the weekend. According to the record, Petitioner's primary care physician (who was not identified) put Petitioner's participation in work conditioning on hold because of his low back symptoms (Respondent's Exhibit 4; Deposition Exhibit 7).

Petitioner was seen at the ER of Pekin Hospital on August 25, 2014. According to the hospital record, Petitioner reported low back pain, worse for the past several days, but Petitioner had a history of low back pain. The record also stated Petitioner "...denies no new injury, but also reports L shoulder pain, feels a grinding when he raises his arm which has been ongoing for several days." It was recommended Petitioner discontinue physical therapy, he was given a prescription and was discharged (Petitioner's Exhibit 6).

Petitioner was subsequently seen by Dr. Michael Honan, his family physician, on August 27, 2014. Dr. Honan noted Petitioner had acute low back pain and left shoulder pain. In regard to Petitioner's low back, Petitioner informed Dr. Honan that he was in a work hardening program and his back injury flared. Petitioner stated "He thinks it should be workman's compensation." In regard to the left shoulder, Petitioner reported he had left shoulder pain post work hardening. Petitioner did not advise Dr. Honan of a specific injury while in work hardening to either the low back or left shoulder (Petitioner's Exhibit 8).

Dr. Honan ordered an MRI scan of the lumbar spine which was performed on September 15, 2014. The scan revealed a foraminal disc herniation at L1-L2 to the left; a foraminal disc protrusion/herniation at L3-L4 to the right; and a disc herniation at L4-L5 to the right (Petitioner's Exhibit 15).

Petitioner was seen by Dr. Pena on September 18, 2014. Petitioner informed Dr. Pena that he had back symptoms after work conditioning on August 18 through August 27, 2014. Petitioner did not advise Dr. Pena of having any left shoulder symptoms. In regard to Petitioner's low back, Dr. Pena opined Petitioner had left and right S1 radiculopathies. In regard to Petitioner's right elbow, he noted the presence of the surgical scar, but that the examination of the elbow was normal. He

opined Petitioner could return to work effective September 22, 2014, in regard to the right elbow condition (Petitioner's Exhibit 7).

Dr. Williams evaluated Petitioner on September 22, 2014. He released Petitioner to return to work without restrictions the following day, September 23, 2014 (Petitioner's Exhibit 24).

Petitioner had low back symptoms which required medical treatment prior to the accident of February 7, 2014. On May 16, 2000, an MRI of the lumbar spine was performed which revealed a central right disc prolapse at L4-L5, degenerative disc disease at L5-S1 and disc bulging at L3-L4 (Respondent's Exhibit 4; Deposition Exhibit 2).

Petitioner was evaluated by Dr. James Maxey on June 12, 2000, for low back and bilateral leg pain. Dr. Maxey reviewed the MRI and opined it revealed a severe spinal stenosis with a disc herniation to the right at L4-L5 (Respondent's Exhibit 4; Deposition Exhibit 3).

Petitioner was subsequently treated by Dr. John Marshall, a pain management physician, who saw Petitioner on June 29, 2000. At that time, Petitioner complained of severe low back pain with radiation into both legs. Dr. Marshall administered epidural steroid injections to Petitioner's low back on July 14, July 28 and August 16, 2000 (Respondent's Exhibit 4; Deposition Exhibit 3).

At the direction of Respondent, Petitioner was examined by Dr. Jay Levin, a spine surgeon, on October 1, 2014. In connection with his examination of Petitioner, Dr. Levin reviewed medical records as well as the MRIs of May 16, 2000, and September 15, 2014. At Dr. Levin's direction, Petitioner underwent EMG/nerve conduction studies of the lower extremities which were performed on October 14, 2014. Those studies were normal. In his report dated October 21, 2014, Dr. Levin opined Petitioner had long standing degenerative disc disease at multiple levels of the lumbar spine. He opined Petitioner's current findings in regard to the low back were not related to the accident of February 7, 2014, and were consistent with his chronic degenerative changes and not related to any event in work conditioning (Respondent's Exhibit 4; Deposition Exhibit 15).

Petitioner was seen by Dr. Richard Kube, an orthopedic surgeon, on October 9, 2014. When seen by Dr. Kube, Petitioner advised that he had hurt his back while in work conditioning on August 18, 2014. Dr. Kube opined that the MRI revealed a disc protrusion at L4-L5. He initially recommended Petitioner undergo an epidural steroid injection (Petitioner's Exhibit 14).

Dr. Kube administered an epidural steroid injection on October 20, 2014, at L4-L5, but Petitioner only experienced temporary relief of his symptoms. Dr. Kube subsequently performed back surgery on December 22, 2014. The surgical procedure consisted of bilateral decompression at L4-L5 with partial laminectomies, foraminotomies and placement of a "Coflex" device for stabilization (Petitioner's Exhibit 14 and 18).

Dr. Kube treated Petitioner following surgery and ordered physical therapy which Petitioner received from January 13, 2015, through June 10, 2015. Dr. Kube also ordered a functional capacity evaluation (FCE) which was performed on June 24, 2015. According the FCE,

Petitioner was limited to work in the medium workload category. Dr. Kube saw Petitioner on July 9, 2015, and imposed permanent work restrictions of no lifting in excess of 40 pounds (Petitioner's Exhibits 14, 20 and 21).

While being treated by Dr. Kube, Petitioner informed him on February 3, 2015, that he had left shoulder complaints. Dr. Kube then referred Petitioner to Dr. Blair Rhode, an orthopedic surgeon (Petitioner's Exhibit 14).

Dr. Rhode initially saw Petitioner on March 25, 2015, and Petitioner informed him that he hurt his left shoulder while in work conditioning for a right elbow injury in August, 2014. Petitioner informed Dr. Rhode he had to shovel and lift bricks and developed back and left shoulder pain. Dr. Rhode ordered an MRI of the left shoulder which was performed on March 26, 2015. The MRI revealed marked glenohumeral joint osteoarthritis (Petitioner's Exhibits 9 and 10).

Dr. Rhode treated Petitioner's left shoulder condition conservatively and administered a series of cortisone injections. However, Dr. Rhode ultimately performed left shoulder surgery on February 15, 2016, and the surgical procedure consisted of a left shoulder replacement (Petitioner's Exhibits 10 and 28).

Respondent provided additional medical records to Dr. Levin for his review; specifically, records for treatment Petitioner had received subsequent to his evaluation of October 1, 2014. Dr. Levin opined that given the fact that the 2000 and 2014 MRIs had consistent findings and the EMG/nerve conduction studies of October 14, 2014, were normal that surgery on Petitioner's lumbar spine was not indicated (Respondent's Exhibit 4; Deposition Exhibit 16).

On February 20, 2015, Petitioner was seen by Dr. Tom Rossi, for an abdominal protrusion which Petitioner noted while in physical therapy for his back. Dr. Rossi diagnosed Petitioner with a ventral hernia and performed corrective surgery on March 3, 2015 (Petitioner's Exhibit 22).

At the direction of Respondent, Dr. Troy Karlsson, an orthopedic surgeon, performed a records review in regard to Petitioner's left shoulder condition. In his reports dated June 18, 2015, and April 30, 2016, Dr. Karlsson opined there was no causal relationship between Petitioner's left shoulder condition and the work hardening activities of August, 2014. He noted the lack of any left shoulder complaints by Petitioner when seen in the ER on August 25, 2014, and the fact that the findings noted in the MRI and surgical reports were chronic long standing degenerative changes not caused or aggravated by any of the activities of August, 2014 (Respondent's Exhibit 5; Deposition Exhibits 11 and 12).

Dr. Kube was deposed on May 18, 2015, and his deposition testimony was received into evidence at trial. In regard to his diagnosis and treatment of Petitioner's low back condition, Dr. Kube's testimony was consistent with his medical records. In regard to causality, Dr. Kube testified that Petitioner's participation in work conditioning could have exacerbated the pre-existing condition or caused a new injury (Petitioner's Exhibit 18; p 46).

On cross-examination, Dr. Kube agreed that Petitioner did not give him a history of having sustained a specific event that caused the back pain while in work conditioning. Dr. Kube also stated that he did not have the opportunity to review the MRI obtained in 2000 and, that if he had been able to do so, he would have been in a better position to determine the age of the disc protrusion. Dr. Kube also conceded that, even assuming some type of occurrence while Petitioner was in work hardening, he could not state whether that activity changed the structure of the lumbar spine in any way (Petitioner's Exhibit 18; pp 46-49).

Dr. Levin was deposed on October 15, 2015, and his deposition testimony was received into evidence at trial. Dr. Levin's testimony was consistent with his medical reports of October 21, 2014, and January 6, 2015, and he reaffirmed the opinions contained therein. Dr. Levin testified that Petitioner did not inform him of having sustained a specific accident while in work conditioning to his back and that when Petitioner was seen in the ER on August 25, 2014, he denied any recent injury or trauma. Further, when Dr. Levine reviewed the MRIs of May 16, 2000, and September 15, 2014, he noted that the abnormalities were at the same level and the same type of pathology. He also noted that Petitioner did not inform him of having sustained any injury to his left shoulder while in work conditioning (Respondent's Exhibit 4; pp 28-34, 38).

Dr. Rhode was deposed on February 11, 2016, and his deposition testimony was received into evidence at trial. In regard to his treatment and diagnosis of Petitioner's left shoulder condition, Dr. Rhode's testimony was consistent with his medical records. In regard to causality, Dr. Rhode testified the work conditioning could have caused or aggravated a pre-existing condition in Petitioner's left shoulder (Petitioner's Exhibit 13; p 26).

On cross-examination, Dr. Rhode agreed he had not reviewed any of the prior medical records. When questioned about the lack of history of Petitioner having sustained a left shoulder injury while in work conditioning, Dr. Rhode repeatedly stated he was "unaware." He also agreed that someone of Petitioner's age could have had the same findings noted in the MRI scan even in the absence of a traumatic event (Petitioner's Exhibit 13; pp 30-35).

Dr. Karlsson was deposed on August 22, 2016, and his deposition testimony was received into evidence at trial. Dr. Karlsson's testimony was consistent with his medical reports of June 18, 2015, and April 30, 2016, and he reaffirmed the opinions contained therein. In explaining his opinion that there was not a causal relationship between Petitioner's work hardening activities and the left shoulder condition, Dr. Karlsson noted the lack of traumatic findings in both the MRI and surgery as well as the fact that the ER record of August 25, 2014, indicated that there was no recent injury (Respondent's Exhibit 5; pp 9-10, 15-16).

Petitioner was able to return to work for Respondent on June 28, 2016, to his regular job. Petitioner still has some complaints of pain in the right elbow. Petitioner stated he has back problems when he stands for an extended period time and he still continues to note popping/grinding and dull pain in his left shoulder.

Petitioner had a prior right elbow injury for which he received a settlement of 17 1/2% loss of use of the right arm. Respondent introduced into evidence a record of that settlement and was claiming a credit for same (Respondent's Exhibit 3).

Conclusions of Law

In regard to disputed issue (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner's current condition of ill-being is, in part, related to the accident of February 7, 2014.

In support of this conclusion the Arbitrator notes the following:

There was no dispute that Petitioner sustained a repetitive trauma injury to his right arm/elbow that manifested itself on February 7, 2014, and that Petitioner's current condition of ill-being in regard to his right arm/elbow is causally related to same.

The Arbitrator finds Petitioner's other conditions of ill-being, specifically, the low back, left shoulder, and hernia are not causally related to the repetitive trauma that manifested itself on February 7, 2014, or the work conditioning of August, 2014.

Petitioner did not describe any specific accident in regard to either his low back or left shoulder while he was in work conditioning on August 18, 2014, to any of his medical providers.

When seen in the ER on August 25, 2014, Petitioner denied having sustained a "new injury."

While Dr. Kube testified Petitioner's participation in work hardening may have exacerbated the pre-existing back condition or caused a new injury, he conceded that Petitioner did not inform him of having sustained a specific accident while in work conditioning, he did not compare the 2000 and 2014 MRIs and he could not state that Petitioner's activities while in work conditioning changed the structure of the lumbar spine.

Respondent's Section 12 examiner, Dr. Levin, opinion that Petitioner's low back condition was not work-related was based upon the lack of history of a specific accident in the ER record of August 25, 2014, and his review/comparison of the 2000 and 2014 MRIs.

While Dr. Rhode testified Petitioner's left shoulder condition was caused or aggravated by Petitioner's work conditioning, he had no knowledge of whether Petitioner informed any of the prior medical providers that he had sustained an injury while in work conditioning. He also agreed that someone of Petitioner's age could have the same findings noted in the MRI scan.

Respondent's record reviewing physician, Dr. Karlsson, specifically noted the lack of any left shoulder complaints when Petitioner was in the ER on August 25, 2014, and the lack of traumatic findings in both the MRI and surgery.

Based upon the preceding, the Arbitrator finds the opinions of Dr. Levin and Dr. Karlsson to be more persuasive than those of Dr. Kube and Dr. Rhode.

In regard to Petitioner's hernia, there was no evidence tendered that this condition was related to the repetitive trauma that manifested itself on February 7, 2014, or the work conditioning of August, 2014.

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 in regard to his right arm/elbow condition 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 27, in regard to Petitioner's right arm/elbow condition, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. All bills for medical services rendered in connection with Petitioner's low back, left shoulder and hernia are denied.

In regard to disputed issue (K) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner is entitled to temporary total disability benefits of 22 5/7 weeks commencing March 8, 2014, through March 19, 2014; and April 29, 2014, through September 22, 2014.

In support of this conclusion the Arbitrator notes the following:

There was no dispute that Petitioner was temporarily totally disabled for aforestated periods of time because of his right arm/elbow condition.

In regard to disputed issue (L) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner has sustained permanent partial disability to the extent of 22 1/2% loss of use of the right arm.

In support of this conclusion the Arbitrator notes the following:

Neither Petitioner nor Respondent tendered an AMA impairment rating. The Arbitrator gives this factor no weight.

Petitioner's job required the use of both upper extremities; however, he was released to return to work to his regular job without restrictions. The Arbitrator gives this factor moderate weight.

Petitioner was 45 years old at the time of the accident. He will have to live with the effects of his right arm/elbow injury for the remainder of his working and natural life. The Arbitrator gives this factor moderate weight.

There was no evidence that Petitioner's right arm/elbow injury had any effect on his future earning capacity. The Arbitrator gives this factor no weight.

The treatment records indicated Petitioner sustained a repetitive trauma injury to his right arm/elbow which ultimately required surgery. Petitioner made a good recovery and, at trial, had minimal complaints. The Arbitrator gives this factor significant weight.

In regard to disputed issue (O) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Respondent is entitled to a credit of 17 1/2% loss of use of the right arm and that Petitioner is entitled to receive from Respondent 12.65 weeks of permanent partial disability benefits.

In support of this conclusion the Arbitrator notes the following:

Pursuant to Section 8(e)17 of the Act, Respondent is entitled to a credit for prior compensation paid in connection with said prior injuries. The Commission has ruled that Respondent is entitled to a credit for prior settlements and awards and that it is to be based upon the number of weeks paid rather than the percentage of disability previously paid. As noted in disputed issue (L) the Arbitrator has awarded Petitioner 22 1/2% loss of use of the right arm or 56.925 weeks. Petitioner had a prior settlement of 17 1/2% loss of use of the right arm or 44.275 weeks. The difference is 12.65 weeks.

William R. Gallagher, Arbitrator

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 PEORIA	)	[X] Reverse causal connection	[ ] Second Injury Fund (§8(e)18)
			[ ] PTD/Fatal denied
		[ ] Modify Choose direction	[ ] None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KEVIN MARONEY,

Petitioner,

19IWCC0484

vs.

NO: 17 WC 14133

JOE'S TOWING & RECOVERY,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, causal connection, temporary total disability, and permanent partial disability and being advised of the facts and law, reverses the Arbitrator's Decision regarding causal connection, vacates the award of temporary total disability and medical benefits and modifies the award of permanent partial disability as stated below. In so finding, the Commission adopts the Procedural History and the Findings of Fact with modifications noted below, and strikes the Conclusions of Law and Order in the Arbitrator's Decision, which is attached hereto and made a part hereof.

Findings of Fact

Respondent stipulated to accident. Petitioner went to the emergency room ("ER") at OSF St. Francis Medical Center on December 18, 2016. The history at the ER reflects that when Petitioner was walking to a car, he slipped and fell on ice. He did not recall the events and had possible loss of consciousness for approximately one minute per a bystander. He complained of headache, neck and back pain. He also had left shoulder pain. The Petitioner reported that he fell off a building approximately 20 years prior and had old compression fractures. PX3.

The ER examination included X-rays and CT scans of the head, lumbar and cervical spine. The lumbar CT scan showed posterior disc bulge with mild left neural foraminal narrowing, L4-

L5 posterior disc bulge without significant neural foraminal or central canal stenosis, and bulges at L2-3 and L3-4 without mild neural foraminal narrowing. The next record of treatment is at the ER on April 19, 2017. Four months had elapsed with no medical treatment, no documented left leg radiculopathy and the CT confirmation in December that no herniation occurred at the time of the December fall.

After consulting Dr. Blair Rhode, Petitioner underwent a lumbar spine MRI on May 12, 2017 which showed disc material extrusion at L5-S1, superimposed on the disc bulge centrally and para-centrally to the left causing compression of the left S1 nerve root in the left lateral recess. Dr. Rhode referred Petitioner to Dr. Richard Kube.

Petitioner was seen for a section 12 evaluation by Dr. Stephen Weiss on June 28, 2017 at Respondent's request. Dr. Weiss opined that Petitioner sustained a lumbar strain secondary to the work incident, supported by the fact that Petitioner was able to continue working after the injury in question and his radicular complaints, which required treatment, were not documented until four months later (April 2017). RX1, DepX2.

On May 31, 2017, Dr. Kube's office note documented that the degeneration of the Petitioner's back was mild, he had a healed L1 fracture and a fairly large disc herniation at L5-S1 on the left side that was causing nerve compression.

On June 19, 2017, Petitioner underwent surgery consisting of a microdiscectomy and hemilaminotomy with decompression of L5-S1. The operative report documents preoperative and postoperative diagnoses that are the same:

1) Very large left-sided herniated nucleus pulposus with noted weakness of the left lower extremity;
2) Left herniated disc at L5-S1;
3) Morbid obesity. PX9.

Dr. Weiss testified on March 2, 2018. The Commission notes that when asked on cross-examination to review the Petitioner's CT scan from the emergency room visit on December 19, 2016. Dr. Weiss testified as follows:

> The 2016 CT scan notes multiple degenerative changes from T12 through S1. There is no disc herniation. L1 compression fracture results in about a 40% anterior height loss and is unchanged when compared to March 20, 2012. No new fracture, cortical disruption or loss of vertebral height and then it shows degenerative changes at several levels consisting of marginal osteophytes, etc., and then it catalogs degenerative changes from T12 through S1. RX1, 37.

Then when asked on cross examination if a CT of lumbar spines compare in general to CT of abdomen and pelvis, Dr. Weiss testified:

> A. In some ways, yes. Bony changes would be able to be seen. Fractures would be able to be seen. Vertebral height would be able to be seen.

Q. What about assessing degenerative changes like the one that you testified for which Mr. Maroney was having some lumbar spine or lumbar pain in 2012?

A. The (2012) CT scan of the abdomen and pelvis wouldn't be as good as the subsequent (2016) one, but it was the subsequent one (2016) which showed degenerative changes at multiple levels without evidence of a herniation or anything else nor was there any evidence clinically of a herniation. RX1, 37-38.

On August 15, 2017, Dr. Kube's 8/15/17 Assessment/Plan states:

...Of note, he has an independent medical evaluation from mid-July that does not find this related. That opinion seems to be related primarily on the fact that the nerve pain was not documented until at least four months out, which is different from the history that I have. At this point, unless I have something that proves to the contrary in front of me, as often there are records that are omitted during those IMEs, I would really kind of end up deferring to the facts and evidence of his radiculopathy as shown to have started early on, and I certainly believe that he sustained this injury at work, and that is really where we would be going. If his radiculopathy that has shown improvement did happen actually 4 months later rather than at the time, then certainly that would be less feasible to tie this to the work injury.

Dr. Kube testified on December 7, 2017 and admitted multiple times he never reviewed the 2016 CT scan or the December 2016 emergency room records. PX10, 23, 39-44, 46-50, 68-71.

Petitioner testified he never asked Respondent for medical treatment between December 20, 2016 until the ER visit on April 19, 2017. T. 69. No evidence was presented that Petitioner tried to secure additional medical treatment between December 20, 2016 and April of 2017. The Commission finds no evidence was presented that Petitioner worked at a much slower pace from December 20, 2016 through April 2017. The Petitioner continued to work his same job.

The Commission views the evidence differently than the Arbitrator and finds Dr. Kube's causal connection opinion was offered without knowledge of the findings of the CT scan on the date of accident and is, therefore, not credible and is entitled to little weight. *See, e.g., Sunny Hill of Will County v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130028WC, 14 N.E.3d 16, 383 Ill. Dec. 184 (Expert opinions must be supported by facts and are only as valid as the facts underlying them.)

The Commission is persuaded by Dr. Weiss's testimony that there was no disc herniation noted on the December 19, 2016 CT scan, which showed degenerative changes at multiple levels, and the fact that the radiologist compared it to the 2012 CT scan of the abdomen and pelvis and found no changes. The Commission similarly relies upon Dr. Weiss's opinion that the surgery was for a herniated disc at L5-S1 and a S1 radiculopathy which developed in April 2017. RX1, 43-46.

Conclusions of Law

Causal Relationship

In resolving disputed issues of fact, including issues related to causation, it is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474. *Fickas v. Industrial Comm'n (Evans Constr.),* 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 1169.

The Commission affords greater weight to the opinions of Dr. Weiss over those of Dr. Kube and finds the surgery consisting of hemilaminectomy and microdiscectomy with decompression of L5-S1, is not related to the Petitioner's work-related fall on December 18, 2016. Based on the opinion of Dr. Weiss, Petitioner suffered a lumbar strain as result of the December 18, 2016 fall. The Commission finds that after the December 18, 2016 fall, the Petitioner returned to his baseline condition when he returned to work full-duty and was without subsequent medical treatment until the herniation in April 2017. The Commission infers, based upon Dr. Weiss's testimony, that the Petitioner was at maximum medical improvement on December 19, 2016.

Temporary Total Disability.

Based upon the Commission's finding regarding causal relationship referenced above, the awarded temporary total disability benefits are vacated.

Medical Expenses

Based upon the Commission's finding regarding causal relationship referenced above, the Commission awards the Petitioner medical expenses for the emergency room treatment at OSF St. Francis on December 18, 2016 including the Central Illinois Radiological bill from December 19, 2016, pursuant to sections 8(a) and 8.2 of Act and subject to the fee schedule.

Permanent Partial Disability

Based upon the Commission's finding regarding causal relationship referenced above, the Commission views the evidence differently than the Arbitrator with respect to the weight of the factors that must be considered under Section 8.1b(b) to determine permanent partial disability for accidental injuries occurring on or after September 1, 2011:

(i) the reported level of impairment pursuant to subsection (a)

No impairment report and/or opinion was submitted into evidence. The Commission gives no weight to this factor.

(ii) the occupation of the injured employee

Petitioner continues to work in his pre-injury job as tow truck driver earning the same wages. The Commission finds this factor weighs in favor of decreased permanent disability.

(iii) the age of the employee at the time of the injury

Petitioner was 46 years old on the date of accident. Noting Petitioner will suffer the effects of his injury for the remainder of his working and natural life, the Arbitrator afforded great weight to this fact. The Commission concurs that Petitioner's age weighs in favor of increased permanent disability given that Petitioner will continue to perform a physical job until the age of retirement.

(iv) the employee's future earning capacity

No evidence was submitted to show that Petitioner sustained an impairment in his earning capacity. The Commission affords this factor moderate weight and weighs in favor of decreased permanent disability.

(v) evidence of disability corroborated by the treating medical records

In analyzing the evidence of disability as corroborated by the treating medical records, the Commission finds that the Petitioner went back to full-duty work immediately after the subject accident and there is no evidence that Petitioner had additional pain complaints or medical treatment until Petitioner went to the ER in April 2017 and subsequently underwent an unrelated L5-S1 microdiscectomy and hemilaminotomy in June 2017. The Commission finds the Petitioner's subjective complaints are unrelated to the subject incident and therefore, the Commission finds the medical records do not corroborate that Petitioner's significant complaints and deficits are related to the subject accident and therefore, weigh in favor of decreased permanent disability.

Having weighed the evidence and analyzed the Section 8.1b(b) factors, the Commission finds Petitioner sustained a 5% loss of use of the person as a whole under Section 8(d)2.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed November 9, 2018, is reversed regarding causal connection, the award of temporary total disability is vacated and the award of medical benefits and permanent partial disability are modified as above, and is otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Conclusions of Law and Order in the Arbitrator's Decision are stricken.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $330.00 per week for a period of 25 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 5% loss of use of the person as a whole.

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

for reasonable related medical expenses incurred on December 18, 2016 and December 19, 2016 under §8(a)and §8.2 of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $25,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: SEP 6 - 2019
DSL/bsd
O070919
46

Deborah L. Simpson

Maria Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

19IWCC0484

MAROONEY, KEVIN
Employee/Petitioner

Case# **17WC014133**

18WC000432

JOE'S TOWING & RECOVERY
Employer/Respondent

On 11/9/2018, 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 2.45% 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:

1824 STRONG LAW OFFICES
HANIA SOHAIL
3100 N KNOXVILLE AVE
PEORIA, IL 61603

0445 RODDY LAW LTD
FRANCIS O'BYRNE
303 W MADISON ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF **PEORIA**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Kevin Maroney
Employee/Petitioner

v.

Joe's Towing & Recovery
Employer/Respondent

Case # **17** WC**14133**

Consolidated cases: 18 WC 00432

An *Application for Adjustment 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 **Peoria**, on **August 17, 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. [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 **12/18/2016**, 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 $**28,600.00**; the average weekly wage was $**550.00**.

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

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

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

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

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

ORDER

Respondent shall pay the Petitioner directly medical bills in the amount of $106,168.10, pursuant to Sections 8(a) and 8.2 of the Act and subjected to the fee schedule. Respondent shall be provided a credit for medical benefits that have been paid and will hold Petitioner harmless form any claims for services for which Respondent is receiving a credit funder Section 8(j) of the Act, as set forth in the Conclusions of Law attached herein.

Respondent shall pay TTD benefits from April 19, 2017 to October 24, 2017. The Arbitrator finds that Petitioner is entitled to TTD for 26 6/7 weeks at a rate of $366.66 per week, as set forth in the Conclusions of Law attached herein.

Respondent shall pay 15% loss of use of his whole body pursuant to Section 8(d)(2) of the Illinois Workers' Compensation Act. Arbitrator awards Petitioner permanent partial disability benefits for 75 weeks at $330.00 per week as set forth in the Conclusions of Law attached herein.

Respondent shall pay Petitioner compensation that has accrued from December 18, 2016 through December 17, 2018 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

11/8/2018
Date

NOV 9 - 2018

PROCEDURAL HISTORY 19IWCC0484

Kevin Maroney filed two Application for Adjustment of Claims against Joe's Towing & Recovery alleging dates of injury of December 18, 2016 and April 19, 2017. The cases were consolidated and tried on August 17, 2018 in Peoria, Illinois. Separate decisions were issued. For Case #17 WC 14133 the issues were whether Petitioner's current condition of ill-being is causally connected to his injury of December 18, 2016, whether Respondent is liable for medical bills and TTD benefits. The nature and extend of Petitioner's injury is also at issue. (Arb. Ex.#1).

FINDINGS OF FACT

Kevin Maroney (hereinafter referred to as "Petitioner") testified that he worked for Joe's Towing (hereinafter referred to as "Respondent") as a flatbed tow truck driver. Petitioner testified that on December 18, 2016, he received a call to jump start a car. Petitioner testified the car was parked in the driveway which was covered in snow. Petitioner was walking toward the car when he slipped on ice that was covered by the snow. Petitioner's feet shot out from under him as he fell on his back striking the back of his head on the ground. Petitioner lost consciousness. Petitioner was taken to St. Francis Hospital by ambulance. Petitioner testified that in the ambulance he was experiencing back and head pain and he was feeling confused. At St. Francis Hospital, Petitioner reported headache, neck and back pain. Petitioner was also complaining that he was ex0perencing pain in his left hip. Petitioner reported suffering compression fractures 20 years ago after a fall off a building. The examination was positive for back pain, left shoulder pain and neck pain. Tenderness was noted in the lumbar and thoracic and cervical areas. Midline and paravertebral tenderness was also noted. X-rays and CT scans were taken of the head, lumbar and cervical spine. The lumbar CT scan showed posterior disc budge with mild left neural foraminal narrowing, L4-L5 posterior disc bulge without significant neural foraminal or central canal stenosis, and bulges at L2-3 and L3-4 without or mild neural foraminal narrowing. Petitioner was diagnosed with a syncope, acute back pain and neck pain. Petitioner was proscribed Flexeril and Ultram and told to follow up with his primary care physician. (PX 3).

Petitioner testified that tried to secure additional medical treatment approved, he continued to work for Respondent but at a much slower pace. Petitioner testified that during this

period he was experiencing back spasms and shooting pain. Petitioner said his symptoms did not go away.

On April 19, 2017, Petitioner testified that while driving a flatbed truck down Route 121 when he experienced additional back pain. Petitioner testified that Route 121 was broken up causing the drive to be bouncy. Upon returning from the tow, Petitioner advised a co-worker about his increased pain level. Petitioner testified that he went to the emergency room.

On April 19, 2017, Petitioner went to the emergency room at St. Francis Medical Center due to worsening back pain. Petitioner reported that after falling last winter he has been experiencing ongoing back pain and during the last five (5) days his back pain worsened causing him to lose two (2) days of work. Petitioner reported that he called his primary care physician and was told to come to the emergency room. Petitioner also reported experiencing left low back pain that radiates down lateral leg to ankle since falling on ice on December 18, 2016 and he has been having these issues since that date. Petitioner said his pain is in the low back and radiates up back and down his left leg. Petitioner also described a sharp left-sided buttock pain radiating down his left ankle which is new with radiation. Petitioner denied any recent trauma but stated that driving the tow truck makes his pain worse. While at the hospital, Petitioner's pain improved, and his condition stabilized. The records show that Petitioner's left lower extremity was now equal in strength compared to the right including dorsi and plantar flexion left foot. The records show that Petitioner's symptoms were controlled, and he was able to ambulate at baseline. Petitioner was discharged and told to return for further imaging if his pain worsens. The medical records state the exam shows a likely herniated disc with radiculopathy due to no midline spinal tenderness or step-off and no new trauma. (PX 3).

Petitioner testified that he saw Dr. Adams two days after being released from the hospital. [1] The Arbitrator notes that Petitioner submitted onto evidence the medical records of OSF Center for Health. (PX 6). The subpoena issued to OSF Center for Health sought records from December 18, 2016 to present. The earliest record found was dated April 24, 2017. On that date, Petitioner reported low back pain from fall during the winter of 2016 while on a service call and an acute exacerbation causing an emergency room visit on April 19, 2017. Petitioner

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[1] The Arbitrator notes that Petitioner testified that he saw Dr. Adams two days after being released from St. Francis Hospital. The OSF Center for Health records do not contain records from an office visit after Petitioner was released from St. Francis Hospital in December of 2016 but the OSF Center for Health records do contain records after Petitioner was released of from St. Francis Hospital in April of 2017.

reported sciatica pain radiating into his left leg. An examination of the lumbar back noted decreased range of motion, Petitioner had a normal straight leg raise test. Petitioner was diagnosed with left-sided low back pain with left sided sciatica. Petitioner was referred to physical therapy and proscribed Toradol. (PX 6).

Petitioner testified that after seeing Dr. Adams, he tried to have the physical therapy approved. Petitioner called Joe's Towing and spoke with an individual named Becky who directed Petitioner to Respondent's insurance company, Western National Mutual Insurance Company. Petitioner testified that he called Western National Mutual Insurance Company on several occasions and spoke to Tom Moretti who told him that the adjuster previously assigned to his claim was no longer with the company and a new adjuster would be contacting him and authorizing the treatment. Petitioner testified that the additional medical treatment was not authorized. Petitioner testified that he made several efforts to reach out to Western National without any success.

Petitioner testified that physical therapy was not approved and while waiting for the physical therapy approval he hired an attorney, who directed him to Orland Park Orthopedics.

On May 11, 2017, Petitioner was examined by Dr. Lori Welke, a physician's assistant, at Orland Park Orthopedics. Petitioner reported five (5) months of back pain, leg pain and weakness after falling on ice while working as a tow truck driver. Petitioner said he fell onto his back striking the back of his head and losing consciousness. Petitioner said he was taken to the emergency room and had a CT scan which showed an unchanged L1 compression fracture from a prior injury and multi-level spondylosis and disc bulging worse at L5-S1. Petitioner reported that he continued to experience pain after the fall and that his pain continued to worsen. Petitioner said that last month he couldn't get out of bed and missed 2 days of work after being bounced around in his work truck. Petitioner said he was finally approved for some physical therapy that he not had an opportunity to attend. Petitioner reported that his low back pain radiated to the left and down his left buttock and sometimes up into his left scapula. Petitioner said his pain was constant and worsens with sitting or standing in any position of a long time. Petitioner complained of numbness and tingling on the outer portion of the lower left leg. Petitioner reported being unable to work for several weeks.

Petitioner's examination showed positive straight leg raises, light touch and pain sensations deficit noted to left L5 distribution, 4/5 left and 5/5 right iliopsoas, 4/5 left and 5/5

right iliopsoas, 4/5 left and 5/5 right hip adductors, 4/5 left and 5/5 right tibialis anterior and 4/5 left and 5/5 right extensor hallucis longus. Petitioner was assessed with a herniated lumbar disc and low back pain and a MRI was ordered. Petitioner was told to follow up with Dr. Kube for a consultation and he was taken off work at that time. (PX 7).

On May 12, 2017 Petitioner underwent the MRI which showed disc material extrusion at L5-S1 superimposed on the disc bulge centrally and para-centrally to the left causing compression of the left S1 nerve root in the left lateral recess. Compression of right L3 nerve root in the neuroforamina secondary to the bulging disc and spurring from the inferior endplate of L3. Mild degree compression of bilateral L4 nerve roots within the neuroforamina, left worse than right. (PX 5).

On May 19, 2017, May 28, 2017 and July 25, 2017 Petitioner returned to the emergency room at St. Francis Hospital complaining of low back pain. (PX 3)

On May 30, 2017, Petitioner returned to Orland Park Orthopedics to review the MRI with Dr. Richard Kube. Petitioner reported falling on ice about five (5) months ago while trying to jump start a car for work. Petitioner reported falling on his back and striking the back of his head. Petitioner said he was unconscious for a few minutes. Petitioner reported experiencing immediately pain that was all over the place but was intense in the left leg. Petitioner further reported pain ongoing down his left leg. Petitioner said he continued working. Petitioner also reported sustaining a compression fracture in 1995 after a fall. (PX 7).

Dr. Kube examined Petitioner and he assessed S1 radiculopathy especially on the left side. Dr. Kube reviewed the MRI and interpreted the MRI to include a large disc herniation at L5-S1 on the left side causing nerve compression. After noting the history, performing a physical examination, and reviewing the diagnostic studies, Dr. Kube wrote in his records that Petitioner was five (5) months out from a significant fall with loss of consciousness and what appears to be a disc herniation at L5-S1 which was likely caused by the fall. Dr. Kube recommended surgery because Petitioner was already demonstrating motor deficits and there was a potential of nerve damage since Petitioner was five (5) months out from the fall. Dr. Kube kept Petitioner off work. (PX 8).

On June 19, 2017, Petitioner underwent a hemilaminotomy and microdiscectomy with decompression traversing existing roots, left L5-S1. The post-operative diagnoses was very

large left-sided herniated nucleus pulposus with noted weakness of the left lower extremity and left herniated disc at L5-S1. (PX 9).

Petitioner continued to follow up with Dr. Kube who recommended physical therapy. Petitioner attended physical therapy at Prairie Spine & Pain. On November 21, 2017, Dr. Kube discharged Petitioner from care after finding that Petitioner reached maximum medical improvement. Petitioner was released to return to full duty work at that time. (PX 8).

Testimony of Dr. Kube

Dr. Kube testified that Petitioner was referred to him by Dr. Rhode. Petitioner reported Dr. Kube that he was working as a tow truck driver and he slipped on ice about five (5) months before when attempting to jump start a car. Petitioner's feet went up into the air and Petitioner fell onto his back striking the back of his head and was knocked unconscious. When he awoke, Petitioner was experiencing pain all over the place including his back but intense pain toward his left leg. Dr. Kuba testified that, when he saw Petitioner, the generalized overall pain had dissipated but Petitioner continued to suffer from mid-low back and left lower extremity pain. Petitioner reported that he was trying to get through the pain and was having a difficult time. Petitioner further reported that he was taking medication and had difficulty getting therapy approved. Petitioner told Dr. Kuba that he suffered lumbar and tibia fracture in 1995 after falling off a building. Petitioner reported that those injuries healed and resolved. Petitioner reported being diabetic and having some degree of neuropathy. (PX 10).

Dr. Kube examined Petitioner and noted pain and mid line swelling in the low back, weakness in the right side with respect to the plantar flection, solus weakness right side as well as the plantar flexion weakness. Petitioner was not able to toe raise and had marginal flexor hallucis weakness. Dr. Kube testified that reviewed the MRI taken on May 12, 2017 and found that the MRI showed a disc herniation at L5-S1 and some early degenerate changes in L3-4, L4-5, and L5-1. Dr. Kube testified that the degenerate changes were at a grade two (2) out of five (5) because the changes were not white and not dissicated. Dr. Kube testified the L5-S1 herniation was going out into the canal and abutting the right S1 nerve root. Dr. Kube also diagnosed S1 radiculopathy predominantly left sided. (PX 10, pg. 10).

Dr. Kube recommended surgery because Petitioner was already five (5) months out and showing motor weakness. Dr. Kube performed a micro discectomy and decompression at L5-S1.

Dr. Kube testified that during the surgery he noted a large disc herniation that was till contained either in outer healing tissue or in outer component of the annulus. The disc was herniated but had not extruded. Dr. Kube said there was a lot of disc material he removed several pieces the size of peas. (PX 10).

Dr. Kube opined that Petitioner sustained an acute disc herniation. Dr. Kube further opined that history Petitioner provided was consistent with his symptoms and consistent with the size and type of disc herniation Petitioner sustained. Dr. Kupe also opined that based upon the imaging and operative findings, the disc herniation was acute and not an old disc herniation.

Dr. Kube opined that the cause and effect of Petitioner's symptoms and disc herniation was his fall at work. Dr. Kube testified that the Petitioner's mechanism of injury was of the type that could cause his disc herniation which was consistent with the images and contemporaneous onset of symptoms. (PX 10, pg. 30).

Dr. Kube reviewed the medial report authored by Dr. Weiss, who performed the Section 12 examination. Dr. Kube testified that Dr. Weiss's opinion were based upon Petitioner not having symptoms shortly after the accident, which, he opined, was contrary to Petitioner's history.

Dr. Kube testified that he also reviewed the medical records from OSF ER dated April 19, 2017. Dr. Kupe opined that Petitioner suffered an exacerbation of his ongoing problems but had reverted back to baseline. Dr. Kube testified that when he examined Petitioner, he was no longer experiencing the shooting pain. Petitioner's main problems was weakness and pain radiating down the left leg. Dr. Kube opined that Petitioner probably sustained an exacerbation that resulted in the ER visit on April 19, 2017 and other than the exacerbation Petitioner's condition remains the same as it did after the accident and when he examined Petitioner. (PX 10).

Testimony of Dr. Weiss, Section 12 Examiner

Dr. Stephen Weiss, who performed a Section 12 examination, was deposed on March 2, 2018. Dr. Weiss testified that Petitioner reported falling backwards on ice and striking his head on the ground and losing consciousness. Petitioner reported low back pain running down his lift lower extremity. Dr. Weiss testified that Petitioner returned to work but continued to experience low back pain running down his left lower extremity. Petitioner further reported sustaining a compress fracture to years ago involving the low

back. Petitioner reported not having any significant problems with his low back until December 18, 2016. Dr. Weiss examined Petitioner and noted a positive finding during the straight leg raise test. Dr. Weiss found pain during the test bilaterally and dorsiflection weakness. Dr. Weiss also noted that Petitioner was experiencing pain running down to his left ankle. (RX 1)

Dr. Weiss diagnosed a L5-S1 disc herniation. Dr. Weiss opined that Petitioner had a L5-S1 disc herniation, but it was not related to his work accidents of December 18, 2016 or April 19, 2017. Dr. Weiss opined that Petitioner's work injury of December 18, 2016 caused a lumbar strain which resolved. Dr. Weiss testified that his opinion was based upon that fact that Petitioner was able to work after his December 18, 2016 accident and did not require any follow-up treatment. (RX 1, pg. 12). Dr. Weiss further testified that Petitioner's disc herniation occurred in April of 2017 when Petitioner started to develop left-sided radicular complaints. (RX1, pg. 12). Dr. Weiss testified that Petitioner's disc herniation was a normal progression of a preexisting condition that was degenerate and became symptomatic in mid-April of 2017. (RX 1, pg. 14). Dr. Weiss opined that the need for surgery was unrelated to the back-sprain Petitioner sustained on December 18, 2016.

Dr. Weiss further opined that Petitioner did not suffer an aggravation of a pre-exiting condition after his fall of December 18, 2016 because Petitioner only sustained a strain which resolved in a short period of time. (RX 1, pg. 28). Regarding Petitioner's accident of April 19, 2017, Dr. Weiss opined that Petitioner's herniated disk occurred a few days before April 19, 2017 which was related to a normal progression of a degenerate condition that culminated in a disc herniation on the left at L5-S1 which occurred a few days before the April 19, 2017 accident. (RX 1, pg. 29). Dr. Weiss testified that Petitioner did not suffer an accident or injury on April 19, 2017. (RX 1, pg. 30).

Dr. Weiss testified that Petitioner's medical treatment was reasonable and necessary but not caused by his work accident. (RX 1, pg. 32). Dr. Weiss admitted that he did not review any diagnostic study from February 2012. Dr. Weiss testified that he did not recall discussing, with Petitioner, treatment Petitioner underwent in February of 2012. Dr. Weiss testified that Petitioner had a CT of his abdomen and not the low back

on March 20, 2012. (RX 1, Pgs. 35-37). Dr. Weiss agreed that a CT of the lumbar spine is not comparable to a CT of the abdomen when assessing degenerative changes. (RX 1, pgs. 37).

Dr. Weiss testified that Petitioner reported his radicular symptoms started after his December 18, 2016 fall at work, but that he relied upon a medical record, dated April 19, 2017, which stated Petitioner's pain started radiating around April of 2017. (RX 1, pgs. 44). On cross examination, Dr. Weiss was asked several times whether Petitioner's disc herniation was an acute or chronic herniation and Dr. Weiss did not respond to that question. (RX 1, pgs. 44-48). Dr. Weiss acknowledged that he no longer treats patients. (RX 1, pg. 55.).

Christina Pedigo testified for Respondent. Ms. Pedigo testified that she works as an office manager for Respondent. Ms. Pedigo testified that she was aware of Petitioner's work accident of December 18, 2016. Ms. Pedigo also testified that she spoke to Petitioner, in April of 2017, about his difficulties getting medical treatment approved from the workers' compensation insurance carrier, General National. Ms. Pedigo admitted that after she reports the accident to the insurance company the does not have any further involvement in the claim. Ms. Pedigo testified that the initial claims adjuster was Tom Moriarty and the injured employees would deal with tom when seeking medical treatment. Ms. Pedigo was told by Tom Moriarty that medical treatment Petitioner was seeking from the 2016 accident was not approved because Tom Moriarty did not get all the information he needed. Ms. Pedigo did not recall Petitioner reporting an April 19, 2017 work accident but she did speak to Petitioner on April 20, 2017 and Petitioner said his back pain was from his fall.

As to the present physical symptoms Petitioner testified that Petitioner continues to experience aches and pains and he takes approximately 12 over-the-counter Ibuprofen daily. Petitioner testified that as a result of this work accident that he is unable to ride his bike, work out, use a treadmill or essentially do any activity that requires heavy physical exertion. Petitioner testified that currently works at Joe's Towing and is doing the same job that he was doing prior to the accident.

The Arbitrator found Petitioner's testimony to be credible.

CONCLUSIONS OF LAW **19IWCC0484**

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law as set forth below. The claimant bears the burden of proving every aspect of her claim by a preponderance of the evidence. *Hutson v. Industrial Commission*, 223 Ill App. 3d 706 (1992).

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

An accidental injury need not be the sole causative factor, or even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Commission*, 797 N.E.2d 665, 672 (2003). Employers are to take their employees as they find them. *A.C.&S v. Industrial Commission*, 710 N.E.2d 8347 (Ill. App. 1st Dist. 1999) citing *General Electric Co. v. Industrial Commission*, 433 N.E.2d 671, 672 (1982). If a pre-existing condition is aggravated, exacerbated or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Construction v. Industrial Commission*, 227 N.E.2d 2d 65, 67, 68 (1967), see also *Illinois Valley Irrigation v. Industrial Commission*, 362 N.E.2d 339 (1977). When a pre-existing condition is present, a claimant must show that a work related accidental injury aggravated or accelerated the pre-existing condition such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury. *St. Elizabeth Hospital v. Workers' Compensation Commission*, 864 N.E.2d 266, 272, 273 (5th Dist. 2007). Causal connection between work duties and an injured condition may be established by a claim of events including claimant's ability to perform duties before the date of an accident and inability to perform same duties following date of accident. *Darling v. Industrial Commission*, 176 Ill.App.3d 186, 530 N.E.2d 1135 (1988). A claimant's prior condition need not be a of good health prior to the accident, if a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. The salient factor is not the precise previous condition, it is the resulting deterioration from whatever the previous condition had been. *Schroeder v. Illinois Worker's Compensation Comm'n*, 4-16-0192WC (Fourth Dist. 2017).

The Arbitrator has carefully reviewed and considered all medical evidence along with all

testimony. The Arbitrator concludes that Petitioner has proven by the preponderance of the credible evidence that his lumbar back condition and disc herniation at L5-S1 are causally connected to his work injury of December 18, 2016, set forth more fully below.

Both Dr. Kube and Dr. Weiss diagnosed Petitioner with a disc herniation. Dr. Kube opined that the disc herniation was acute and must have occurred at the time frame of December of 2016. Dr. Kube opined that Petitioner's mechanism of injury was insistent with the type and size of Petitioner's disc herniation. Petitioner's complaints and symptoms were also consistent with the type and size of the disc herniation. Dr. Kuba further opined that the mechanism of injury could cause the large disc herniation Petitioner had. The size of type of disc herniation was consistent with the type of complaints Petitioner experienced.

Dr. Kuba testified that Petitioner sustained a temporary exacerbation of his injury around April 19 of 2017 with some shooting pain but his condition returned to baseline. Dr. Kube and Dr. Weiss both agree that Petitioner did not sustain a second accident on April 19, 2017. Petitioner also testified he did not suffer an accident, but he did experience some increased symptoms from being bumped around in his work truck, but he returned to baseline. The emergency room records also indicate the increase in Petitioner's symptoms resolved as well as the weakness noted in his right foot. The records show that Petitioner's pain improved, and his left lower extremity strength equalized. The Arbitrator finds that Petitioner's condition returned to his baseline when released from the St. Francis Hospital and that incident is not a cause of Petitioner's current condition of ill-being, as set forth more fully in the Findings of Fact and Conclusion of Law in *Case #17 WC 14133*.

The Arbitrator finds the opinions of Dr. Kube to be more persuasive than the opinions of Dr. Weiss. Dr. Weiss disputed causation based upon, in part, a pre-existing degenerative disc condition which caused a disc herniation in April of 2017, prior to Petitioner's alleged work accident of April 19, 2017, and after his work accident of December 18, 2016. The Arbitrator finds that Dr. Weiss disregarded the medical history Petitioner provided to Dr. Weiss as well as to Drs. Kube, Adams and while at St. Francis Medical Center. Dr. Weiss testified that his opinion was based, in part, upon a note contained in the St. Francis Medical Center records for the April 19, 2017 visit, which indicates that Petitioner reported feeling a sharp left sided pain in his buttock about five (5) days ago. The Arbitrator notes that Dr. Weiss did not acknowledge that Petitioner also reported at the hospital that he had been experiencing left low back pain

radiating down his left leg to ankle since his fall of December 18, 2016 and that Petitioner continued to experience radiating pain since that date. The sharp left sided pain Petitioner described, at the hospital, resolved as well as the motor weakness. Petitioner testified that he did experience an exacerbation of pain after being bumped around in a work truck, but the pain resolved by the time he left the hospital. The St. Francis Hospital Center records also state that the sharp pain and motor weakness resolved while at the Hospital. Petitioner testified that since his December 18, 2016 fall he would experience exacerbations of pain depending upon his work activities. Dr. Weiss also testified that his opinion was based upon Petitioner not seeking medical treatment and returning to work after his December 18, 2016 fall.

The Arbitrator found the Petitioner to be credible and Petitioner testified that he experienced pain that radiated down his left leg since his fall at work on December 18, 2016. Respondent did not offer any credible testimony sufficient to rebut the Petitioner's testimony. Testimony of the employee, if not impeached or rebutted, is sufficient to support an award. *Phoell Manufacturing Cr. v. Industrial Comm'n*, 54 Ill.2d 119, 295 N.E.2d 469 (1973). Petitioner testified that after his December 18, 2016 fall he continued to work with the pain. It is not appropriate to penalize an employee who diligently worked through progressive pain until it affected his or her ability to work and require medical treatment. *Durand v. Industrial Comm'n*, 224 Ill.2d. 54, 862 N.E.2d. 918 (2006).

The Arbitrator also notes that Dr. Weiss did not review the MRI to determine when the disc became herniated nor would Dr. Weiss answer the question of whether or not Petitioner's disc herniation acute or chronic. Dr. Weiss opined that Petitioner had a preexisting chronic condition that manifested in a disc herniation that was unleaded to his work accident but would not opine on whether the disc herniation was acute or chronic. Dr. Weiss testified that his opinion was also based upon that Petitioner's condition must have had been symptomatic in 2012 because, at that time, Petitioner underwent a pelvis CT scan. The Arbitrator finds that Petitioner's condition was symptomatic in 2012 as being mere conjecture or guess. Respondent proffered no other evidence to support the conclusion of Dr. Weiss. It is axiomatic that the weight accorded an expert opinion is measured by the facts supporting it and the reasons given for it' an expert opinion cannot be based on guess, surmise, or conjecture. *Wilfert v. Retirement Board*, 318 Ill. App.3d 507 (First Dist. 2000).

WITH RESPECT TO ISSUE (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 FINDS AS FOLLOWS:

Pursuant to Section 8(a) of the Act, the employer shall pay all necessary first aid, medical and surgical services and all necessary medical, surgical and hospital services which are reasonably required to cure or relieve the employee from the effects of the accidental injury. Respondent did not proffer evidence the medical treatment Petitioner received was not reasonable or necessary. For treatment of an employee's workplace injury to be compensable under the workers' compensation laws, Petitioner must establish the treatment is necessitated by the work injury and not some other condition or conditions. *Hansel & Gretel day Care Center v. Industrial Comm'n,* 215 Ill.App.3d 284; 574 N.E.2d 1244 (1991).

Respondent disputed liability. As stated above, the Arbitrator found that Petitioner's lumbar back condition and disc herniation at L5-S1 to be causally connected to his injury of December 18, 2016. Petitioner submitted medical bills in the amount of $106,168.10 as outlined in PX 12, which was entered into evidence without an objection. Based upon the Arbitrator's findings above and the opinion of Dr. Weiss that Petitioner's medical treatment was reasonable and necessary, the Arbitrator finds that Respondent shall pay Petitioner the for the medical bills identified in PX 12 (see below), pursuant to Sections 8(a) and 8.2 of the Act, and subject to the fee schedule. Respondent shall receive a credit, pursuant to Section 8(j) of the Act, for medical benefits paid and Respondent shall hold Petitioner harmless from any claims by any providers for services for which Respondent is receiving a credit under Section 8(j) of the Act.

Petitioner's Exhibit 12 entitled Medical Bill List

NAME OF PROVIDER	ACCOUNT NUMBER	DATE OF SERVICE	TOTAL AMT OF BILLS
Central IL Radiological	6083-279891.1	12/18/16	$463.00
Central IL Radiological	6083-283604.1	12/19/16	$738.00
Central IL Radiological	6083-692685.1	05/19/17	$543.00

Central IL Radiological	6083-708429.1	05/28/17	$53.00
Live Bold	2017012KU	06/19/17	$9,563.00
Orland Park Orthopedics	MARKEV0003	05/11/17-06/25/17	$3,365.20
OSF Healthcare	40046839	12/18/16-06/13/17	$479.00
OSF St. Francis	31802644	12/18/16	$16,044.30
OSF St. Francis	36788738	04/19/17	$2,347.60
OSF St. Francis	37413828	05/19/17	$8,437.15
OSF St. Francis	37527041	05/25/17	$1,526.55
OSF St. Francis	37580044	05/28/17	$1,933.95
Prairie Spine & Pain Institute	7865	05/30/17-12/07/17	$35,364.85
Prairie Surgicare	7865	06/19/17-11/07/17	$22,339.50
Bob Rady, Inc.	KU2017037	06/19/17	$2,970.00
TOTALS			**$106,168.10**

WITH RESPECT TO ISSUE (K) WHAT TEMPORARY BENEFITS, IF ANY, IS PETITIONER ENTITLED, THE ARBITRATOR FINDS AS FOLLOWS

Petitioner claims to be entitled to temporary total disability benefits from April 17, 2017 through October 24, 2017 representing 27 1/7 weeks. (Arb. Ex # 1).

A claimant is temporarily and totally disabled from the time an injury incapacitates her until such time as she is as far recovered or restored as the permanent character of her injury will

permit. *Westin Hotel. V. Industrial Comm'n*, 372 Ill. App. 3d 527 (2007). In determining whether a claimant is no longer entitled to continue receiving TTD benefits, the primary consideration is whether the claimant's condition has stabilized and whether she is capable of return to the workforce. *Interstate Scaffolding, Inc. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132 (2010). Once a claimant has reached MMI, her condition has become permanent and she is no longer eligible for TTD benefits. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d. 107 (1990).

Respondent denied liability for the benefits claiming that Petitioner's current condition of ill-being was causally connected to his accident of December 18, 2016. As stated above, the Arbitrator found that Petitioner's condition of ill-being was causally connected to his accident of December 18, 2016. The Arbitrator further finds that Petitioner was temporarily and totally disabled from April 17, 2017 through October 24, 2017 and, as such, Respondent shall pay Petitioner TTD benefits from April 17, 2017 through October 24, 2017 representing 27 1/7 weeks.

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

Pursuant to Section 8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability ("PPD"), 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 Section 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 Section 8.1b (b), the occupation of the injured employee, the Petitioner was employed as a service technician at Joe's Towing & Recovery. The Petitioner testified that he has returned back to his usual and customary job of that of a service technician. The Arbitrator notes that there has been no change in occupation of Petitioner because of the accident that Petitioner was involved in on December 18, 2016, as such the Arbitrator gives this factor some weight.

With regard to subsection (iii) of Section 8.1b (b), the age of the employee. Petitioner was 46 years old. Petitioner still has significant number of years to work before reaching the age of retirement. Petitioner will need to suffer the lingering effects of his injury and continue to perform his job duties until retirement. Individuals of more advanced age then to take longer to recover from injuries or an aggravation of his current condition. The Arbitrator gives this factor great weight.

With regard to subsection (iv) of Section 8.1b (b), the employee's future earning capacity. The Arbitrator notes that Petitioner was released from Dr. Kube's care full duty and no evidence was submitted to show that Petitioner sustained an impairment in his earning capacities. The Arbitrator gives this factor little weight.

With regard to subsection (v) of Section 8.1b (b), evidence of disability corroborated with the treating physicians' medical records. Petitioner testified that he continues to experience Problems with his low back and he is not able to engage in activities that he was able to engage in prior to the accident. The Arbitrator notes that Petitioner's complaints are corroborated by the medical records. Petitioner was released to return to work full duty and, the Arbitrator notes that, Petitioner has been able to perform his job duties. The Arbitrator gives this factor great weight.

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 person pursuant to §8(d)2 of the Act and awards Petitioner permanent partial disability benefits for 75 weeks at $330.00 per week.

STATE OF ILLINOIS	)
	) SS.
COUNTY OF MADISON	)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David DeWall,
Petitioner,

vs. No. 16 WC 18369

City of Alton,
Respondent.

19IWCC0485

DECISION AND OPINION ON REVIEW PURSUANT TO §19(B) AND §8(A)

Timely Petition for Review under §19(b) and §8(a) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses and prospective medical care, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission,* 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The underlying facts of this claim were well laid out in the Arbitrator's decision, which is incorporated herein. Petitioner, a 52-year-old policeman, injured his left shoulder and neck on February 6, 2015, while subduing a prisoner. He was diagnosed with a rhomboid strain, a scapular strain and herniated discs at C5-6 and C6-7. Conservative treatment for Petitioner's cervical condition failed. The Arbitrator awarded Petitioner past medical expenses totaling $19,449.00, and prospective medical care including cervical spine surgery.

Respondent disputes the causal relationship of Petitioner's condition of ill-being after May 10, 2016 – the date of Dr. Russell Cantrell's Section 12 examination. Dr. Cantrell diagnosed Petitioner's work injury as being only a parascapular muscle strain, and he did not consider Petitioner's cervical condition to be causally related to his accident.

19IWCC0485

19IWCC0485

The Commission affirms the Arbitrator's finding that Petitioner's current condition of ill-being, including his cervical condition, was causally related to his February 6, 2015 accident. His cervical problems began soon after his accident, and have continued through the date of the arbitration hearing. Petitioner testified that shortly after the altercation, he noticed a tightness not only in his back and shoulder, but also in his neck area. Petitioner completed an Incident Report for the Alton Police Department in which he reported that within hours of his accident, he felt a burning sensation traveling up to the back of his neck. On the day of his accident, Petitioner also signed a Supervisor's Accident Report for the City of Alton. In this report, he identified the affected parts of his body to be his left shoulder and his neck. He also reported a pain and burning sensation in his left shoulder.

At Petitioner's visit to Midwest Occupational Medical Center on February 12, 2015, he indicated on a pain diagram that he was feeling slight to moderate pain and burning in his left arm, left shoulder and upper back near his cervical and thoracic spines. At Petitioner's February 27, 2015 office visit, he indicated on another pain diagram that he had pain to the left side of his neck.

Following conservative treatment including medications, physical therapy and trigger point injections to his left shoulder, his condition improved. On July 15, 2015, he was released to return to full duty work.

Petitioner testified that his symptoms waxed and waned, but never completely went away. On September 8, 2015, he returned to the Alton Orthopedic Clinic with complaints of pain in his left shoulder. Physician's assistant Donald LeMoine documented that Petitioner was experiencing discomfort in his left trapezius and axilla with referred pain down his left arm, with numbness and paresthesias in his left index and middle fingers. Petitioner was sent for an EMG/NCV to rule out nerve root impingement and C5-6 radiculopathy. Petitioner's October 14, 2015 cervical x-rays showed disc space narrowing at C4-5 and C6-7. His January 7, 2016 cervical spine CT revealed a predominant abnormality: endplate spurring at C6-7 resulting in foraminal encroachment with mild central canal stenosis. On January 8, 2016, pain management physician, Dr. Christopher Beuer, diagnosed Petitioner with cervicalgia, cervical spinal stenosis and cervical radiculopathy. He recommended and provided Petitioner with cervical epidural steroid injections for those conditions.

Petitioner's cervical pain has persisted, even after he was treated with medications, injections and physical therapy. He testified that since his accident, he always has a burning feeling in his left arm, and that certain activities cause flares of pain down his whole arm along with numbness in his fingers. Petitioner's November 21, 2016 cervical spine post myelogram CT revealed a left-sided disc/osteophyte complex which created a deformity on the spinal cord, probable left C7 root impingement, and a disc herniation at C5-6. On February 2, 2017, Petitioner's cervical spine MRI showed protrusions at C4-5 with ventral cord flattening with moderate to severe stenosis, broad-based protrusion at C5-6 with mild foraminal stenosis, and a left foraminal protrusion with spurring at C3-4 with mild stenosis.

Dr. Matthew Gornet, Petitioner's treating orthopedic surgeon, opined that Petitioner's February 6, 2015 accident caused herniations of his C5-6 and C6-7 discs. Dr. Gornet testified that it was not unusual for patients with cervical findings to report their symptoms were initially located more predominantly in their shoulders. Although Dr. Gornet agreed that Petitioner had pre-existing disc degeneration at C6-7, he opined that Petitioner also suffered an acute disc herniation on top of his chronic degeneration. Dr. Gornet recommended Petitioner undergo a 2-level disc replacement surgery.

Dr. Cantrell, Respondent's Section 12 expert, testified that Petitioner's accident-related injury was only a parascapular muscle strain. He denied Petitioner's accident caused a herniated cervical disc because, if it did, then Petitioner should have experienced an acute onset of symptoms. However, Dr. Cantrell admitted that Petitioner's mechanism of injury – a prisoner pulling forcibly on his left arm – could possibly cause a cervical injury. Dr. Cantrell admitted that Petitioner's symptoms of tingling and numbness in his fingers could be consistent with a C6 radiculopathy, and that disc pathology can cause discomfort in the shoulder, upper back, scapular and upper arm. He also admitted that a disc herniation can be aggravated and can worsen over time.

The Commission agrees with the Arbitrator that Dr. Gornet's opinions were more persuasive than Dr. Russell Cantrell's. Dr. Cantrell bases his opinions on incomplete information regarding Petitioner's medical treatment and reports after his injury at work. Moreover, Petitioner's testimony is credible as it is corroborated by other evidence.

Petitioner testified that he experienced an onset of cervical symptoms shortly after his accident. He testified he had neck tightness shortly after the occurrence. He also reported pain and a burning sensation to his left arm, shoulder and back of his neck. Although at times his symptoms improved, they never went away. Petitioner's testimony to the foregoing effect is corroborated by the contents of the Supervisor's Accident Report for the City of Alton created on the date of accident. It is also corroborated by the medical records.

In addition, Dr. Cantrell admitted that Petitioner's tingling and numbness in his fingers could be consistent with a C6 radiculopathy. He also admitted that disc pathology can cause discomfort in the shoulder, upper back, scapular and upper arm. Dr. Cantrell further admitted that a disc herniation can be aggravated and can worsen over time. Moreover, in considering the opinions of both physicians, it is notable that Dr. Gornet is a board-certified spine surgeon with more training and experience in this area of medicine. Dr. Cantrell's specialty is in physical medicine and rehabilitation, and he acknowledged he would give some deference regarding whether or not to proceed with a surgery to a patient's surgeon. Based on the foregoing, the Commission finds that Dr. Cantrell's opinions are not supported by this record and relies on the opinions of Petitioner's treating physician, Dr. Gornet.

Respondent does not argue that Petitioner reached MMI for his work-related injuries prior to May 10, 2016. Prior to that date, Petitioner had been diagnosed with radiculopathy of his arm, cervical spine pain and cervicalgia. He required two epidural steroid injections to his cervical spine. Respondent acknowledges that on September 8, 2015, Petitioner had referred pain down his left arm, with numbness and paresthesia in the fingers of his left hand. Clearly, Petitioner had worsening cervical symptoms. The Commission finds persuasive Dr. Gornet's opinion that Petitioner's cervical spine condition was caused by his accident, and that his has progressively worsened.

Dr. Gornet opined that a 2-level disc replacement would be appropriate treatment for the Petitioner's C5-6 and C6-7 disc herniations. The Commission finds Dr. Gornet's recommendation reasonable and affirms and adopts the Arbitrator's award of prospective medical care.

19IWCC0485

Finally, the Commission also affirms the Arbitrator's award of Petitioner's past medical expenses, albeit modifying the dollar amount of that award downward to $16,449.92, from the $19,442.00 figure awarded by the Arbitrator. At arbitration, Petitioner stipulated that Respondent was liable only for unpaid medical bills totaling $16,449.00 (Arbitrator's exhibit #1). Petitioner's counsel also agreed that the bills for which Petitioner was seeking payment totaled $16,449.92, and the bills he offered into evidence (PX5) totaled only $16,449.92.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 15, 2018, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of medical expenses is modified. Respondent shall pay Petitioner's outstanding medical bills totaling $16,449.92 as listed in Petitioner's exhibit #5, pursuant to the Fee Schedule; as provided in §8(a) and §8.2 of the Act.

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

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

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

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

DATED: SEP 6 - 2019

o-07/11/19
mp/mcp
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Marc Parker

Barbara N. Flores

CONCURRENCE IN PART AND DISSENT IN PART

I concur in part and dissent in part with the decision of the majority. I concur with the majority in affirming the Decision of the Arbitrator regarding causal connection to Petitioner's condition of ill-being of his shoulder and the award of medical treatment associated with that condition. However, I respectfully dissent from the decision of the majority affirming the Decision of the Arbitrator regarding Petitioner's condition of ill-being of his cervical spine and the award of medical expenses, as well as prospective medical treatment, associated with that condition.

Petitioner sustained a stipulated accident on February 6, 2015 while attempting to subdue a combative prisoner. He initially sought treatment on February 12, 2015. He complained of persistent pain in his upper back. It was noted that he had good range of motion in his neck with no upper extremity paresthesias or weakness. He was diagnosed with rhomboid strain and physical therapy and restriction from combative situations were prescribed. On June 18, 2015, he was given trigger-point injections in his shoulder, at which time he denied any numbness or paresthesia in the left arm. On July 14, 2015, Petitioner reported "minimal to no discomfort along the medial border of the scapular and would like to return to his weight lifting and overall fitness program." Petitioner was released to work without restrictions and to resume his normal conditioning program but with some modification of his weight-lifting.

Petitioner did not have any specific cervical/radicular complaints until September 8, 2015. On October 7, 2016, he came under the treatment of spine surgeon, Dr. Gornet. Dr. Gornet diagnosed a "massive" herniation at C6-7 and recommended cervical disc replacement surgery. In his deposition, Dr. Gornet opined that Petitioner's cervical condition was causally related to his work incident on February 6, 2015. However, Dr. Gornet testified that he based his opinion on his understanding that Petitioner had cervical and radicular symptoms immediately following that incident.

On May 10, 2016, Petitioner was seen by Dr. Cantrell for a Section 12 medical examination. After his examination of Petitioner and review of his medical records, Dr. Cantrell opined that Petitioner sustained a parascapular muscular strain in the incident but also that he did not suffer any cervical injury. He noted that the mechanism of injury Petitioner reported, having his left arm forcibly pulled, was not consistent with a cervical injury, his report of cervical complaints did not develop until several months after the accident, and Petitioner's positive response to the trigger-point injections, which one would not expect if he had a cervical injury. Dr. Cantrell reiterated his opinions after he was presented additional medical records to review.

The Arbitrator and majority found Petitioner proved his cervical condition was caused by the work accident relying on the causation opinion of Dr. Gornet, which they found more persuasive than those of Dr. Cantrell. I disagree with that assessment of the relative persuasiveness of the opinions of Dr. Gornet versus Dr. Cantrell. I find the opinions of Dr. Cantrell more persuasive than Dr. Gornet. Dr. Gornet assumed that Petitioner's cervical/radicular complaints corresponded temporarily to his accident. That assumption was incorrect. On the other hand, Dr. Cantrell had a better understanding of the onset of Petitioner's cervical/radicular complaints. In addition, Dr. Cantrell's opinion was persuasive regarding Petitioner's extremely positive response to the trigger-point injections, after which he was essentially free of symptoms. Besides the fact that Petitioner did not report cervical/radicular symptoms until seven months after the accident, I find it particularly relevant that Petitioner did not have such complaints until two months after he was declared to be at maximum medical improvement from his work injury, after he

19IWCC0485

returned to work at full duty, and after he resumed his normal work-out regimen. Based on those facts, I do not believe that Petitioner sustained his burden of proving that the work-related accident caused a condition of ill-being of his cervical spine.

For the reasons, I stated above, I concur with the majority in affirming the Decision of the Arbitrator regarding causal connection to Petitioner's condition of ill-being of his shoulder and the award of medical treatment associated with that condition. However, I respectfully dissent from the decision of the majority affirming the Decision of the Arbitrator regarding Petitioner's condition of ill-being of his cervical spine and the award of medical expenses, as well as prospective medical treatment, associated with that condition. I would have found that Petitioner did not sustain his burden of proving the current condition of ill-being of his cervical spine was caused by the work accident and terminated benefits as of May 10, 2015, when he was declared at maximum medical improvement and released to work at full duty.

Deborah L. Simpson

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

DEWALL, DAVID
Employee/Petitioner

Case# **16WC018369**

CITY OF ALTON
Employer/Respondent

19IWCC0485

On 5/15/2018, 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 2.03% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0487 SMITH ALLEN MENDENHALL ET AL
STEVEN W SELBY
510 E 6TH ST PO BOX 518
ALTON, IL 62002

1001 SCHREMPF KELLY & NAPP LTD
MATTHEW W KELLY
307 HENRY ST SUITE 415
ALTON, IL 62002

STATE OF ILLINOIS)
)SS.
COUNTY OF **Madison**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

DAVID DEWALL
Employee/Petitioner

Case # **16**WC **018369**

v.

Consolidated cases: ______

CITY OF ALTON
Employer/Respondent

19IWCC0485

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Collinsville**, on **3/22/18**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches 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. [ ] 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

19IWCC0485

FINDINGS

On the date of accident, **2/6/2015**, 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 $**100,212.64**; the average weekly wage was $**1927.16**

On the date of accident, Petitioner was **52** years of age, **married** with **2** dependent children.

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services in the amount of $ 19,449.00, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act. The MRI and surgery sought by Petitioner is found to be reasonable and necessary and Respondent shall authorize and pay for the same, subject to the Fee Schedule.

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

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

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

[signature] 5/12/18

Signature of Arbitrator — Date

MAY 15 2018

The Arbitrator makes the following Findings of Fact:

Petitioner testified that he is 54 years of age and has worked for the last 25 years as a police officer with the Alton Police Department. He currently holds the rank of lieutenant and works in the command center.

Petitioner testified that on the date in question, he was assisting with a combative prisoner. Petitioner testified that he was assisting four other officers at the time. The prisoner was very combative and mentally unstable and had been fighting with several officers. Petitioner testified that he reached in and attempted to subdue the prisoner because he was getting ready to bite one of his coworkers. Petitioner testified he was pushed, pulled and twisted as the group attempted to subdue the prisoner. Lieut. DeWall stated he felt immediate tightness his neck and shoulders and over the next several hours his symptoms increased in his left shoulder.

Petitioner identified Petitioner's group Exhibit #6 as an accident report, personal injury report and typed narrative incident report that he completed on the date of the accident. That report is consistent with description of the accident given by the Petitioner. (Pet. 6)

Over the next several days, Petitioner testified that he had the weekend off but his symptoms had not subsided. Petitioner testified he was ordered to go to Midwest Occupational Medicine in Wood River for an assessment. Those records indicate that Petitioner was seen on 2/12/15, six days after his accident. He gave a history of the altercation and reported with left upper back pain, good range of motion and a burning sensation. On exam, spasm was noted in the left upper back and was diagnosed with left Rhomboid strain. Dr. Moore prescribed 3 visits of therapy and his duties were restricted to avoid prisoner contact. (Joint #1) Petitioner followed up at Midwest on 2/27/15 with some relief but had not abated. When he sat in a chair he was having pain right between the shoulder blade border and the spine. Once again spasm was noted. Additional therapy was ordered and it was thought that Petitioner had a worsening of symptoms and his restrictions were continued. His pain chart continued to show burning from his left neck down through his left shoulder blade. On 3/13/15, Petitioner returned with recurring symptoms after 10 sessions of PT. He continued to show spasm over the left rhomboid. He was then referred to a physical medicine and rehab doctor for more aggressive treatment. (Id at Joint #1.)

On cross, Petitioner stated that on the date of accident he started with tightness and the pain became worse over the next several hours. He also acknowledged his pain levels have been around a 2 since his accident. As to the referral to Dr. Omotola's office, Petitioner stated that Midwest Occupational gave him a list of doctors to be referred to and he chose to go to Dr. Omotola and Dr. Stewart's office. Likewise, Petitioner received a referral to Dr. Gornet from Dr. Omotola at his request. Petitioner talked to several co-workers who had treated with Dr. Gornet. He also acknowledged he has worked since his date of accident. As to prior conditions, Petitioner testified he had some upper back problems in the 90's but he saw a doctor once, iced it and "was good to go".

On redirect, Petitioner was shown his pain diagram he drew at Midwest Occupational. (Joint #1) showing burning in his left upper back and shoulder as well as dull and aching in his upper arm.

Joint Exhibit #2 are the PT records from The Work Center for visits 2/20/15 thru 3/12/15. Those records indicate continued symptoms in the left rhomboid and continuing inability to perform all of his work duties. The notes indicate a maximal effort and compliance. (Joint #2)

Petitioner testified he followed up with Dr. Stewart and Alton Orthopedic on the referral of Midwest Occupational. Those records indicate an initial visit of 5/6/15 with a diagnosis of left shoulder pain from an

injury at work. Petitioner told them he had a cochlear implant on the left ear in 2008. X-rays were taken and a trigger point injection was given in the left rhomboid and he was placed on light duty. On the follow-up of 5/20/15, Petitioner had mild relief from the injection but was about the same. He was put back in therapy and restrictions were continued. An additional injection was performed on 6/18/15 and was eventually released full duty on 7/4/15 with a follow up scheduled. On 9/8/15, Petitioner returned with discomfort in the upper left trapezius and axilla with referred pain down the left arm with numbness and parasthesias in the index and left middle fingers. An EMG/NCV was ordered as well as cervical traction (Joint #1) and Naproxen. On 11/10/15 Petitioner was given the results of his EMG (Joint #4), which was abnormal and an additional injection was given on the left scapula. A CT of the cervical spine was ordered since Petitioner could not have an MRI due to his ear implant. Petitioner was also referred to Dr. Beuer at Christian Northeast Hospital for pain treatment. A referral note dated 1/20/16 was generated by Dr. Stewart's office to Dr. Shitut for an Orthopedic Consult. (Joint #3)

On 1/18/16, Petitioner saw pain specialist, Dr. Chris Beuer. This was a referral from Dr. Omotola's and Stewart's office. Dr. Beuer reviewed the CT scan of 1/7/16(Joint Ex. #5) which showed spurring at C6-7 left, greater than right resulting in severe left, mild right foraminal encroachment with mild central stenosis. (Id.) Dr. Beuer diagnosed the Petitioner with cervicalgia, cervical spinal stenosis, cervical radiculopathy and left shoulder pain. He felt that this represented more of a C6 radiculopathy and recommended epidural injections. He felt his symptoms represented a C6 distribution pattern. (Joint #6) Petitioner received the ESI injection on 2/29/16. He then saw Dr. Beuer again on 3/16/16 and only received about a week worth of relief. Dr. Beuer scheduled another ESI that was performed on 3/29/16. (Id.) At next appointment of 4/12/16, Petitioner reported a 1-2 day relief of the radicular pain but continued neck and shoulder pain that is exacerbated by activity and he has had to limit activity secondary to pain. Dr. Beuer continued to believe this was a C6 distribution issue and therefore, Dr. Beuer recommended a surgical workup.

Shortly after that recommendation, Respondent scheduled a Section 12 examination with Physiatrist/Rehabilitation physician, Dr. Russell Cantrell. Petitioner was seen on May 10, 2016. (Resp. 1 P. 5) Dr. Cantrell opined that Petitioner suffered a parascapular muscle strain and that the radicular symptoms were not related to his injury. He also disagreed with his treating physicians that Petitioner needed to see a surgeon. Based on that opinion, no further treatment was authorized. (Id, Att. 2 P.6)

On 8/9/16, Petitioner was referred to Spine Surgeon, Dr. Matt Gornet by Dr. Omotola's office. (Id.) Petitioner's initial examination with Dr. Gornet was on 10/7/16. (Pet. 1 Ex. 2) Dr. Gornet examined the Petitioner and reviewed the Dr. Cantrell report as well as the 11/21/16 films and CT scan of 1/7/16. He noted the CT was a non-contrast study. Dr. Gornet did not believe that Lt. DeWall was appropriately imaged and recommended a CT myelogram and a potential MRI, depending on his cochlear implant. Dr. Gornet did not believe Petitioner was at MMI. He also discussed Dr. Cantrell's report with Petitioner and his wife, noting that Dr. Cantrell was not a spine specialist and did not do surgery. Dr. Gornet stated that he believed Dr. Cantrell's diagnosis was incorrect and inconsistent with objective motor weakness and that patients can have negative nerve function in face of nerve irritation and if the nerve is not damaged, it will not produce an y findings on EMG or nerve conduction studies. Dr. Gornet prescribed Meloxicam and Cyclobenzaprine and a Post CT follow up appointment. (Id.)

The CT was performed and Dr. Gornet saw Petitioner on 11/21/16. (Id. and Joint #7). Dr. Gornet believed Petitioner was suffering from an acute on chronic disc pathology at C6-7 and a "soft disc" at C5-6, both of which correlating with his objective pathology. He also believed there was a disc herniation at C6-7 and C5-6. Dr. Gornet recommended an MRI with a 1.5 Tesla MRI. Dr. Gornet believed he was a candidate for a two level disc replacement and that the Petitioner's symptoms and needed treatment were causally related to his work injury. Dr. Gornet released Petitioner at full duty pending follow-up. (Id.) On 2/2/17, an MRI was performed and Dr. Gornet saw Petitioner. (Id. and Joint #8) Dr. Gornet stated that the MRI revealed a foraminal disc

herniation at C6-7 on the right central and on the left a herniation at C5-6 and C6-7 with C6-7 being fairly massive and significantly obstructing the foramen. Dr. Gornet continued to recommend a two-level disc replacement. (Id) Dr. Gornet saw Petitioner again on 8/14/17 and 11/13/17. At both visits, Dr. Gornet noted he was awaiting approval for surgery and that the Petitioner wanted to proceed. (Id)

Petitioner testified to the bills contained in Pet. 6 were partially paid and the surgery had not been authorized. He also testified that he is desirous of having the surgery.

Dr. Russell Cantrell testified by deposition on October 4, 2017. He is a member of the American Board of Physical Medicine & Rehabilitation. His 3 page C.V. indicates that he is not a surgeon, nor has he written any authoritative publications. Dr. Cantrell was hired by respond to examine under section 12. He prepared a written report on 5/10/16 after his exam of the Petitioner as well as a supplement on 12/9/16 after reviewing some medical records. (Resp. 2 p. 5)

Dr. Cantrell took the history of Petitioner's injury. He did not note any past medical of relevance. On exam he noted mild limitation in neck rotation, and minimal tenderness overlying the left infraspinatous fossa and along the left medial scapula area. (Id at 8) He reviewed records that had been submitted by the Respondent, including the 1/6/16 CT scan. He believed based on the CT that Petitioner had multiple degenerative levels, most prominent at C6-7 where there was evidence of bilateral left greater than right bone spurring and foraminal narrowing. He also noted the first onset of tingling in the left arm was 9/28/15. (Id at 10) Dr. Cantrell diagnosed Petitioner with a parascapular muscle strain from his accident and no cervical diagnosis. He did not believe the mechanism of injury, his arm being pulled on, would cause a cervical injury. Secondly he did not develop radicular symptoms for several months and finally that the positive trigger point injection results would not be expected if his problems were radicular. (Id at 11) He believed Petitioner was at MMI as of the date of his exam and no restrictions or treatment was necessary, other than a home exercise program. (Id at 12)

On 12/9/16 Dr. Cantrell prepared an update after reviewing additional records, including Dr. Gornet's initial records. He disagreed with Dr. Gornet's proposed surgery because of the positive effect of trigger point injections. He also believed that the rhomboid muscle is in the C5 nerve root. Dr. Cantrell also reviewed the MRI and CT ordered by Dr. Gornet just prior to his deposition (Joint Ex. 7 &8) and neither changed his diagnosis or opinions. (Id at 16) He did not believe the proposed surgery was causally related to the accident. He questioned Dr. Gornet's finding of dermatomal weakness as well. He also would have expected more symptoms based on the herniations found on the MRI. (Id at 17)

On cross, Dr. Cantrell acknowledged that accident caused a parascapular strain. He was unable to identify any systemic illness; injuries or anything else would explain his paresthesia down into his fingers. (Id at 18) As to his opinion on direct about the mechanism of injury having his arm pulled on not causing a cervical injury, Dr. Cantrell acknowledged on cross that having your arm pulled on as Petitioner described could cause a cervical injury. (Id at 19) He also acknowledged that the parasthesia into the fingers since at least September 2015. He also acknowledged no evidence of those symptoms existing prior to the accident. (Id at 20) When shown the MRI film he acknowledged impression on the thecal sac at both levels C5-6 and C6-7 and that the C6-7 level shows almost a complete displacement into the thecal sac. He acknowledged films are objective evidence. He also acknowledged the paresthesia into the arm and hand could be explained by these abnormalities. (Id at 22) He also acknowledged that the distribution symptomology could be consistent with a C6 radiculopathy and that disc pathology could explain shoulder, upper back, scapular and upper arm discomfort. (Id at 24)

He also acknowledged during his exam that Petitioner mild limitation of neck rotation as well as tenderness of the scapular area. He also noted that cervical issues can wax and wane. Dr. Cantrell admitted that he is not a surgeon and that he gives deference to a surgeon. (Id at 27) Dr. Cantrell found Petitioner to an accurate historian and his complaints were not out of proportion to his findings. There was no evidence of symptom

magnification. (Id. at 28)

On redirect, Dr. Cantrell opined that despite the waxing and waning he would have expected more immediate symptoms given the C6-7 abnormality. (Id.) On recross, Dr. Cantrell acknowledged that the herniation could have increased in size over time. He also acknowledged that this accident could have caused the disc to become symptomatic. He also acknowledged that it is difficult for even a doctor to differentiate between shoulder and neck symptoms. (Id at 33)
Dr. Matthew Gornet testified by deposition on 9/14/17. (Pet 1.) He is an orthopedic surgeon whose practice is devoted to spine surgery. He is a board certified spine surgeon. (Id at 6) Exhibit 1 of the deposition is the CV of the doctor, consisting of some 62 pages. It indicates that Dr. Gornet graduated Summa Cum Laude from Washington University and attended medical school at Johns Hopkins. He is also Fellowship trained in Spine surgery as having served as an instructor of spine surgery at Johns Hopkins and St. Louis University. (Id) His CV contains 5 pages of research experience projects he has performed. It also contains eight pages listing over 50 peer-reviewed studies that Dr. Gornet has authored as well as 21 pages of abstracts, lectures, scientific exhibits he has prepared and presented nationally and internationally. (Id.)

As stated previously, Dr. Gornet was able to secure an MRI despite Petitioner's cochlear implant. Attachments 3 and 4 of his deposition are sagittal and foraminal views showing disc injuries at C5-6 and C6-7. Dr. Gornet marked the herniations. Those views show a large herniation at C6-7 abutting up to the cord Att. 4 shows the herniation coming out in the foramen on the left side, the side of Petitioner's pain. There is also a free fragment coming off of C5-6. Dr. Gornet believed both levels play a role in his symptoms. There is severe foraminal compression and tenting of the ligament and both correlate very well with his complaints. (Id. at 2)

Having reviewed the CT and MRI, Dr. Gornet recommended a two level disc replacement. (Id at 10) Dr. Gornet testified he was extremely confident he could help Petitioner with his pain, quality of life, and weakness and believed he could return the Petitioner to work full duty no restrictions. (Id at 10) Dr. Gornet believed the 2-6-15 injury caused the herniations at C5-6 and C6-7 and the accident necessitated the conservative care to date as well as the prospective surgery. (Id) Dr. Gornet has published on return to work time for cervical work comp patients. He would be expected released for sedentary work within 3-6 weeks and full duty in 3 months. Dr. Gornet has performed this procedure on several police officers, particularly Granite City. (Id at 11)

Dr. Gornet reviewed Dr. Cantrell's original and supplemental report. As to Dr. Cantrell's assertion that he did not see any persistent myotomal weakness in the left upper extremity, Dr. Gornet responded that he found objective weakness to testing in the exact distributions you would see for these discs. Dr. Gornet stated that he such objective pathology that there is no question, this a hundred per cent certainty that this pathology is the source of his symptoms. (Id at 14) Dr. Gornet was also read the findings of Dr. Moore six days after the injury and Dr. Stewart 3 months after the injury and neither affected his opinions. (Id at 14) As to Dr. Cantrell's opinion that a positive result to trigger points would not be anticipated with cervical nerve impingement, Dr. Gornet responded that such a proposition is "absolutely false". Part of the trigger point where they are describing is muscle spasm in the rhomboid and parascapular muscles which are innervated at C5-6 and C6-7. He also opined that just because you inject the rhomboid and they relax temporarily doesn't mean you solved the problem and it does not mean it is not referred pain from C5-6 and C6-7. Dr. Gornet commonly sees pathology in the neck causing shoulder, upper back, scapular and upper arm discomfort. This is no different. (Id at 150. Dr. Gornet also stated the 2 out of 10 pain complaints in June 2015, discomfort in the scapula and lack of paresthesia were consistent with the waxing and waning of the pathology. (Id. at16)

On cross, Dr. Gornet did not know who referred Petitioner to him. Additionally, Dr. Gornet testified that he had received a considerable amount of outside medical records. (Id. at 18) Dr. Gornet's understanding was that Petitioner's complaints had varied since the time of accident. Dr. Gornet understood most of his complaints to be scapular pain but not significant neck pain and intermittent arm symptoms as described by Dr. Cantrell. (Id at

19) Dr. Gornet agreed that he referred to the C6-7 herniation as "massive" and his symptoms on the 10/7/16 visit were consistent with his disc pathology. Dr. Gornet also opined that the size of a herniation doesn't necessarily correlate with the patient's symptoms so in this case the symptoms are consistent with the pathology and not necessarily the size of the herniation. Dr. Gornet reiterated that he believed his cervical condition was causally related to the injury, assuming the factual history is correct. (Id at 20) Dr. Gornet did not expect neck pain when Petitioner developed the findings. The symptoms could all be in the shoulder, as that is what he sees commonly. He considers Petitioner's symptoms to be "classic" for someone who has herniations, disc pathology and mild nerve root irritation. He would not necessarily expect radicular symptoms because it is an inflammatory based process, thus the reason for the injections. Just because someone gets a herniation doesn't means someone gets instantaneous symptoms. The symptoms evolve over time based on the body's inflammatory process. (Id. at 22) Dr. Gornet also acknowledged that the weakness findings were mildly abnormal. (Id at 23) Dr. Gornet did not have a specific diagnosis after his first visit pending testing but did acknowledge that neck pain was listed on the x-ray order. On the second visit, Dr. Gornet was able to make a diagnosis and recommend the two level replacement. Dr. Gornet acknowledged that no study can date the pathology present. (Id at 25)

As to the need for an MRI after deciding surgery was appropriate, Dr. Gornet explained it is best for the patient's health and surgical planning. Dr. Gornet explained that is preferable to visualizing at the time of surgery alone because a floating fragment would not necessarily show on the CT and you really don't want to explore, you want to carry out the details of your plan and people that do that did not do enough preoperative planning. (Id at 27) Dr. Gornet also stated he continues to see the Petitioner intermittently while awaiting approval to make sure it big enough problem in the Petitioner's life and in this case, it is. (Id at 29)

On redirect, Dr. Gornet testified that his services were reasonable, necessary and proper. As to preexisting degeneration, Dr. Gornet did not believe there was anything outside of the norm and that this incident could have aggravated any preexisting condition. Finally, Dr. Gornet was not aware of any other possible causes for Petitioner's condition. (Id at 31)

The Arbitrator concludes the Following:

F. Causal connection

Accident is not disputed. Petitioner was initially treated by doctors selected by the Respondent and has continually described consistent symptoms since the date of accident. Dr. Gornet states that his presentation is "classic". Each of the treaters has pointed to this being a C6 distribution issue, except for the IME Dr. Cantrell. Even when shown the MRI, Dr. Cantrell discounts the Petitioner's complaints since he had limited relief from trigger point injections. Dr. Stewart and Dr. Beuer believed this was a cervical issue. Dr. Gornet clearly identified the surgical issue. The Arbitrator finds the Petitioner credible and finds Dr. Gornet, Dr. Stewart and Dr. Beuer more credible than the IME. The Arbitrator takes note that Dr. Cantrell is not a surgeon and even he acknowledges the accident could cause a cervical injury and that when it comes to surgery, he must defer to a surgeon such as Dr. Gornet. Additionally, neither Dr. Cantrell nor Dr. Gornet was able to identify any systemic illnesses or possible causes for Petitioner's state of ill-being. The Arbitrator also takes note of Dr. Gornet's extensive credentials on spine surgery in comparison to Dr. Cantrell. As such the Arbitrator finds that Petitioner's current condition is causally connected.

J. Reasonableness and Necessity of Medical Services

The Arbitrator finds the bills in dispute appear to be for services subsequent to Petitioner being seen by Dr. Cantrell for an IME. The parties stipulated that any bills incurred prior to that are to be paid per the fee schedule.

Pet. 6 contains certified bills per the Act. Dr. Gornet has testified as their reasonableness and necessity. There has been no testimony to rebut the same and they are therefore found to reasonable, necessary and proper. Respondent is directed to pay them per the Fee Schedule.

K. PROSPECTIVE MEDICAL CARE

Petitioner seeks two level disc replacement surgery. Dr. Gornet appears to have a significant level of expertise in spine surgery. His analysis and opinions of disc injury and nerve root irritation appear to be supported by the record, particularly the findings on the MRI that even Dr. Cantrell states to abnormal. Dr. Beuer believed Petitioner needed a surgical consult. Subsequent to that, the Section 12 exam was performed and the consult was not authorized. It is worth noting that Petitioner did not select Dr. Beuer.

Dr. Cantrell, being a non-surgeon testified that he defers to the surgeon. At no time has Dr. Cantrell

question the expertise or efficacy of the surgery proposed by Dr. Gornet. Dr. Gornet believes he has an excellent chance to relieve Petitioner's symptoms and return him to full duty, as he has done with other police officers in the past. Petitioner is desirous of proceeding with the surgery. The Arbitrator finds it reasonable for Petitioner to rely on the treatment recommendations of Dr. Gornet and finds his testimony to be more credible and persuasive than that of Dr. Cantrell . Accordingly, the prospective MRI and surgery recommended are approved and Respondent is directed to authorize and pay for the same, per the Fee Schedule.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

William Gale,
Petitioner,

vs. No. 10 WC 40550

State of Illinois,
Illinois Youth Center Murphysboro,
Respondent.

19IWCC0486

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, causal connection, medical expenses, and permanent disability, and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission,* 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Arbitrator found Petitioner did not prove that his conditions of bilateral carpal and cubital tunnel syndromes were the result of repetitive work activities, and denied all benefits to Petitioner. For the reasons stated below, the Commission reverses the Arbitrator and finds that Petitioner's bilateral carpal and cubital tunnel syndromes did arise out of and in the course of his employment with Respondent.

Petitioner testified that he worked at the Department of Corrections from 1984 until his retirement in 2012. Between 1984 and 1992, he worked as a prison guard at Menard. One of his duties there was to rap on the bars of prison cells with a 14" steel pipe to check that they weren't cut. Although that activity caused some numbness in his fingers and hands and pain in his elbows, at that time Petitioner did not consider his symptoms significant enough to report to his employer or to seek medical treatment.

In 1996, Petitioner began working as a Corrections Food Supervisor at the Illinois Youth Center in Murphysboro. His duties in that position required him to prepare and serve two meals a day for 220 people. On most days, only he and another person were charged with all of the cooking and food preparation; on weekends, sometimes a third person would help.

Petitioner's work included cutting and peeling large amounts of vegetables like onions, cucumbers and celery. He was also required to cut meat regularly. Each day, Petitioner had to open 60 to 70 one-gallon cans of food with a manual, crank-style can opener. Although he is right-handed, he would often switch hands and arms when one extremity became sore.

Petitioner testified that he cooked food in large, deep stock pots which held five or six gallons of soups, stews or sauces. Because the food would stick to the pots if not stirred constantly, Petitioner had to use whisks and large metal spoons or paddles to stir them. Again, he used both of his hands for this task.

When the food was ready to be served, pans were put on a steam table and the cadets and employees would form a line. Petitioner would then use tongs and spoons to place food on their plates as they went through the line. Petitioner estimated that while serving food, he had to dip large spoons into pots an average of 600 to 700 times per day. He would reach out with his arm to place the food on the plates.

Most of the items, utensils and tools which Petitioner used for his job were required to be locked in cabinets, coolers and freezers. As a result, Petitioner had to constantly lock and unlock doors with keys throughout each workday. Petitioner performed his duties 40 hours a week, and averaged six hours of overtime per week.

Petitioner's first awareness that he had a problem was when he began feeling numbness in both hands and started to drop things. He began to feel pain in his hands, wrists and elbows. On February 23, 2010, he went to Dr. Mohammad Azam with complaints of left elbow pain and bilateral hand pain, shooting from his wrists to his fingers. Dr. Azam's notes documented Petitioner's history of frequently having to use his hands to open and close locks with keys. Dr. Azam diagnosed Petitioner with peripheral neuropathy, and he believed that Petitioner may have bilateral carpal tunnel syndrome. Dr. Azam also diagnosed Petitioner with gout, but did not find that condition related to his work activities. Dr. Azam referred Petitioner to Dr. Fakhre Alam for NCV testing, and reported that Petitioner may benefit from carpal tunnel surgery.

On March 15, 2010, Petitioner underwent EMG/NCV testing to his upper extremities. Those test results were consistent with moderately severe bilateral carpal tunnel syndrome. In April 2010, Petitioner saw Dr. Stephen Young. Dr. Young's intake form documented Petitioner's history of dropping objects and complaints of pain and numbness in his forearm and hands. At that time, Petitioner indicated on a pain diagram that his worst pain was located in both of his hands and forearms. Petitioner attributed his symptoms to ongoing repetitive motions.

Dr. Young performed left and right carpal tunnel releases on May 14, 2010 and September 22, 2010, respectively. Petitioner returned to full duty work in November 2010; but the following month, he returned to Dr. Young with complaints of numbness and tingling in his elbows. On December 3, 2010, Petitioner reported that he first noticed elbow symptoms around the time that he underwent surgeries to his wrists. At that time, Dr. Young suspected Petitioner had cubital tunnel syndrome, based upon his symptoms and his positive bilateral Tinel's and ulnar nerve compression tests. Dr. Young ordered a repeat EMG/NCV study to confirm that diagnosis. The EMG/NCV test was performed on September 13, 2011. The results confirmed Petitioner's bilateral ulnar neuropathy.

Petitioner's next visit with Dr. Young, on September 22, 2011 was a follow-up visit for Petitioner's EMGNCV test, the results of which Dr. Young agreed were significant for bilateral cubital tunnel syndrome. Upon examination of Petitioner's hands, Dr. Young observed that the tips of his thumbs and fingers were cool to touch and bluish colored, more prominently on the right thumb and right ring finger. Petitioner reported his symptoms had been present for the past month. Dr. Young suspected Raynaud's syndrome and recommended an angiogram of Petitioner's upper extremities to evaluate the integrity of his vascularity and referred him to CV surgeon Dr. Bob Miller. Following the CT angiograms, Drs. Young and Miller agreed to have Petitioner's primary care physician treat Petitioner's circulation problems with channel blockers or dilatators inhibitors to increase blood flow to Petitioner's hands. When Petitioner returned to Dr. Young on October 25, 2011, his decreased vascularity to his left hand was much improved.

Dr. Young performed ulnar nerve transposition surgery to Petitioner's left elbow on November 4, 2011, followed by an ulnar nerve transposition to his right elbow on January 11, 2012. A few weeks after each surgery, Petitioner returned to his usual job without restrictions.

Petitioner called Dr. Young as a witness and he gave testimony at an evidence deposition on October 25, 2016 and January 31, 2017. Dr. Young testified that he is a board-certified orthopedic surgeon, with a subspecialty in hand and upper extremity surgery. When he saw Petitioner as a patient on April 13, 2010, Petitioner had complaints of numbness, pain in both hands and forearms. He also reported dropping things. Petitioner told Dr. Young that he had arthritis and gout.

When Dr. Young examined Petitioner on April 13, 2010, he observed no indications of Raynaud's Syndrome – a condition in which blood vessels, usually in the hands, constrict and diminish blood flow. Dr. Young diagnosed Petitioner with bilateral carpal tunnel syndrome and left index finger gout. Dr. Young believed Petitioner's carpal tunnel was related to his duties at work, but that his gout deposit was not. Dr. Young testified that when he performed carpal tunnel releases on Petitioner, he saw no gouty tophi, no crystal deposits or any other signs of gout in Petitioner's wrists. Dr. Young released Petitioner to work on November 11, 2010. Dr. Young testified that during that visit, Petitioner had good neurovascular function – "there was no discoloration of digits, good blood flow to the digits, which would be inconsistent with Raynaud's."

Dr. Young testified that Petitioner returned to see him on December 3, 2010. At that time, Petitioner had complaints of numbness and tingling in the small and ring fingers of both hands. Dr. Young reported that Petitioner had findings consistent with cubital tunnel syndrome or ulnar nerve compression at the elbows. After a repeat NCV test confirmed that diagnosis, Dr. Young performed bilateral ulnar nerve transpositions surgeries to Petitioner's elbows. Dr. Young also removed a gouty mass from Petitioner's right olecranon. He testified that the mass had not been pushing against Petitioner's right ulnar nerve.

Dr. Young opined that Petitioner's work activities for Respondent were a cause or contributing factor to the development of his bilateral carpal tunnel and cubital tunnel syndromes. Dr. Young did not believe that either Petitioner's degenerative arthritis or his gouty arthritis were contributing factors to his carpal tunnel syndrome. Further, Dr. Young denied that Petitioner's Raynaud's syndrome caused or contributed to his conditions.

On behalf of Respondent, Petitioner underwent a Section 12 examination on October 29, 2015 by Dr. Anthony Sudekum, a physician board-certified in plastic surgery, reconstructive surgery and surgery of the upper extremity. Dr. Sudekum's October 29, 2015 IME report noted that a Form 45 was completed on March 17, 2010 for Petitioner's accident. Dr. Sudekum testified on February 23, 2016 via evidence deposition that when he examined Petitioner's upper extremities, he observed significant arthritic deformity of his hands, wrists, and elbows with moderate generalized swelling. Dr. Sudekum reported that Petitioner's severe degenerative changes appeared to be secondary to gout and affected his fingers. Petitioner also had osteoarthritis and finger deformities secondary to ischemic amputation, due to his very severe Raynaud's syndrome.

Dr. Sudekum opined that Petitioner's gouty mass, which was excised at the time of his cubital tunnel surgery, would be a cause, if not the cause, of Petitioner's cubital tunnel syndrome. He opined that Petitioner's job duties at Respondent were not the type which would cause or aggravate his carpal tunnel or cubital tunnel syndromes. Dr. Sudekum testified that not all gouty effects are visible during a surgery. He opined that Petitioner's pathologies would have progressed at the same rate and required the same treatment, regardless of what job Petitioner may have had.

In denying Petitioner's claim, the Arbitrator found that Petitioner failed to prove that his conditions were not the result of a normal degenerative aging process. The Arbitrator found Dr. Sudekum's opinion – that Petitioner's multiple chronic inflammatory and degenerative conditions were the causes of his carpal and cubital tunnel syndromes – more persuasive than Dr. Young's opinion.

The Commission views the evidence and credibility of these physicians differently than the Arbitrator. In order to prove his claim Petitioner was not required to disprove that his conditions were age-related. Rather, Petitioner's burden was to prove that his repetitive work activities were a cause of his conditions. The Commission finds that Petitioner met that burden, both by his own testimony regarding the repetitive nature of the duties he performed, and by the testimony of Dr. Young, whose opinions the Commission finds more credible than Dr. Sudekum's.

Petitioner's testimony and job description established that he did numerous repetitive tasks involving his hands, wrists and arms every day that he worked. He constantly utilized knives, can openers, large spoons and paddles. He testified that when his right hand and arm became tired, he would perform the task at hand with his left. Most days, only Petitioner and one other person were charged with preparing food for and feeding 220 individuals.

No evidence controverts Petitioner's testimony regarding the type, frequency, or amount of repetitive duties that he performed at work between 1996 and his first medical treatment in 2010. Although Dr. Sudekum considered Petitioner's work activities to have been, "relatively benign," he never reviewed Petitioner's job description. While Dr. Sudekum believed Petitioner's job duties involved only moderate gripping, grasping and moving, when considering the record as a whole an opposite conclusion emerges. Petitioner stirred and ladled food 600-700 times per day using commercial equipment in a prison setting requiring him to lock and unlock cabinets repeatedly for safety reasons. To prepare the food, he used a manual can opener 60-70 times to open one-gallon containers. To serve the food, Petitioner reached a plate to 220 inmates at least once on most days. All of these activities occurred every working day for over 15 years, which the Commission finds constituted more than just moderate activity of his hands as opined by Dr. Sudekum.

Dr. Young opined that Petitioner's work activities were a cause of his carpal tunnel and cubital tunnel syndromes. In so concluding, he testified that he received and reviewed a detailed description of Petitioner's job duties, which informed his medical causation opinion. Dr. Young also testified that the gouty mass in Petitioner's right elbow did not impact his ulnar nerve.

Dr. Young and Dr. Sudekum's opinions differed significantly regarding whether Petitioner's pre-existing conditions – his gout, Raynaud's syndrome and arthritis – were causes or contributing factors to his carpal tunnel and cubital tunnel syndromes. The Commission notes that Petitioner's Raynaud's condition was not documented in any of his medical records until September 2011, long after his carpal and cubital tunnel syndrome conditions had been diagnosed. Additionally, the Commission finds that Dr. Young had an accurate understanding of the true nature of Petitioner's work upon which to base his medical opinions. It is also notable that Petitioner provided extensive and unrebutted testimony about the particular types of repetitive activities involved in his work for Respondent over many years. Based on the totality of the record, the Commission finds sufficient evidence that Petitioner's work contributed to his development of bilateral carpal and cubital tunnel syndromes as opined by Dr. Young.

Finally, the Commission amends, consistently with the record, the manifestation date to February 23, 2010. That was the date on which Dr. Azam diagnosed Petitioner with peripheral neuropathy/likely bilateral carpal tunnel syndrome, and the date on which Petitioner first knew that his conditions were work related. The Commission further finds that Petitioner provided proper notice to Respondent within the requisite 45 day period, when he completed his employer's First Report of Injury (Form 45) on March 17, 2010. Respondent also received notice on March 18, 2010, when Petitioner delivered to them his signed Workers' Compensation Claim Information Release Authorization.

19IWCC0486

Because the Arbitrator did not rule upon the issues of medical expenses and nature and extent, the Commission remands this claim to the Arbitrator to make findings on those issues.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on January 16, 2018, is hereby reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent 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.

Pursuant to §19(f)(1) of the Act, there shall be no right of appeal as the State of Illinois is Respondent in this matter.

DATED: SEP 9 - 2019

o-07/11/19
mp/mcp
68

Marc Parker

Barbara N. Flores

19IWCC0486

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

William Gale,
Petitioner,

vs. No. 10 WC 40550

State of Illinois,
Illinois Youth Center Murphysboro,
Respondent.

DISSENT

I respectfully dissent from the decision of the majority. I would have affirmed the Decision of the Arbitrator in which she found that Petitioner did not sustain his burden of proving that he sustained work-related repetitive trauma causing his conditions of ill-being of carpal tunnel and cubital tunnel syndromes and denied compensation.

The majority bases it reversal of the Arbitrator on its assessment that the opinions of Petitioner's treating surgeon, Dr. Young, were more persuasive than those of Respondent's Section 12 medical examiner, Dr. Sudekum. I disagree with that assessment of the relative persuasiveness of Dr. Young versus Dr. Sudekum. Rather, I agree with the analysis of the Arbitrator who found Dr. Sudekum more persuasive.

As noted by the Arbitrator, Dr. Sudekum reviewed Petitioner's medical history, asked Petitioner about his work activities, and reviewed the statement of Petitioner's job activities. Dr. Sudekum concluded that the type of work activities performed by Petitioner as a food preparer for a youth center were not those normally associated with development of peripheral neuropathies. In addition, he noted that Petitioner had a significant history of co-morbid pathology which is known to cause both carpal tunnel and cubital tunnel syndromes. Those conditions include Raynaud's disease (in which blood flow is constricted), osteoarthritis, and severe inflammatory gouty arthritis. On the other hand, Dr. Young simply expressed his opinion that Petitioner's work activities contributed to his development of his peripheral neuropathies and did not provide any explanation for the bases for his opinion on causation and showed little understanding of Petitioner's job activities. He did not ask Petitioner for a history of his work activities and he apparently formed his opinions prior to ever even seeing a description of Petitioner's job duties, which he saw only immediately prior to his deposition. In addition, Dr. Young did not even address the Petitioner's extensive prior history of co-morbid conditions of Raynaud's disease, degenerative arthritis, and inflammatory arthritis that Dr. Sudekum, the Arbitrator, and I find extremely relevant and significant.

19IWCC0486

For the reasons stated above, I would have affirmed the Decision of the Arbitrator in which she found that Petitioner did not sustain his burden of proving that that he sustained work-related repetitive trauma causing his conditions of ill-being of carpal tunnel and cubital tunnel syndromes and denied compensation. Therefore, I respectfully dissent from the decision of the majority.

DLS/dw
O-7/11/19

SEP 17 2019

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GALE, WILLIAM
Employee/Petitioner

Case# **10WC040550**

SOI/ILLINOIS YOUTH CENTER MURPHYSBORO
Employer/Respondent

19IWCC0486

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:

4593 LAW OFFICE OF JAMES E PARROT
1221 LOCUST ST
SUITE 1000
ST LOUIS, MO 63103

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

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

JAN 30 2018

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

19IWCC0486

STATE OF ILLINOIS)
)SS.
COUNTY OF **WILLIAMSON**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

WILLIAM GALE
Employee/Petitioner

Case # **10** WC **40550**

v.

Consolidated cases: ______

STATE OF ILLINOIS/ILLINOIS YOUTH CENTER MURPHYSBORO
Employer/Respondent

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

DISPUTED ISSUES

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

19IWCC0486

FINDINGS

On **March 1, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

In the year preceding the injury, Petitioner earned $**66,839.76**; the average weekly wage was $**1,285.38**.

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

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

ORDER

As explained in the Arbitration Decision, Petitioner failed to prove by a preponderance of the evidence that he sustained an accident which arose out of and in the course of his employment on March 1, 2010. All benefits are denied.

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

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

Signature of Arbitrator

January 26, 2018
Date

JAN 30 2018

STATE OF ILLINOIS)
) ss
COUNTY OF WILLIAMSON)

19IWCC0486

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

WILLIAM GALE
Employee/Petitioner

v. Case #: **10 WC 40550**

STATE OF ILLINOIS/ILLINOIS YOUTH CENTER MURPHYSBORO
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner filed an Application for Adjustment of Claim alleging repetitive trauma injury to his bilateral wrists and bilateral elbows arising out of and in the course of his employment with Respondent.

On March 1, 2010, Petitioner was 50 years old, single, and had one dependent child. He testified that he worked for the Department of Corrections from 1984 to the date of his retirement on December 31, 2012. He worked at Menard from 1984 to 1992 as a prison guard. As part of his guard duties each day Petitioner was required to "rap" or bang the bars in each of 100 cells with a pipe to make sure that prisoners were not trying to cut the bars. He testified that caused numbness in his fingers and pain in his elbows. However, he was not dropping things and he never made a report. After Menard, Petitioner moved to the Adult Transition Center in Carbondale until 1996, when he started work at the Illinois Youth Center in Murphysboro.

Petitioner's job title at the Youth Center was Corrections Food Supervisor II. His job duties including frisking and cuffing detainees/cadets daily, but was primarily kitchen work. He testified that much of the work was cutting and peeling vegetables, salads, chickens, and meat with a knife to feed 220 people two times per day. He testified he also opened about 70 large one-gallon cans with a hand-crank opener per day, using a circular motion with his wrists and elbows, and would switch from his dominant right hand to the left when the right got sore. He prepared soups, stews, and pasta in a large 5 or 6-gallon stock pot, which had to be stirred with a large paddle. Petitioner testified that he had to constantly stir other dishes in aluminum pans because the sauce would stick. He also manned the serving line. This required dipping, ladling, using tongs, and reaching across the line to dispense food, moving his wrists and elbows about 600 times per day. Everything was locked in the kitchen, which required constant locking and unlocking of cabinets, freezers, the tool room, and containers, about 300 times per day by Petitioner. He swept and mopped the kitchen and dining area daily, using a squeeze mop bucket. If a kitchen tool was missing, he would have

to climb in the dumpster to sort trash. Petitioner also had to write disciplinary reports on cadets, often daily. He had this job for eleven or twelve years. He testified that two to three people did this work each day.

When asked about his symptoms, Petitioner testified that he started to drop things and he had numbness in both hands. He testified his elbows also started hurting quite a bit. He went to see his family doctor, Dr. Azam, who referred him to Dr. Alam for a nerve conduction study. Following the nerve conduction study, he was referred to Dr. Steven Young. He had surgeries on both hands and then was released to return to work full duty in November of 2010. He then began having complaints of numbness and tingling in his elbows. When asked the time frame of the elbow symptomology beginning, he testified, "[t]hat started when I had---they did the wrists…It had been doing it ever since then." Dr. Young sent him for another nerve conduction study. Petitioner testified there was a nine-month gap in treatment due to him not wanting to have the surgery. He eventually did have surgery on both elbows. He returned to work after the surgeries and retired at the end of 2012. Petitioner testified he had Raynaud's syndrome, gout, and arthritis.

Petitioner testified he has not had any troubles with either his elbows or wrists since his surgeries, and denied numbness and tingling. However, he did admit telling Dr. Sudekum, Respondent's Section 12, that he had occasional soreness in his wrist and elbows. On cross-examination, he testified he was not having any troubles "today". When asked, he indicated he had soreness quite a bit of the time at work before his surgeries. He thought his symptoms started sometime in 2010. He stated that he had not been diagnosed with high blood pressure or diabetes before the accident date in 2010. He did testify on cross-examination he suffers from gout. He did not know if it was diagnosed before 2010.

When asked about his job duties; Petitioner testified the key used was about two or three inches in length. He was not able to say definitively how many doors would have to be unlocked. He remembered opening a tool room and within the tool room were three locked boxes to open. On cross-examination, he testified he cuffed and uncuffed cadets "a couple of times a week, maybe, depends on how they were acting." He estimated there would be altercations between the cadets once or twice a week. When asked about the numbness and tingling he experienced at Menard, he stated he did not report this to anyone. He did not remember dropping things while at Menard. He did notice numbness and tingling, which he thought was caused by rapping bars.

On February 23, 2010, Petitioner presented to his family physician, Dr. Mohammad Azam, with complaints of bilateral hand pain and numbness in the thumb, index finger, and middle finger. He reported the symptoms had been occurring for the last few weeks and would also shoot from his wrist to his fingers. He also had pain in his left elbow joint and down toward his wrist. He did not have any loss of strength, but reported that he felt "cold and numbness in the area". It was noted that he used his hands pretty often to open and close the keys, presumably at work but it is not specified. Under past medical history it was noted that Petitioner suffered from tophaceous gout. On examination, Dr. Azam noted, "He has changes in both of his hands. This is a little cold in the middle finger of both hands, but Phalen's test is negative." He also noted that Petitioner did not have any pain at the time, but did have "some cold feeling" in the index and middle fingers of both hands. Assessment was peripheral neuropathy and Dr. Azam opined that Petitioner may have bilateral carpal tunnel syndrome and may benefit from surgery. He referred him to Dr. Alam for

a nerve conduction study. RX2.On March 15, 2010, Petitioner underwent an EMG/NCS by Dr. Fakhre Alam at SI Neurology and Sleep Medicine. It was noted was that Petitioner had complaints of numbness, tingling, and pain involving both hands and forearm. The test revealed: (1) moderately severe bilateral carpal tunnel syndrome; (2) no evidence of cervical radiculopathy on either side; and (3) no evidence of ulnar neuropathy on either side. PX2.

On April 13, 2010, Petitioner presented to Southern Illinois Orthopedic Center and was evaluated by Physician's Assistant Phil Erthall, as well as by Dr. Steven Young. He completed a Worker's Compensation Information form and indicated this was a worker's compensation claim. He did not indicate when or how the symptoms occurred. He reported numbness and tingling in both hands that radiated up into the forearms and advised it had been occurring for several months. He stated he had tried splints and anti-inflammatories, which had not helped. PA Erthall noted Petitioner had medical history of arthritis and "a significant history for gout", and had previously had gouty deposits removed from several fingers. He stated, "It should be noted that the hand numbness and pain is work comp; however, the index finger pain and gouty deposits is not; it is on his regular insurance." The Arbitrator notes there is no indication that there was any discussion regarding Petitioner's job duties or how those duties may relate to his complaints. On examination of the elbows, there was full range of motion, negative ulnar nerve compression test, and negative Tinel's bilaterally. On examination of the hands and wrists, there was full range of motion, positive Tinel's, and positive median nerve compression test bilaterally. Assessment was bilateral carpal tunnel syndrome and left index finger gouty tophi. Surgery was recommended for both conditions. The carpal tunnel was noted to be worker's compensation, without further discussion or explanation. PX3.

On May 14, 2010, Petitioner underwent surgery by Dr. Young, consisting of left carpal tunnel release and excision of deep (gouty) mass from the left index finger. He presented for an initial physical therapy evaluation in Dr. Young's office on May 17, 2010. PX3.

On May 24, 2010, Petitioner presented to the Center for Medical Arts and reported he had tripped on a deck step and fallen on his outstretched left hand with resulting pain in his left thumb. It was noted that his left hand was very swollen, but the sutures were still in place. Hand x-rays showed minimal osteoarthritic changes of the first carpal metacarpal joint with no fracture or dislocation. PX1.

Petitioner advised Dr. Young's office of the fall, via a phone call, on May 24, 210. He was advised to keep his therapy appointment, due to the swelling. He followed up with Dr. Young on May 27, 2010, and reported no complaints with respect to the fall. On examination, Dr. Young noted, "His hand is massively swollen." There was tenderness in the left thumb but not in the snuffbox. Swelling about the wrist was very minimal. Stitches were removed and he was put on a Medrol Dosepak. He was also put into an edema glove. Petitioner continued to participate in physical therapy. PX3.

Petitioner returned to Dr. Young on June 10, 2010, and reported he was doing much better. On examination, he had diminished sensation to the tip of his index finger and he was still weak. He was instructed to continue with therapy and advance into work hardening. It was noted he continued to have complaints to the right upper extremity but wanted to wait until the left side was

better before proceeding with treatment. Petitioner followed up on July 8, 2010, and reported he was doing well. There was slight tenderness in the incision site. He had full range of motion of the wrists and hands. He was released to return to full duty work and released prn from care. PX3.

The next record from Dr. Young is an operative report of September 22, 2010. At that time, Petitioner underwent a right carpal tunnel release. He had an initial physical therapy evaluation on September 27. He returned to Dr. Young on October 6, 2010, and sutures were removed. He was put on work restrictions of no lifting over two or three pounds with the right hand. He returned on November 11, at which time his incision was healed. He was allowed to return to work without restriction, effective November 14, 2010, and released prn from care. PX3.

Petitioner returned to Dr. Young on December 3, 2010. Dr. Young noted, "He states now that [he] is having numbness and tingling in the small finger and ring finger of the hands bilaterally." On examination, he had positive Tinel's and positive ulnar nerve compression test bilaterally. Range of motion was full in both elbows. Dr. Young noted that the previous nerve conduction study was negative for cubital tunnel, but that Petitioner could nevertheless have cubital tunnel syndrome and it could be getting worse. He ordered a repeat nerve conduction study and explained that he "may have had a false negative on his previous test". PX3.

The next medical record is not until August 16, 2011, more than eight months later. At that time, Petitioner called Dr. Young's office "regarding pending bilateral NCS". It was noted that work comp had denied the test and that it was going to be scheduled through primary insurance. PX3.

On September 13, 2011, Petitioner underwent an EMG/NCS by Dr. Brent Newell. The study was "[s]uggestive of bilateral ulnar neuropathy at the elbow, estimated to be mild-moderate in degree, with the primary type of pathology at the site of abnormality being conduction block and demyelination." It was noted this appeared to be new when compared to the previous study from March 15, 2010. Dr. Newell also noted that the study was consistent with bilateral medial neuropathy at the wrist and that, when compared to the previous study, it did not appear there had been much improvement. PX4.

On September 15, 2011, Petitioner presented to Urgent Care at the Center for Medical Arts and reported pain in his right ring finger. He further reported that his fingers often turned purple and were painful and that it had occurred off and on for about three weeks. On examination, there was tenderness to palpation with purple discoloration of the distal end of the right ring finger, as well as discoloration of the other digits. There was no swelling. Assessment was Raynaud's disease. Petitioner was instructed to follow up with his primary physician the next day. PX1.

On September 21, 2011, Petitioner was seen by Dr. Azam and reported pain in his right hand, particularly in his ring finger, and bluish coloration and pain in all of the fingers of his right hand. On examination, there was bluish coloration and tenderness in all the fingertips of the right hand and his right hand was "very cold". Dr. Azam's assessment was peripheral vascular disease, and noted it was a problem with circulation or Raynaud's disease. He was advised to keep his hand warm with gloves and to observe it. PX1.

On September 22, 2011, Petitioner presented to Dr. Young, who indicated that the nerve conduction study had been done and was significant for some cubital tunnel in both upper extremities. Petitioner reported numbness and tingling at the ring and small fingers of both hands. Dr. Young noted, however, that upon inspection he had "quite a bit of cool feeling fingers and bluish colored fingers at the tips of his thumb and fingers of both upper extremities, most prominently his right thumb and right ring finger". There was pain with palpation of his right ring finger and sensitivity to palpation of all other digits. Dr. Young recommended an angiogram of the bilateral upper extremities to evaluate the integrity of his vascularity. The angiogram was performed that day. Dr. Young's record contains a note that Dr. Young spoke with the radiologist who performed the test, as well as a cardiovascular surgeon regarding the results. It was decided that Petitioner should treat with his primary physician for these circulation problems and to put treatment of the upper extremity numbness on hold. Petitioner was so advised by phone. PX3.

Petitioner returned to Dr. Young on October 25, 2011, "for follow up of his bilateral ulnar nerve neuropathy". It was noted he had been evaluated for decreased vascularity in his fingers and evaluated by a cardiovascular nurse practitioner as having a moderate to high risk in surgical intervention. Despite the risk, Petitioner advised he wanted to proceed with surgery, first on the left. He was noted to have continued numbness and tingling in both upper extremities, left worse than right. He had full range of motion of elbows, fingers, and wrists bilaterally, but did have some decreased vascularity to his left hand. It was noted that the color of his left hand had returned to normal. Dr. Young recommended left ulnar nerve transposition. PX3.

On November 4, 2011, Petitioner underwent left ulnar nerve transposition with a diagnosis of cubital tunnel syndrome. He followed up with Dr. Young on November 18 and was doing well. He advised he would not be able to return to work unless it was for full duty, and further advised he did not lift over five pounds at his job. As such, Dr. Young advised he could return to full duty effective November 23, 2011. Petitioner followed up on December 19, 2011, and was "doing very well" with his left arm. He reported he was still having problems with his right arm, and examination showed positive Tinel's and positive ulnar nerve compression test. Surgery for the right arm was scheduled and he was released with regard to his left arm. PX3.

On January 11, 2012, Petitioner underwent surgery on his right arm, consisting of ulnar nerve transposition for cubital syndrome and excision of a mass along the olecranon. The mass was determined to be a gouty deposit. Petitioner followed up with Dr. Young on January 25, 2012, and was advised that the mass was consistent with gout. It was noted, "He has a long history of gout in numerous joints." Petitioner's incision was healing nicely and he had good movement in his elbow. He returned to Dr. Young on February 23, 2012, and reported he was very happy with the outcome of his surgery. Dr. Young noted, "He has a long history of Raynaud's disease." On examination, Petitioner's fingers were cool to touch. The numbness and tingling was much better, although he did have some residual numbness in the right small finger. He was released from care at that time. PX3. The Arbitrator notes this is the last treatment record.

On October 29, 2015, Petitioner was evaluated by Dr. Anthony Sudekum, Respondent's Section 12 examiner. Dr. Sudekum took a detailed medical and occupational history from Petitioner, reviewed medical records and, and performed a physical examination. With regard to his bilateral hands and elbows, Petitioner advised he had occasional soreness in his elbows and

palms but denied any numbness or tingling in his hands. Petitioner reported he had recently undergone left shoulder surgery on October 9, to repair a complete rotator cuff tear sustained when he tripped over a hose and fell. For that reason, some of the examination of the left upper extremity was limited. On examination, Petitioner had significant arthritic deformities and moderate swelling in both hands, wrists, and elbows. He also had visible and palpable gouty deposits in and around the joints of both hands. Dr. Sudekum noted there were severe degenerative arthritic changes, likely secondary to gout, affecting the right index, middle, and little fingers. There was severe deformity of the left index finger and partial amputation of the left index finger, secondary to Raynaud's. RX3.

With regard to diagnosis, Dr. Sudekum opined that Petitioner had (1) chronic severe gouty arthritis affecting multiple joints in both upper extremities; (2) osteoarthritis of both hands, wrists, and elbows; (3) relatively severe chronic Raynaud's phenomenon affecting both hands. He noted that Petitioner currently denied any numbness or tingling and had no subjective complaints of significant upper extremity peripheral neuropathy, carpal tunnel syndrome, or cubital tunnel syndrome. With regard to causation, Dr. Sudekum noted that Petitioner had chronic severe inflammatory and degenerative arthritis affecting the bilateral upper extremities, including chronic severe gout, which cause severe degenerative changes. Petitioner also had advanced osteoarthritis and chronic severe Raynaud's. Dr. Sudekum noted:

> "Peripheral neuropathies including carpal and cubital tunnel syndrome develop much more frequently in individuals who suffer from chronic inflammatory degenerative conditions of the hands and wrists, including gout, osteoarthritis, and/or Raynaud's disease. Individual who suffer from these conditions experience chronic inflammation of the joints and/or vasculopathies which compromise the perfusion and blood flow to the bones and soft tissues (including the peripheral nerves) of the elbows, forearms, wrists, and hands and these changes result in peripheral neuropathy pathology and symptomatology. *It is my opinion, within a reasonable degree of medical certainty, that Mr. Gale's bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome developed secondary to his chronic severe gouty arthritis, osteoarthritis, and Raynaud's vasculopathy.*" RX3.

Dr. Sudekum testified by way of deposition on February 23, 2016. He is board certified in plastic and reconstructive surgery and board certified in surgery of the upper extremity. He testified consistent with his report of October 29, 2015. RX4.

Dr. Sudekum testified there are many co-morbid factors that could potentially affect the development of carpal and cubital tunnel syndrome. He opined the ones most relevant in Petitioner's case were his severe gout, osteoarthritis, and Raynaud's disease, all of which were "very significant contributing factors". He explained that carpal tunnel and cubital tunnel syndrome are due to a deprivation of blood flow to the nerve, and many things can lead up to that, including compression, injury, scarring, inflammation, or direct vascular issues. He further explained that Raynaud's is a direct vascular issue, whereby the extremity and the nerves themselves are deprived of blood. He compared it to laying on your arm and cutting off circulation to the nerves, resulting in your hand going numb. Dr. Sudekum testified that Raynaud's results in repeated intermittent deprivation of blood (ischemia) to the extremity and to the nerves, which adversely affects the nerves and causes the symptoms associated with carpal tunnel and/or cubital tunnel syndrome. He noted this was a direct vascular effect, where the blood flow was reduced.

He further testified that both osteoarthritis and gouty arthritis were inflammatory conditions and that the inflammation itself can be a source of swelling and compression. He noted if there is swelling and compression in and around the wrist and hand, it will put pressure on the nerve and reduce the blood flow to the nerve by building up inflammatory tissue around it, preventing blood flow from getting to the nerve and causing symptoms of carpal tunnel syndrome. Dr. Sudekum agreed that Petitioner had carpal tunnel syndrome, he did not believe it was related to his work activities. RX4.

Dr. Sudekum further agreed that Petitioner had cubital tunnel syndrome, but did not believe it was related to his work activities. He explained that cubital tunnel syndrome was an intrinsic neuropathy caused by compression of normal structures against the ulnar nerve. In Petitioner's case, the gout would be considered the cause of that condition. RX4.

Dr. Sudekum testified that in evaluating the cause of the conditions in question, he evaluates the job duties, but also looks at what other potential causes could explain the development of the condition. In this case, Petitioner had "significant medical history of co-morbid conditions". In looking at the work and the non-work/medical issues, he testified that the work activities Petitioner performed did not cause or accelerate the development of these conditions. He testified that Petitioner's co-morbid medical conditions (Raynaud's, arthritis, and gout) would have caused the same types of pathology (carpal and cubital tunnel syndrome) at the same rate and require the same treatment regardless of Petitioner's work. As such, Petitioner's job activities did not cause or aggravate the carpal or cubital tunnel syndrome. RX4.

On cross-examination, Dr. Sudekum testified that in analyzing causation he evaluates the work itself in relation to the severity of the pathology of the co-morbid factors. He analyzes each issue in a graded fashion and assigns relative importance and value and causation to the different factors. In Petitioner's case, the activities he was performing at work were relatively benign. He stated, "It was the type of things that the hand is designed to do, that is at least moderate gripping and grasping and moving, and there's no indication in the medical literature that that type of activity causes pathology. The hand is designed to do that. There is plenty of literature to support the fact that conditions like gouty arthritis and Raynaud's and osteoarthritis are going to cause these chronic pathologic changes." Dr. Sudekum testified that gouty effects would not necessarily be visible intraoperatively, as it is a metabolic condition which is not always seen in every joint that it might affect. Particularly with regard to the carpal tunnel surgery, he noted that it is a "very limited exposure operation" and the surgeon does not go into the joints at all, which limits the ability to see anywhere beyond the immediate carpal tunnel area. As such, the ability to make a judgment that there is or is not any direct gouty effect would be limited. RX4.

Dr. Young testified by way of deposition on October 25, 2016, (direct examination) and January 31, 2017 (cross-examination). He is a Board Certified Orthopedic Surgeon who specializes in hand and upper extremity surgery. He testified consistent with his treating records. He testified that at Petitioner's first visit of April 13, 2010, he had positive Tinel's and positive median nerve flexion-compression tests bilaterally, which are provocative signs for carpal tunnel syndrome. Dr. Young testified that Petitioner had no indication of Raynaud's syndrome at that time and that the gouty deposit on his index finger had nothing to do with his bilateral carpal tunnel syndrome. PX5.

Dr. Young testified that, as noted in the operative report of May 14, 2010, Petitioner's left transverse carpal ligament was thickened, which was an indication of carpal tunnel syndrome. He saw no evidence of gout or Raynaud's syndrome in the left wrist during surgery. There were also no signs of Raynaud's at the May 27, 2010, follow up visit. As noted in the operative report of September 22, 2010, Petitioner's right transverse carpal ligament was thickened, an indication of carpal tunnel syndrome. He saw no evidence of gout or Raynaud's in the right wrist during surgery. He testified that on November 11, 2010, Petitioner was examined and it was noted "neurovascular is intact", which would be inconsistent with active Raynaud's. PX5.

At the December 3, 2010 exam, Petitioner had positive Tinel's and ulnar nerve compression test bilaterally. Dr. Young testified that it is possible for a person to have a negative nerve conduction study (a "false negative") but have positive clinical findings, in reference to the initial nerve conduction test by Dr. Alam in March 2010. The 2011 nerve conduction test was positive for bilateral cubital tunnel. PX5.

Dr. Young testified that it was not until September 2011 that Petitioner had documented signs of Raynaud's Syndrome in his hands (not his wrists), and those cleared as of October 2011. There was no evidence of gout in Petitioner's left elbow or any vascular issues when Dr. Young did the cubital tunnel surgery in November 2011. Although Dr. Young removed a mass in Petitioner's elbow during the January 2012 cubital tunnel release, he testified the mass was not pushing on the ulnar nerve and had nothing to do with the work injury. PX5.

Dr. Young acknowledged that he received an occupational history (Petitioner's Exhibit 12) from Petitioner's counsel in August 2016, which he reviewed. Based on that work history, Petitioner's treatment chart, and his experience as an orthopedic surgeon, Dr. Young testified that to a reasonable degree of medical certainty Petitioner's work as a correctional officer and a kitchen supervisor were causative or contributing factors in the bilateral carpal and cubital tunnel syndromes. He further opined that neither the gouty arthritis nor the osteoarthritis caused the carpal or cubital tunnel syndromes, nor did the Raynaud's syndrome. PX5.

On cross-examination, Dr. Young acknowledged that he did not review Petitioner's job description (PX12) until shortly before his first deposition. He further acknowledged that while he was treating Petitioner he did not have specific information regarding his job duties, and that the initial history only indicated that Petitioner worked for the Department of Corrections. He conceded that "arthritis can be a contributing factor" for carpal tunnel syndrome. However, he did not believe it was a factor in Petitioner's case as he did not excise any gouty deposits from the wrists. Dr. Young acknowledged that Petitioner had degenerative changes in his fingers but did not recall how involved it was in the wrists. Further, he "did not recall believing" that the degenerative changes in Petitioner's wrist contributed to the carpal tunnel syndrome. Dr. Young testified that Raynaud's is a condition in which the vessels can spasm and are hypersensitive. It can cause the fingers to turn blue or white or bright red, and can cause pain, numbness, and tingling. He acknowledged that the symptoms can mimic those of carpal tunnel and/or cubital tunnel syndrome. PX6.

CONCLUSIONS OF LAW

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

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

To obtain compensation under the Illinois Workers' Compensation Act, a claimant must show by a preponderance of the evidence that he suffered a disabling injury arising out of and in the course of his employment. 805 ILCS 305/2; *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill.App.3d 1010, 1013 (1st Dist. 2011); *Caterpillar Tractor Co. v Industrial Comm'n*, 129 Ill.2d 52, 57 (1989).

The Arbitrator notes that Petitioner put forth a theory of repetitive trauma in support of his claim that he sustained an accident that arose out of and in the course of employment. Illinois recognizes that a claimant's condition may not always arise out of a single incident of trauma and, thus, benefits may be awarded for repetitive trauma. However, even when repetitive trauma is asserted as a theory of accident, the employee must still show that the job duties were, in fact, repetitive. *See e.g., Williams v. Industrial Comm'n*, 244 Ill.App.3d 204 (1st Dist. 1993). An employee who alleges injury based on repetitive trauma must still meet the same standard of proof as other claimants alleging an accidental injury. There must be a showing that the injury is work related and not the result of a normal degenerative aging process. *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill.2d 524, 529-530 (1987).

The Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he sustained an accident which arose out of and in the course of his employment. In so concluding, the Arbitrator finds significant that Petitioner suffered from multiple chronic inflammatory and degenerative conditions, all of which can cause carpal and cubital tunnel syndrome. The Arbitrator also finds significant that, while Dr. Young opined that Petitioner's job duties were a causative or contributing factor in his carpal and cubital tunnel syndrome, he gave no explanation whatsoever as to the basis of that opinion. Dr. Young's records appear to indicate that an *assumption* was made at the time of Petitioner's initial examination that his carpal and cubital tunnel conditions were related to his job, yet there was no explanation for why such assumption was made. It does not appear that Dr. Young, contemporaneous with his treatment, ever took a history from Petitioner as to his work duties, nor did he ever have any discussion with Petitioner regarding those work duties. The job duties were not known to him at the time of Petitioner's treatment, but rather were provided six years later, just prior to his deposition.

Dr. Sudekum reviewed not only Petitioner's treating records, but also the detailed job description which Petitioner prepared (PX12). He also discussed the job duties with Petitioner at the time of his examination. Dr. Sudekum thoroughly explained Petitioner's co-morbid factors of severe gout, osteoarthritis, and Raynaud's disease. Further, and more notably, he thoroughly explained *how* and *why* those conditions were "very significant contributing factors" in Petitioner having developed carpal and cubital tunnel syndrome. He also thoroughly explained how and why

Petitioner's work activities did not cause or accelerate the development of those conditions. He thoroughly explained that Petitioner's co-morbid medical conditions (Raynaud's, arthritis, and gout) would have caused the same types of pathology (carpal and cubital tunnel syndrome) at the same rate and require the same treatment regardless of Petitioner's work.

Dr. Young gave no explanation as to the basis of his causation opinion. Dr. Sudekum gave a very detailed and well-reasoned explanation for his opinion. The Arbitrator finds Dr. Sudekum to be much more credible and persuasive on the issue of causation.

Based upon the foregoing and the record in its entirety, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he sustained an accident on March 1, 2010, that arose out of and in the course of his employment with Respondent. All other issues are rendered moot and the Arbitrator makes no findings regarding same. All benefits are denied.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ESMERALDA ESTRADA,

Petitioner,

19IWCC0487

vs.

NO: 17 WC 32181

NESTLE HOLDINGS, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, medical treatment, and prospective medical care and being advised of the facts and law, affirms but modifies the Decision of the Arbitrator, which is attached hereto and made a part hereof, as stated below.

The Decision of the Arbitrator denied benefits under the Act to Petitioner. It was determined Petitioner failed to prove that she sustained an accident that arose out of and in the course of her employment with Respondent. It was also determined that her current condition of ill-being was not causally related to her claimed accident. The Commission agrees with the conclusions the Arbitrator drew from the evidence but finds additional evidence not discussed in the Decision of the Arbitrator that supports the denial of benefits.

Petitioner's credibility was rightfully questioned. She filed an Application for Adjustment of Claim with the Commission on November 1, 2017 in which September 29, 2017 is claimed as the date of accident. September 29, 2017 was also given as the date of accident when she presented to Dr. Lawrence Li on April 6, 2018. The repeated claim of September 29, 2017 as the

date of the accident appears to be an attempt to create medical records consistent with the Application for Adjustment of Claim. Separate medical records created on October 3, 2017, only four days after the claimed date of accident, make no reference to Petitioner having sustained an accident on September 29, 2017.

Petitioner presented to the Illinois Workers' Injury Resource Center ("IWIRC") on October 3, 2017 for an evaluation of right shoulder pain. She was recorded as experiencing pain in her right shoulder at 9:00pm on September 30, 2017 while performing her job activities. She was also recorded as denying an injury had occurred.

Petitioner's presentment to IWIRC resulted in her being examined by Dr. Dru Hauter and, subsequently, being diagnosed with cervical pain, possibly due to a C6 nerve root syndrome. Dr. Hauter's assessment reiterated that Petitioner denied experiencing an injury at work as well as his admission that he was unable to relate Petitioner's complaint to her work for Respondent. He also indicated that Petitioner's condition was not related to repetitive trauma. Dr. Hauter released Petitioner from IWIRC's care and recommended she follow-up with her primary care physician for what he deemed a non-work-related problem.

Petitioner attempted to see her primary care physician, Dr. Whitney Mack, at UnityPoint Health ("UPH"), on the same day she was seen at IWIRC, but Dr. Mack was unavailable. She was seen instead by Dr. Alexa Miller. Dr. Miller did not document, as Dr. Hauter did earlier that day, a history from Petitioner of experiencing right shoulder pain on September 30, 2017 but documented, instead, Petitioner claiming two weeks of right shoulder pain that she noticed at work. Dr. Miller documented that Petitioner's job involved repetitive motions but did not document Petitioner stating that those repetitive motions caused her right shoulder pain. Dr. Miller did not offer an opinion with regard to the etiology of Petitioner's right shoulder pain.

Dr. Hauter and Dr. Miller both took from Petitioner a history of her presenting to an emergency room on September 30, 2017 for complaints involving her right shoulder. Dr. Hauter identified the emergency room Petitioner presented to as "OSF ER" and noted Petitioner presented there after the pain she experienced at 9:00pm that day had gotten "so bad." Dr. Miller did not identify the hospital to which Petitioner said she presented to on September 30, 2017, stating only that Petitioner presented to "the ER." Both Dr. Hauter and Dr. Miller also noted Petitioner told them, respectively, that she had been given medication while at the emergency room. No medical record or medical bill corroborating any treatment Petitioner obtained on September 30, 2017 was tendered into evidence.

Medical records and/or medical bills that document Petitioner obtaining treatment on September 30, 2017 would not necessarily allow the Commission to find that she sustained a compensable injury one day earlier, but such records might reveal that Petitioner had been injured on September 29, 2017 or, otherwise, allow the Commission to modify the date of accident to September 30, 2017 as to comport with medical records. In the absence of such medical records, the Commission cannot reflexively accept Petitioner's claim that she came to be

injured on September 29, 2017, particularly when the medical records most contemporaneous to that day are silent as to any injury befalling Petitioner on that date.

The Commission recognizes Illinois case law provides several ways to for an injured worker to establish the manifestation date for the type of repetitive trauma injury Petitioner claims to have sustained. A manifestation date can be the date by which a causal relationship between an injured worker and their employment became plainly apparent. *General Electric Co. v. Industrial Com.*, 190 Ill. App. 3d 847, 857, 546 N.E.2d 987, Ill. Dec. 874 (1989). A manifestation date can also be established either as the date the injured worker requires medical treatment or as the date the injured work can no longer perform their work activities. *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 138 Ill. App. 3d 880. 887, 487 N.E.2d 356, 93 Ill. Dec. 689 (1985). If any of the above-stated ways to establish a manifestation date were applied to Petitioner's case, she would still be unable to demonstrate a manifestation date of September 29, 2017.

September 29, 2017 cannot be said to be the date on which Petitioner found there to be a causal relationship between her right shoulder pain and her employment when she testified that she remembered reporting having pain in her right shoulder while weighing cans of pumpkin in "September." She then answered, "Yes," when she was asked, "September of 2017?"

Petitioner complained to Dr. Miller on October 3, 2017 of experiencing right shoulder pain for the two weeks immediately prior to that October 3, 2017 visit. Accordingly, the manifestation date, based on the reasonable person standard, would be approximately September 20, 2017. Petitioner sought out medical treatment for her right shoulder, per Dr. Miller, on September 30, 2017. September 30, 2017 would be the manifestation date under the obtaining of medical treatment scenario.

The remaining way to determine a manifestation date would be to use the date Petitioner stopped working on account of her injury. In this case, however, Petitioner did not lose any time from work due to her injury and, therefore, there is no date Petitioner was unable to work due to her injury that could be used as a manifestation date.

The Commission cannot confer benefits under the Act for a claimed September 29, 2017 accident when Petitioner did not testify to experiencing any accident on that date, and nothing in the record supports an accident on that date.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 15, 2019 is hereby affirmed as modified above.

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 for removal of this cause to the Circuit Court is required as no award for payment has been entered. The party commencing 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: SEP 9 - 2019
DLS/mav
O: 07/09/19
46

Deborah L. Simpson

Thomas J. Tyrrell

Maria E. Portela

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

19IWCC0487

ESTRADA, ESMERALDA
Employee/Petitioner

Case# **17WC032181**

NESTLE HOLDINGS INC
Employer/Respondent

On 1/15/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.46% 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:

5354 STEPHEN P KELLY LAW OFFICE
MATT BREWER
2710 N KNOXVILLE AVE
PEORIA, IL 61604

2461 NYHAN BAMBRICK KINZIE & LOWRY
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CHICAGO, IL 60602

19IWCC0487

STATE OF ILLINOIS)
)SS.
COUNTY OF Peoria)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Esmerelda Estrada
Employee/Petitioner

Case # 17 WC 32181

v.

Consolidated cases: N/A

Nestle Holdings, Inc.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Melinda Rowe-Sullivan**, Arbitrator of the Commission, in the city of **Peoria**, on **November 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

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

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

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

G. [ ] What were Petitioner's earnings?

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

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

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

K. [x] Is Petitioner entitled to any prospective medical care?

L. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD

M. [ ] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [ ] Other ____________

FINDINGS

On the date of accident, **September 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 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.

Per the stipulation of the parties, in the year preceding the injury, Petitioner earned $**10,383.04**; the average weekly wage was $**890.98**.

On the date of accident, Petitioner was **25** years of age, ***married*** with **5** 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.**

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

Petitioner failed to prove that she sustained an accident that arose out of and in the course of her employment with Respondent, and that her current condition of ill-being is casually related to her alleged accident. All benefits are denied; the remaining issues are moot and the Arbitrator makes no conclusions as to those issues.

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

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

1/9/19
Date

ICArbDec19(b)

JAN 15 2019

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(B)

Esmerelda Estrada
Employee/Petitioner

Case # 17 WC 32181

v.

Consolidated cases: N/A

Nestle Holdings, Inc.
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that in September 2017, she was employed by Respondent in quality control/fill weights. She testified that as September 2017, she had worked for two years for Respondent. She testified that she works seasonally for Respondent, that she then gets laid off and draws unemployment, and that she then returns to work seasonally again for Respondent. She testified that the season in 2017 began in July.

Petitioner testified that her job included checking four lines of product and that the product consisted of cans filled with pumpkin filling. Petitioner testified that the sequence of job required her to check the various lines to ensure that quality control was being maintained. She testified that she had a home station at Respondent's facility that included a scale and a computer where various aspects of quality control would be input into the system.

Petitioner testified that she would take a cart (which she described as at belly button height) and push it to the various lines. She testified that the first line that she would come to when doing her quality checks would be Line 2 which carried 1-gallon cans of pumpkin, which were the largest cans she would handle. She testified that the product inside these cans would weigh approximately 6 lbs., 10 oz.

Petitioner testified that she would push her cart to the line and then reach over a table onto the line and grab six of the 1-gallon cans of pumpkin. Petitioner described the conveyer belt moving the cans down the line, and that in between where she would be standing and the conveyer belt there was a metal table. She testified that she would reach over the table, grab the product off the line and move it towards herself on the table. She testified that she is only 4'9" in height, so she would have to reach more than others. She testified that once she got six cans of product moved onto the table, she would then pick all six up individually and place them on her cart. Petitioner described using her right hand to grab the product from the conveyer to move it to the table, and testified that she would use her right hand – and in fact sometimes both hands -- to move the product from the table to her cart. She testified that once the product was on her cart, she would pierce one of the cans with a needle-shaped object. She testified that once the can was pierced, she would use a digital thermometer to test the temperature of the product.

Petitioner testified that once she completed her temperature testing, she would then move to the next line. She testified that out of the four lines that were running, only one would carry the 1-gallon cans of pumpkin and that the other three lines would carry a combination of 29 oz. cans and and 15 oz. cans. She testified that once she finished her quality control check on Line 2, she would then move on to Lines

3, 4 and 5 and undertake a similar procedure with the medium and small sized cans of pumpkin. She testified that the conveyor belt for the medium cans was at waist height. She also testified that the difference with the last three lines was that she would take out eight cans of product with the medium and smaller cans, whereas she would only take off six cans with the one gallon can. She testified that the weight on the cans was that of the net weight of the product in the can.

Petitioner testified that after she would go to all four stations, her cart would be full and would contain approximately 30 cans of pumpkin. She testified that she would then push the cart back to her home station, where the computer and scale would be. She testified that she would then take each can of pumpkin off her cart and weigh it on the scale, and that she would then enter that information into the computer and onto a paper log.

Petitioner testified that after she completed data entry, she would then push the cart over to a dumpster. She testified that all the cans that she had taken off the lines would have to be thrown away. She testified that there were different sized dumpsters, and that the biggest dumpster would require her to lift the cans over shoulder height to be thrown away.

Petitioner testified that this entire process covering all four lines with the various sized cans of pumpkin had to be done every 30 minutes throughout her 12-hour shift. She testified that she could complete this task in approximately 15-20 minutes. She testified that she primarily used her right arm to lift the cans and further testified that she is right-hand dominant.

Petitioner testified that she began noticing pain and discomfort in her right shoulder in September 2017, that she reported this to Respondent and that she was sent to IWIRC. She testified that prior to September 2017, she had never had any pain or problems with her right shoulder, that she had never taken any prescription medications and that she had never sought any care for her right shoulder. She further testified that she had never participated in physical therapy, never had any injections and was never on any work restrictions for her right shoulder and that no surgeries had ever been recommended to the right shoulder prior to September 2017. She also denied any prior injuries to her right shoulder before September 2017.

Petitioner testified that she was ultimately seen by Dr. Li, who has recommended that she undergo surgery. She testified that Dr. Li has kept her at full duty throughout his care. She testified that the pain in her right shoulder gets worse every day, and that as of the time of arbitration, her right shoulder was bothering her all day long. She testified that she feels sharp pains in the front portion of the shoulder and that it affects her activities of daily living. She testified that she has five children at home and that she does everything at the house because she is laid off. She testified that she wants to have the surgery recommended by Dr. Li.

Petitioner testified that she talked to a supervisor about changing her position and that her arm hurt, but that she needed to work. She testified that this season (*i.e.*, 2018) she did not work in quality control, but that she did work for Respondent.

On cross examination, Petitioner agreed that she was not claiming a specific, traumatic accident at work, that she did not fall and that she did not have anything fall on her. She agreed that she has been employed by Respondent since the end of August 2014 and that she works at the Morton plant. She testified that she worked the quality control position throughout the 2017 season and agreed that the season runs July through October or November. She agreed that between November and the following July, she does not work for Respondent. She further testified that she does not have another job during that timeframe.

On cross examination, Petitioner agreed that she filed a prior repetitive trauma case against a different employer. She agreed she was 20 years old at time of that alleged accident and that she settled her claim.

On cross examination, Petitioner testified that her entire job was not below the shoulder and that she would lift above shoulder level to throw cans into the dumpster. Petitioner agreed that all the lines were below shoulder level. She agreed that the cart was below shoulder level. She agreed that checking the temperatures of the cans was done below shoulder level. She testified that she believed that it was above shoulder level when she was typing the information into the computer, but she also agreed that she was not holding any weight when doing so.

On cross examination, Petitioner agreed that when weighing each can and moving it from the cart to the scale, this was done below shoulder level. She agreed that doing her cycle required her to do different things like typing and weighing. She agreed that she did this position in 2016 and that she was familiar with the job. She agreed that if it took 20 minutes to complete a cycle, then 10 minutes would be spent not dealing with the cans of pumpkin.

On cross examination, Petitioner agreed that she reported her injury on September 29th and that she had worked that season for two months before reporting her accident.

On cross examination, Petitioner agreed that her children had bicycles. She agreed that her kids' bikes weighed more than a large can of pumpkin.

On redirect, Petitioner testified that the bottom of each can listed the net weight, which was how much the pumpkin itself weighed. She testified that this did not include the weight of the actual can itself. She testified that she did not know the weights of the cans by themselves.

Scottie Snyder was called as a witness by Respondent at the time of arbitration. Mr. Snyder testified that he performed surveillance and has a PERC license as a private investigator. He testified that he surveilled Petitioner from July 20-22, 2018 and that he prepared three separate videos of surveillance, each of which were approximately 10-15 minutes in length.

Chad Wurmnest was also called as a witness by Respondent at the time of arbitration. He testified that he is employed by Respondent as an engineering and maintenance manager. He testified that he has been in this position for 3 ½ years and that he is responsible for overall operation of the plant itself. He testified that he is familiar with the quality control position and that he is also familiar with Petitioner.

Mr. Wurmnest testified that in 2017, there were three cans of pumpkin in production. He testified that the indication of 15.9 ounces of net product meant that that was the weight of the product itself inside the can. When asked how much the can itself weighed, Mr. Wurmnest responded that it weighed approximately 1 ounce and that as a whole, the can was about 1 pound. As to the medium can that listed a net weight of 29 ounces, Mr. Wurmnest testified that the empty weight of the can was that of about 2 ounces. As to the largest can, Mr. Wurmnest testified that the empty weight of the can was about 4 ounces with the lid.

As to the item depicted in Respondent's Exhibit 5A1, Mr. Wurmnest testified that this photo depicted the discharge of the Line 4 seamer. When asked how high above ground the conveyor area was, Mr. Wurmnest responded that it was about 41 inches where the cans would be removed. He testified that this was the same line that Petitioner worked in 2017. As to the item depicted in Respondent's Exhibit 5A2, Mr. Wurmnest testified that this photo depicted the Line 3 conveyor. He testified that the highest point above ground was that of 40 inches. He testified that this was the same line that Petitioner worked in 2017.

As to the item depicted in Respondent's Exhibit 5B, Mr. Wurmnest testified that this photo depicted a cart that would be used in the course of the quality control job. He testified that it was a Rubbermaid-style push cart and that the highest part of the cart above ground was that of 33 ¼ inches. As to the item depicted in Respondent's Exhibit 5C, Mr. Wurmnest testified that this photo depicted the Line 2 seamer discharge table. He testified that this was used when pulling the cans off the line so as to be able to set them on the cart. He testified that the table was just under 32 inches high off the ground. As to the item depicted in Respondent's Exhibit 5D, Mr. Wurmnest testified that this photo depicted a hopper where the cans would be discharged. He testified that this was the primary hopper, but that it was possible that there were others. When asked how high one would have to lift to get an item into the hopper, Mr. Wurmnest responded that it would be 38 inches and that that one would have to lift less than 38 inches in order to place an item into any of the other hoppers.

Mr. Wurmnest testified that the job video showed quality control work activities. He testified that these tasks were performed every 30 minutes during the shift. He testified that the video showed where the cans were removed from the line for all 3 lines, that it showed where the employee would take the temperature of the product in a can, that it showed weighing of the cans on the scale, and that it also showed discarding the cans. He testified that the job vide was a true and accurate representation of the quality control job. When asked what a quality control employee did with any remaining time if the tasks were done in less than 30 minutes, Mr. Wurmnest responded that there were no prescribed tasks.

Mr. Wurmnest testified that employees worked 12-hour shifts and that they generally had 30 minutes for lunches and 15 minutes for each break. He testified that a relief operator was available to cover an employee's job while the normal operator was at lunch, and that they would perform the entire cycle, if necessary.

On cross examination, Mr. Wurmnest testified that he did not take the photographs himself, nor was he present for the photos. He testified that he did not know who was using the tape measure shown in the photographs, but that he validated the measurements using his own tape measure, that the tape measure went to the floor and that they were the heights as shown.

On cross examination, Mr. Wurmnest testified that he has not done the quality control position for an entire shift but that he has pulled cans off the line. He testified that as to the weights of the cans, he has weighed the cans to confirm their respective weights. He confirmed that Petitioner was not the individual shown in the job video. He denied being aware of any ergonomic studies having been performed for Petitioner's position.

On redirect, Mr. Wurmnest testified that when individuals took breaks or lunch, another operator covered for them. He testified that per shift, an employee was given a break about every 2 hours. He testified that each of the breaks were 15 minutes in length and that lunch was 30 minutes. He testified that in 2018, Petitioner was a cook room operator.

On rebuttal, Petitioner confirmed that she reviewed the surveillance video that showed her moving children's bikes. She testified that she had bikes for her 3-year-old twins that had training wheels on them. She testified that as to the footage showing her carrying bags into Crittenton Center, the bags she was seen carrying contained breakfast, clothes and toys. She testified that the bags were not heavy. She further testified that as to the video showing her carrying a book bag on her back, the bag contained her wallet and cell phone.

On rebuttal, Petitioner confirmed that she reviewed the job video. She testified that it was not her shown in the job video. When asked when she performed the tasks whether it was the same as that depicted in the video, Petitioner testified that everything was the same except for Line 4.

The Application for Adjustment of Claim was entered into evidence at the time of arbitration as Petitioner's Exhibit 1.

The medical records of UPH Methodist Family Medicine were entered into evidence at the time of arbitration as Petitioner's Exhibit 2. The records reflect that a letter from Dr. Schlotterback was issued on October 17, 2017, which noted that Petitioner was seen on that date in his office and that she could return to work on October 18, 2017. The records reflect that a letter from Dr. Gonzalez was issued on November 29, 2017, which noted that Petitioner had been referred to an orthopedic surgeon for evaluation of her right shoulder. The records reflect that a referral was issued for Midwest Orthopaedic Center on October 30, 2017, that the Consultation Form noted that it was possible worker's compensation and that the referral was for right rotator cuff tendinosis and probable labral tear as seen on MRI. Petitioner's height was noted to be that of 4'11". (PX2).

The records of UPH Methodist Family Medicine reflect that Petitioner was seen on October 3, 2017 for right shoulder pain. It was noted that Petitioner reported two weeks of right shoulder pain, that she worked in a Nestle factory and that her job involved repetitive motions including lifting and moving cans. It was noted that Petitioner had a history of bilateral carpal tunnel syndrome status post release, that she also had a right cubital tunnel release, that over the past two weeks she had noted right shoulder pain at work that was increasing in severity and that she pointed to her right anterior shoulder and stated that the pain wrapped around to the back as well. It was noted that the pain was sharp, that it worsened with the repetitive motions that Petitioner did at work and also with lifting the arm above her head, and that it hurt to sleep on the shoulder. It was noted that Petitioner described occasional radiation down the arm and into the hand, that she also described weakness both of the shoulder and of the right hand, and that she was frequently dropping things. It was also noted that Petitioner reported an occasional popping sensation in the joint and that her range of motion was limited due to pain. It was noted that Petitioner went to the emergency room for the complaint on September 30, 2017 and was prescribed Ibuprofen and Flexeril, and that she felt that the Flexeril helped but that she could not take it and go to work because it made her dizzy and sleepy. It was noted that Petitioner then went to IWIRC, where she was told that she likely had a neck problem and should follow-up with her primary care physician. It was noted that Petitioner requested a note to return to work, that she had requested transfer to a different job within her company due to the pain and that she was currently training another employee to take her current job and was not doing the normal repetitive motions that her job typically involved. It was noted that Petitioner would be changing to a position that involved mostly computer work. The assessment was noted to be that of right shoulder pain. It was noted that Petitioner's pain had characteristics both of cervical disc herniation with radicular pain and of rotator cuff tendinitis or partial tear, as well as possibly labral tear. It was noted that due to the description of right hand weakness and frequent dropping of objects, Petitioner was to undergo an MRI of the cervical spine. Petitioner was also referred to physical therapy. (PX2).

The records of UPH Methodist Family Medicine reflect that Petitioner was seen on October 17, 2017, at which time it was noted that she was seen in follow-up for shoulder pain. It was noted that Petitioner was initially seen on October 3, 2017 for right shoulder pain of two weeks' duration at that time and that she was also complaining of associated right hand weakness so a C-spine MRI was obtained to rule out disc herniation. It was noted that the MRI was normal showing no disc protrusion or herniation, and that Petitioner was referred to physical therapy. It was also noted that on that date Petitioner stated that her pain was the same, that the pain had now been ongoing for a month, that it was characterized by pressure and a stabbing sensation, and that it was worse with movement and exertion and better with rest. It was noted that since the last week Petitioner had noticed numbness in her right shoulder on two occasions for approximately one minute and that she felt like her right hand strength had been decreasing since her last appointment. It was noted that Petitioner did not go to her physical therapy appointment because she first wanted to see what the results of her MRI were. It was noted that Petitioner had been working in her new role at work that was less physically demanding and involved more computer work, that she had been taking

Etodolac which helped a little bit and that she had also been taking Ibuprofen which helped a little as well. It was noted that Petitioner had not been taking Flexeril because it made her too lethargic and dizzy. The assessment was noted to be that of right shoulder pain of unspecific chronicity and hand weakness. It was noted that Petitioner had findings suggestive of right rotator cuff tendonitis, that she was recommended to follow-up with physical therapy, that she was to continue Etodolac and that she was to continue to use ice pack/heat as needed. It was also noted that Petitioner's carpal tunnel syndrome could be recurring and that she was to be placed in a wrist splint. (PX2).

The records of UPH Methodist Family Medicine reflect that Petitioner was seen on October 19, 2017, at which time it was noted that she stated that her right shoulder pain began one month ago, that she did not remember any inciting event but stated that she thought she injured herself at work by doing repetitive heavy lifting and that she worked for Nestle and carried cans every 30 minutes and lifted "gallons." It was noted that Petitioner had shooting/achy pain all over her shoulder but that it was worse over the anterior shoulder, that it was worse with movement, that she stated that the pain was increasing and that she felt stiff as well. It was noted that in the past two weeks Petitioner had also started dropping objects out of her right hand, that she had a history of cubital and carpal surgery six years ago and that a c-spine MRI was recently obtained and did not show any acute changes. It was noted that Petitioner was referred to physical therapy but that she stated that she did not want to go until she found out what was wrong with her shoulder due to the risk of further injuring her right shoulder, that she was now doing more computer work at work instead of heavy lifting but that she stated that she still helped her friends out, and that taking Etodolac and using icy-hot and a muscle relaxant would help. It was noted that Petitioner stated that she had been evaluated there twice by two residents and at IWIRC and that per the patient, IWIRC stated that they could not help her. It was noted that Petitioner wanted to have an MRI of her right shoulder to see what was wrong with her shoulder. The assessment was noted to be that of right shoulder pain, likely rotator cuff tendinopathy. It was noted that Petitioner was recommended to continue Etodolac, to use a muscle relaxant as needed, and to try Aspercream with Lidocaine patches as needed. It was noted that Petitioner would be sent for an MRI of the right shoulder given her subjective weakness, history of dropping objects and inability to fully assess muscle strength of the right arm due to pain. (PX2).

Included within the records of UPH Methodist Family Medicine was an interpretive report for an MRI of the cervical spine performed on October 13, 2017, which was interpreted as revealing a normal MRI of the cervical spine. The records reflect that an MRI of the right shoulder was performed on October 27, 2017, which was interpreted as revealing (1) the study is significantly compromised by patient movement; (2) rotator cuff tendinosis; no full-thickness rotator cuff tear; (3) probable labral tear as described. The records reflect that a letter from Dr. Miller was issued on October 3, 2017, which noted that Petitioner could return to work immediately with no restrictions. (PX2).

The Medical Bills Exhibit was entered into evidence at the time of arbitration as Petitioner's Exhibit 3.

The medical records of Dr. Lawrence Li were entered into evidence at the time of arbitration as Petitioner's Exhibit 4. The records reflect that Petitioner was seen on April 6, 2018, at which time it was noted that the chief complaint was that of the right shoulder. It was noted that the date/time of injury was that of September 29, 2017 and that Petitioner stated that the injury occurred because of repetitive work. It was noted that Petitioner worked in a pumpkin can packing factory, that she had to lift heavy pans [*sic*] of pumpkin and that it aggravated her shoulder. It was noted that Petitioner had an MRI of the right shoulder, but that Dr. Li did not have the results or the images. It was also noted that Petitioner had had continued pain and that the pain was worse with any type of raising her arm or reaching, that her pain was aggravated by activities of daily living and limited the lifestyle desired, that the pain interfered with sleep and woke the patient up and that she denied numbness and tingling. The diagnosis was noted to be that of right shoulder impingement syndrome, AC joint dysfunction, possible partial tear of the rotator cuff tendon or

labral tear. It was noted that Petitioner would obtain the images and report of the MRI, and that Dr. Li would formally plan based on that. (PX4).

Included within the records of Dr. Li as an Initial Evaluation (physical therapy) dated April 10, 2018, which noted that Petitioner reported that she developed right shoulder pain at work due to repetitive lifting and reaching. It was noted that Petitioner worked at a pumpkin factory (seasonal work) and that she had to carry heavy cans of pumpkin to check the weight and temperature of the pumpkin (quality control). It was noted that the cans were one gallon and that Petitioner carried six cans (one at a time) every 30 minutes and that she then had to lift the full cans into a trash can which required her to reach up to about shoulder/head height holding a heavy, hot can of pumpkin. It was noted that Petitioner worked 12-hour shifts, that she developed right shoulder weakness and pain from her job, and that the pain was located in the posterior right shoulder as well as lateral and anterior and that it went down her arm. It was also noted that Petitioner's hand was swollen, that she saw a doctor who thought it was her neck but that she reported that she did not have neck pain and had a normal MRI of her neck, and that she also had an MRI of her shoulder. At the time of the April 13, 2018 visit, it was noted that Petitioner reported that her pain was 6-7/10 on that date and that she reported that her upper extremity was weak and that her shoulder was painful. (PX4).

The records of Dr. Li reflect that Petitioner was seen for physical therapy on April 17, 2018, at which time it was noted that she reported that she had some relief from the last session, that she reported that her pain was 7-8/10 on that date and that she reported that her left shoulder was starting to hurt as she was using it more. At the time of the April 19, 2018 physical therapy visit, it was noted that Petitioner reported that therapy was not helping, that it was getting worse, that the home exercise program was painful and that the modalities reduced her pain for a couple of hours but that the pain then came right back. At the time of the April 26, 2018 physical therapy visit, it was noted that Petitioner's range of motion had improved but that her pain continued without improvement. At the time of the April 24, 2018 visit, it was noted that Petitioner's pain was not getting better, that she did her home exercise program but modified the sets/reps due to pain and that she was trying to rest her arm at home but continued to have pain. It was noted that Petitioner's pain was rated 7/10 upon entering the clinic and was located in the anterior and posterior shoulder, that she got temporary relief with modalities, that the pain woke her up at night and that she was now also having left shoulder pain because she was using her left shoulder more than her right. At the time of the May 3, 2018 physical therapy visit, it was noted that Petitioner reported that her shoulder was still painful and that her left shoulder was painful now as well. (PX4).

The records of Dr. Li reflect that Petitioner was seen on May 7, 2018, at which time it was noted that the corticosteroid injection helped for about a week but that her symptoms recurred, and that physical therapy was helping with range of motion but not pain. The diagnosis was noted to be that of right shoulder partial thickness tear of infraspinatus tendon and anterior labral tear, and it was noted that Petitioner also had impingement symptoms and AC joint dysfunction. Petitioner was given prescriptions for medications including Mobic, Cyclobenzaprine and Voltaren Gel and was recommended to continue therapy. At the time of the May 8, 2018 physical therapy visit, Petitioner's shoulder pain upon entering the clinic was noted to be that of 7-8/10. At the time of the May 15, 2018 physical therapy visit, it was noted that Petitioner reported 7/10 achy pain on the front her right shoulder and that she continued to have sharp pain on the back of her shoulder to the upper arm. It was noted that Petitioner felt that her pain was getting worse, that therapy was not helping overall and that she felt better after therapy sessions, but that the pain returned in three hours. At the time of the May 18, 2018 physical therapy visit, it was noted that Petitioner reported that she was doing "OK" but that she was still having quite a bit of pain. (PX4).

The records of Dr. Li reflect that Petitioner was seen for physical therapy on May 24, 2018, at which time it was noted that she reported that her shoulder hurt more after the last session and that she wished she would have decided to have ultrasound performed. It was also noted that Petitioner reported that she felt that her strength and range of motion were improving, but that her pain still remained. At the

time of the May 31, 2018 physical therapy visit, it was noted that Petitioner's pain was unchanged. At the time of the May 29, 2018 visit, it was noted that Petitioner stated that it still hurt all the time. At the time of the May 10, 2018 physical therapy visit, it was noted that Petitioner reported that she was getting sharp pains down her arm in the middle of the night. At the time of the May 1, 2018 physical therapy visit, it was noted that Petitioner reported temporary relief after therapy but that her pain returned, and that she reported pain at the anterior/posterior shoulder and now at the armpit region. (PX4).

The records of Dr. Li reflect that Petitioner was seen on June 4, 2018, at which time it was noted that she continued to have significant discomfort with any reaching and raising her arm, that therapy had helped with her range of motion and strength but had not reduced her pain, and that she complained of significant pain over the anterior and lateral aspect of her shoulder. The assessment was noted to be that of right shoulder impingement syndrome and AC joint dysfunction with partial thickness tear of infraspinatus tendon and anterior labral tear. Petitioner was dispensed medications. It was noted that Petitioner had had eight weeks of physical therapy without relief, and that she had had corticosteroid injections and oral medications with no relief. It was also noted that Petitioner was to proceed with right shoulder arthroscopy arthroscopic subacromial decompression and distal clavicle excision, and that Dr. Li would address the labral and rotator cuff issues as the pathology required. (PX4).

The records of Dr. Li reflect that Petitioner was seen for physical therapy on June 7, 2018, at which time it was noted that she wished to continue physical therapy once per week in conjunction with doing her home exercise program as prescribed. At the time of the June 14, 2018 physical therapy visit, it was noted that Petitioner reported that her shoulder still hurt. At the time of the June 21, 2018 physical therapy visit, it was noted that Petitioner's symptoms were unchanged and that her pain was 6/10 upon entering the clinic. At the time of the July 2, 2018 visit with Dr. Li, it was noted that Petitioner continued to have significant pain in spite of therapy and that the therapy helped her with range of motion and strength but not pain. The diagnosis was noted to be that of right shoulder impingement syndrome, AC joint dysfunction, partial thickness tear of the supraspinatus tendon and anterior labral tear. It was noted that Petitioner had failed all non-operative treatment. Petitioner was dispensed medications and was recommended to undergo right arthroscopic shoulder surgery with arthroscopic subacromial decompression and distal clavicle excision. It was also noted that Dr. Li had not heard from the worker's compensation adjuster yet. At the time of the June 28, 2018 physical therapy visit, it was noted that Petitioner's shoulder pain was 6/10 upon entering the clinic and that on that date the pain was more towards the back of the shoulder. (PX4).

The records of Dr. Li reflect that Petitioner was seen on August 27, 2018, at which time it was noted that she had been working and had significant pain with raising her arm. It was noted that Petitioner had been doing her home exercise program. The assessment was noted to be that of right shoulder AC joint dysfunction, impingement syndrome, partial thickness tear of the supraspinatus tendon and anterior labral tear. It was noted that Petitioner had failed all non-operative treatment. Petitioner was dispensed medications. It was also noted that they were awaiting adjudication from worker's compensation. Included within the records of Dr. Li was a work slip dated September 10, 2018, which noted that Petitioner could work full duty with no restrictions. (PX4).

The transcript of the deposition of Dr. Lawrence Li dated July 5, 2018 was entered into evidence at the time of arbitration as Petitioner's Exhibit 5. Dr. Li testified that he is board-certified by the American Board of Orthopedic Surgery, that his practice focuses on shoulders, hands and knees, that he treats both the entire upper extremity and the entire lower extremity both operatively and non-operatively, and that he treats spinal conditions only non-operatively. (PX5).

Dr. Li testified that he first saw Petitioner on April 6, 2018 and that he obtained a history that on September 29, 2017 she developed right shoulder pain, that she worked at a pumpkin can packing factory and that she had to lift heavy cans of pumpkin and aggravated her right shoulder. He testified that Petitioner stated that since her injury she had had continued pain, that the pain was worse with any type of raising her

arm or reaching, that it was aggravated by activities of daily living and that it woke her up. He testified that Petitioner's pain was in the shoulder and went down her arm, that she rated it at an 8 and that she complained of weakness as well as swelling. He testified that the physical examination revealed a positive Neer and Hawkins impingement tests consistent with rotator cuff pathology that would include rotator cuff tearing and impingement syndrome, that the positive cross arm adduction tests along with the AC joint pain were consistent with AC joint dysfunction and that the positive O'Brien's test and biceps load test were consistent with labral or biceps pathology. He further testified that the x-rays revealed a Type II acromion but no bony abnormalities. (PX5).

Dr. Li testified that his diagnosis was that Petitioner had impingement syndrome, AC joint dysfunction, possibly a partial tear of the rotator cuff tendon and a possible labral tear. He testified that he recommended that Petitioner come back after she had the MRI images and he got the report so that he could speak with her about the details of her problem. He testified that he also gave Petitioner work restrictions of no use of the right arm. He testified that Petitioner's subjective complaints were consistent with his findings on physical examination, and that it was later consistent with the imaging reports. (PX5).

Dr. Li testified that he next saw Petitioner on April 9th at which time she brought her MRI, which showed that there was a partial thickness tear of the infraspinatus tendon and anterior labral tear. He testified that his recommendations were that of work restrictions, physical therapy, a cortisone injection and anti-inflammatory medication. He testified that he next saw Petitioner on May 7, 2018, at which time she stated that the cortisone injection had helped for about a week but that her symptoms had recurred. He testified that therapy was helping with range of motion but not Petitioner's pain. He testified that the improvement in the symptoms with the cortisone injection indicated that there was definitely pathology where the injection was performed (the subacromial space or the rotator cuff tendon), so it reinforced the diagnosis. He testified that on physical examination Petitioner still had the same provocative testing and the same weakness in the rotator cuff, and that his diagnosis was right shoulder partial thickness tear of the infraspinatus tendon, anterior labral tear, impingement syndrome and AC joint dysfunction. (PX5).

Dr. Li testified that impingement syndrome was where the patient developed pain with over chest movement of the shoulder and that it would be related to the partial thickness tear of the infraspinatus tendon. He further testified that AC joint dysfunction was pain over the AC joint that was caused by inflammation of the AC joint either due to injury or due to chronic repetitive micromotion. (PX5).

Dr. Li testified that it was his opinion that Petitioner's symptoms and diagnosis were a direct result of her work activities. He testified that Petitioner was a relatively short person, that she would have to use the shoulder to carry the cans of pumpkin and that she would have to raise it above her shoulder, which was for her was not that high. He testified that this was the type of activity that would cause either an injury to the rotator cuff, injury to the labrum or an aggravation of the rotator cuff or labrum which would cause impingement syndrome, and that it could also cause AC joint disruption. He testified that as of May 7th, he recommended continuing therapy and that he also prescribed a topical cream to see if that would help. (PX5).

Dr. Li testified that he next saw Petitioner on June 4th, at which time Petitioner had significant discomfort with reaching and raising her arm and that the pain was over the anterior lateral aspect of the shoulder. He testified that on physical examination Petitioner had slightly less active motion than before, which suggested that she was probably more inflamed on that day. He testified that he felt that there was not likely to be any hope that doing therapy would provide long-term relief, so he recommended an arthroscopic procedure to address the rotator cuff and labral issues. He testified that the work restrictions remained the same in May and June of 2018. (PX5).

Dr. Li testified that he last saw Petitioner on July 2, 2018, at which time she stated that she still continued with the same pain and that she thought that the therapy helped her with some strength and range

of motion, but not the pain. He testified that the physical examination was similar to what it was before. He testified that Petitioner was doing a home exercise program while they waited and that the diagnosis was the same. He testified that Petitioner's work restrictions were still no use of the right arm. (PX5).

Dr. Li testified that he believed that the care and treatment that he was recommending was related to the described work activities that Petitioner gave to him that she performed for her employer, and that he also believed that the work restrictions that he placed upon her and the potential work restrictions she may have after surgery were related to the work injuries that Petitioner described. (PX5).

When posed with a hypothetical asking him to assume that Petitioner went to the emergency room on September 30, 2017 and gave a history of extending her arm out lifting a can and that she felt an immediate onset of pain as opposed to a gradual onset of pain, Dr. Li testified that this was the type of activity that would cause the diagnosis that he provided in this case. When posed with a hypothetical asking him to assume that Petitioner worked for employer as a fill weight checker, that in doing so she was required to lift and carry up to 10 pounds frequently (34-66% of the time) and with his understanding of her stature and her ability or height or where she had to reach, Dr. Li testified that these were the type of activities that could have contributed or caused the diagnosis that he provided in this case and that they did so. When posed with a hypothetical asking him to assume various job tasks that Petitioner performed, Dr. Li testified that these were the types of activity that would have contributed to the diagnosis that he rendered in the case and that he thought the important activities to consider were lifting the cans, taking them from one place to another and the weight of the cans which was a gallon, which was about 9-10 pounds. He testified that he did not think that the computer work had any bearing. When posed with a hypothetical asking him to assume that Petitioner was also required to dump cans into dumpsters where she reached above chest level for this activity, Dr. Li testified that this type of activity could cause or aggravate her condition of ill-being and that it would be particularly aggravating because Petitioner would have to reach up, then pronate her arm and control the dump, which was stressful. He testified that his opinions in this case considered the fact that Petitioner was four-foot-nine inches in height. (PX5).

On cross examination, Dr. Li agreed that he was aware that Petitioner was alleging a repetitive trauma-type injury. He testified that Petitioner did not tell him that she had a one-time accident. He testified that Petitioner claimed that her accident occurred around the end of September of 2017. (PX5).

On cross examination, Dr. Li agreed that according to the radiologist's review of Petitioner's shoulder MRI, the test was significantly compromised by her movement. He testified that there was a partial thickness tear of the rotator cuff. He testified that in his review of the images, there was a short segment intrasubstance delamination tear of the distal supraspinatus tendon just proximal to the foot plate insertion measuring about 6 mm by 0.9 mm in transverse dimension, and that there was under surface and bursal surface fraying and partial thickness bursal tear of the supraspinatus tendon but no full thickness tear of the supraspinatus tendon or infraspinatus tendon. He testified that the partial thickness tear was small to medium. When asked whether after reviewing the MRI films he agreed with what was drafted by the radiologist in his report, Dr. Li responded that he thought that the tear was actually worse in the infraspinatus than the supraspinatus, but that it was really the same place. (PX5).

On cross examination, Dr. Li agreed that it was not uncommon for partial thickness rotator cuff tears to occur idiopathically in people ages 40-60. He further agreed that Petitioner did not fit into that age group as she was only 25 years old. He agreed that he would not expect a 25-year-old person to develop a partial thickness rotator cuff tear just through everyday life. He testified that he did not think that Petitioner's Type 2 acromion played any role in developing the partial thickness tear because Type 2 was the most. (PX5).

On cross examination, Dr. Li agreed that he was diagnosing Petitioner with a labral tear in addition to the partial thickness rotator cuff tear. When asked whether he would expect that someone who was 25

years old to have both of those findings to have had a degree of force to be applied or at least required in order to cause that damage, Dr. Li responded that if it was a one-time event then he would agree, but that if it was something that occurred from repetitive activities then it would not have to be a tremendous amount of force. (PX5).

On cross examination when asked of his understanding of what Petitioner's job requirements are, Dr. Li responded that Petitioner basically worked with cans of fluid, that she would basically lift them and move them around and that sometimes she dumped them. He testified that it was his understanding that Petitioner was not just in one place and that she had to do some walking, and that he did not mean to say that she lifted from one place to another all day long. (PX5).

On cross examination when asked whether it was one of Petitioner's job requirements that she remove five of the large cans every half hour, Dr. Li responded that he did not recall a specific number. When asked whether he was told that Petitioner carried the can herself or whether she placed the can on a cart, Dr. Li responded that Petitioner had to move the cans around and that it was not important to him whether it was a cart or table. He testified that the most significant part to him was to reach and grab the can and then bring it to the body. (PX5).

On cross examination when asked whether it would make any different whether Petitioner was reaching forward with her hands and grabbing a feather versus grabbing a bowling ball, Dr. Li responded that it would make a difference and that he assumed that Petitioner was lifting one-gallon cans. He agreed that Petitioner told him that the cans were heavy. He testified that his understanding was that the gallon cans weighed about 9 or 10 pounds. He testified that he found it hard to believe that the heaviest can that Petitioner was using coming off the line weighed about 6.5 pounds. (PX5).

On cross examination when told that the medium can weighed 1.81 pounds, that the smallest can weighed 0.9375 pounds and that Petitioner's job required her to remove five of the large cans every 30 minutes, eight of the medium cans and eight of the small cans every 30 minutes, Dr. Li agreed that Petitioner would not be spending an entire half hour removing a grand total of 21 cans. He agreed that this was new information, but further testified that he was never under the impression that Petitioner just removed cans all the time. When asked in consideration of the weight of the cans and the fact that the heaviest can was only being removed five times per half hour and how it was possible that Petitioner could develop a partial thickness rotator cuff tear and a labral tear from materials that weighed so little, Dr. Li responded that he did not accept that they weighed 6.5 pounds as it went against the law of physics but that assuming that they did, Petitioner was short and had to reach above her chest and had to reach out and extend her arm, which were all things that had to be considered. (PX5).

On cross examination when asked if Petitioner's production line was at slightly above her waist height and more at abdomen height and that that was where she would reach forward and grab the can off the line and whether that would make a difference, Dr. Li responded that he thought that if Petitioner never reached above the horizontal then it would be less stressful on the shoulder. He testified that he did not think that writing down data and putting items on the scale was considered to be repetitive work. He testified that if the dumpster was at chest height and one had to raise it above that to dump it and with pronation of the arm, it would be stressful. He testified that if the dumpster were at chest height and Petitioner would reach above her shoulder, then his opinion would remain the same. (PX5).

On cross examination when asked to assume that the heaviest can that Petitioner lifted was at 6.62 pounds and what, if any, impact that would have on his opinion, Dr. Li testified that it would not have any affect. He testified that he was not aware of Petitioner having a prior shoulder condition. (PX5).

On redirect, Dr. Li testified that Respondent's counsel had not provided him with any evidence that Petitioner had any prior diagnosis to the right shoulder pre-dating September 2017, nor had he provided him with any evidence of any type of medical treatment or records pre-dating September 2017. (PX5).

On redirect, Dr. Li testified that as a physician he did not rely solely upon the radiologist's interpretation or report, and that he also considered his own interpretation and review of the MRI studies. He further testified that he relied upon his physical examination for the diagnosis as well as treatment. He testified that he also relied upon the history given to him by the patient. (PX5).

On redirect, Dr. Li testified that even after cross examination it was still his opinion that Petitioner had a partial tear of the rotator cuff and a tear of the labrum. He testified that he had no evidence that the tear or tears occurred idiopathically. He agreed that more likely than not, considering Petitioner's age and the records, it did not occur idiopathically. (PX5).

On redirect, Dr. Li testified that pushing a cart that had 30 pounds on it was the type of activity that could aggravate the shoulder condition. He testified that moving 80 cans in a day's time was the type of activity that could be responsible for the condition of ill-being that he had diagnosed in the case and that this was absent her moving other cans. He agreed that his opinions had not changed since direct examination. (PX5).

The transcript of the deposition of Dr. Sam Biafora was entered into evidence at the time of arbitration as Respondent's Exhibit 1.[1] Dr. Biafora testified that he is an orthopedic surgeon who subspecializes in surgery of the shoulder to the fingertips. He testified that he is board-certified in orthopedics with a subspecialty certificate in hand surgery. (RX1).

Dr. Biafora testified that he performed an IME on February 26, 2018, at which time Petitioner said that she had the onset of right shoulder pain in approximately September of 2017. He testified that Petitioner stated that initially it began as a feeling of tiredness and weakness in the right shoulder, that she reported her complaints and was evaluated about two weeks later, and that she soon thereafter was told that she had issues with her neck. He testified that Petitioner ultimately sought treatment from her primary care physician who referred for an MRI of her neck and ultimately an MRI of her shoulder, and that at that point she had been referred to an orthopedic surgeon but was not yet evaluated. He testified that at the time that he examined her, Petitioner denied any neck pain and denied any radicular-type pain into the hand or forearm. He further testified that Petitioner denied any one particular traumatic injury to her shoulder. He also testified that Petitioner had had bilateral cubital tunnel releases and bilateral carpal tunnel releases about five years prior. (RX1).

Dr. Biafora testified that he interviewed Petitioner about her job duties and that she told him that she was a seasonal worker from August through November in a lab since about 2014, that she described various job activities, that one of her job tasks involved standing at a conveyor at or about the level of the abdomen, and that she described various cans, some of which weighed 29 ounces, some of which weighed 15 ounces and some of which weighed 106 ounces. He testified that Petitioner demonstrated grabbing the cans that were filled with pumpkin and placing them on a cart, that Petitioner demonstrated holding back some of the cans with her left arm as she grabbed the cans with her right and placed them on a cart, that this for the most part was at the level of Petitioner's abdomen but as she placed them on the cart it was about closer to the level of her chest, and that she repeated the process on other lines. He testified that Petitioner described grasping a few cans per minute, that she then described poking holes with a needle, that she demonstrated a stabbing-type motion with her right elbow at her side as she jabbed the type of can to check its temperature and that she then checked the weight of each can, placing the can onto a scale. He

[1] The Arbitrator notes that Petitioner's attorney confirmed at the outset of the deposition that he had elected to attend the deposition over the telephone. (RX1).

testified that Petitioner also demonstrated reaching from her right side to place a can on the scale. He testified that Petitioner then dumped the cans individually into a dumpster knowing that she reached up to the level of her chest, that she repeated this activity every 30 minutes, that she stated there were a total of four separate lines and that she worked 12 hours per day and 6 days per week. When asked whether Petitioner talked about remaining in the same position doing the same thing over and over or whether she moved around, Dr. Biafora responded that Petitioner moved around. (RX1).

Dr. Biafora testified that Petitioner reported her height to be 4 feet 9 inches tall. When asked how Petitioner demonstrated to him the height of the conveyor belt, he responded that in these types of cases he asked the individual to stand up and show him exactly what they did and that if he indicated it was at waist level, Petitioner must have pointed at waist level. He testified that it seemed in reading his report that the cart might have been a little bit higher than the conveyor belt. He further testified that Petitioner did not describe any activity that was either at or above shoulder level. (RX1).

Dr. Biafora testified that he reviewed the job description from Nestle and a job functions assessment among other documentation, which also included including various medical records. As to the October 3, 2017 note from IWIRC, Dr. Biafora testified that the note indicated that Petitioner denied any injury at work. He testified that he felt that based on her presenting complaints and her physical examination, Petitioner had right shoulder pain related to biceps tendonitis or biceps labral pathology. When asked what type of mechanism or trauma was required to cause a labral tear, Dr. Biafora responded that the most common cause of a labral tear would be some type of traction injury across the shoulder, such as someone falling off a ladder and, as falling, they were hanging onto an object. He testified that another example would be an unexpected load through the shoulder like a heavy object falling toward the ground and that as grasping the object, it pulled the arm down. He testified that repetitive trauma was unlikely to cause a labral tear especially if it was performed below the shoulder level, and that he did not believe that it could occur that way. (RX1).

When asked of the significance to the fact that Petitioner did not work at or above shoulder height, Dr. Biafora responded that in some instances repetitive, forceful activities could cause an aggravation of these types of pathologies. He testified that it was hard to quantify the force required to aggravate these pathologies if performed at or above the shoulder level, but that it would be either pushing or pulling forcefully, picking up heavy objects repetitively up to that height and that the weight was going to depend a lot on the individual itself, but that it would require it to be repetitive or sustained for long periods of time. (RX1).

When shown a sample of the smallest can on the line, Dr. Biafora testified that the label indicated "15 ounces" and that not much impact on the labrum would occur from lifting this item at a level below shoulder height. As to the middle size can, Dr. Biafora testified that the label indicated that the weight of the can was that of 29 ounces and that just lifting it alone would not cause any injury to the labrum. Dr. Biafora further testified that lifting the can from a conveyor belt to a cart at a level below the shoulder would not cause a labral injury. As to the large can, Dr. Biafora testified that the label indicated that the weight of the can was that of 6 pounds, 10 ounces. He testified that lifting this object alone would not cause a labral tear unless some type of traumatic event occurred such as the can falling, someone trying to prevent it from falling and it having pulled the arm down. He testified that merely lifting the object alone without any type of traumatic event or unexpected load would not cause a labral tear. He testified that based on Petitioner's statements to him during the IME, she worked with all three sizes of cans. He testified that based on what Petitioner told him, she used a cart to remove the items from the line. (RX1).

Dr. Biafora testified that his opinion was that Petitioner's shoulder condition was not causally related to her activities at work as he felt that there was really no traumatic event that caused her shoulder complaints. He testified that Petitioner had been there working that particular season for about a month or two and that based on her exam and complaints, he felt that there was some type of pathology at the biceps

or the labrum. He testified that if one were to perform activities for years that were at or about shoulder height that were forceful maybe that could aggravate an underlying labral tear, but that that was not the case. He testified that Petitioner was only working there for a month or two, nor was she performing repetitive, forceful use at or above shoulder height. He testified that he did not have the MRI. (RX1).

Dr. Biafora testified that he recommended based on his exam that Petitioner undergo an injection to the shoulder with some therapy and that if that did not help an MRI would be indicated, and that further treatment would depend on the results of the MRI. He testified that this treatment would not be causally related to Petitioner's work. He further testified that while unrelated to her work, Petitioner should avoid lifting, pushing or pulling greater than 20 pounds and to avoid overhead lifting with that extremity. (RX1).

On cross examination, Dr. Biafora agreed that he had not seen the cans that were spoken of until the morning of the deposition. He agreed that he was not provided with the cans until he came for the deposition and that his reports did not mention that he actually saw the cans. He agreed that he saw no pictures of the work station that his client was working at. He agreed that he had seen no actual measurements of Petitioner's work station. He further agreed that he had seen no videos of Petitioner performing the work activity for Respondent. He also agreed that he had not actually seen the cart that Petitioner was required to work with. (RX1).

On cross examination when asked if Petitioner were to go back to work and receive the restrictions that he placed and whether that could aggravate her condition of ill-being, Dr. Biafora responded that he thought that it could cause pain but that he did not think it would accelerate her condition. He testified that he had not seen any medical records for treatment provided to Petitioner after the IME on March 12, 2018. He testified that he did not know that Petitioner was currently being treated by Dr. Li.[2] He testified that from his understanding Petitioner was recommended to be evaluated by an orthopedic surgeon but had not seen an orthopedic surgeon from what she had told him. He agreed that Dr. Li would be in a better position to address Petitioner's condition from April 2018 to present, and that Dr. Li would be in a better position than him to address Petitioner's work capabilities since April of 2018 since he had seen her. (RX1).

On cross examination, Dr. Biafora agreed that he had no records of physical therapy that Petitioner may have undergone to her right shoulder, that he had not seen any records indicating the injection that Petitioner had to the right shoulder and that he had not seen any "arthroscopic reports or op reports" related to the right shoulder. He testified that he had written job descriptions and whatever Petitioner had described to him when he evaluated her. (RX1).

On cross examination, Dr. Biafora testified that as to the position description from Nestle, he did not have it in front of him so he was unable to testify as to what percentage of time Petitioner was performing those work activities outlined in the primary responsibilities Tasks 1-5. He testified that he used it to formulate his opinion at the time that he authored the report so he took it into account, but that he did not have it in front of him at the time of the deposition. He agreed that he could not identify the five primary responsibilities listed on the job description given to him by Nestle, that he could not identify the information related to supervision received, that he could not identify supervision given and that he could not identify requirements and minimum education level and experience for the job. Dr. Biafora agreed that he did not have the essential elements of job function assessment in front of him. He testified that he did not have the physical requirements document in front of him, but that he relied on it when generating his report. He admitted that he did not know what the document indicated about the stress factors related to Petitioner's job responsibilities. (RX1).

[2] The Arbitrator notes that the last name of Petitioner's treating physician was incorrectly spelled in Dr. Biafora's deposition transcript by virtue of the fact that he was referenced as "Dr. Lee." (RX1).

On cross examination, Dr. Biafora testified that he did not know that Petitioner had the diagnosis of a right shoulder partial thickness tear of the infraspinatus, so he had no opinion. He further testified that he had no opinion as to the diagnosis of an anterior labral tear, impingement syndrome or AC dysfunction. He testified that he did not know whether Petitioner had a positive Neer's finding on exam since he had seen her, nor did he know whether she had a positive Hawkins impingement test or a positive O'Brien's test. (RX1).

On cross examination, Dr. Biafora testified that his diagnosis was that of potential biceps pathology and/or labral tear. He agreed that a labral tear was more common with a one-time event. He agreed that in his review of the records he did not see evidence of that whatsoever. He agreed that the activities Petitioner described to him could have caused pain in her right shoulder area. He further testified that anything could cause pain, and that it did not mean that it was going to cause or aggravate a condition. (RX1).

On cross examination, Dr. Biafora testified that the employer has not provided him with any evidence of Petitioner having pain in the right shoulder prior to the alleged accident date of September 29, 2017. He denied that the employer provided him with any evidence of any prior medical treatment to the right shoulder pre-dating September 29, 2017. He denied that the employer had provided him with any evidence that Petitioner sustained an intervening accident outside of work after September 29, 2017 involving her right shoulder. He testified that he did not find Petitioner to be "non-truthful" when it related to the history she gave him. He testified that he had no evidence of Petitioner being not truthful regarding her complaints, nor had the employer provided him with any evidence of Petitioner not being truthful in this case as it related to her work capabilities. (RX1).

On redirect, Dr. Biafora testified that the three cans were discussed by him with Petitioner during his examination. He testified that the weights that were depicted on the labels of the three cans were consistent with the history and weights that Petitioner gave him during his interview. He testified that when he drafted his report and formed his opinions, he did so with these exact weights and these three cans in mind. (RX1).

On redirect, Dr. Biafora testified that it was possible to experience pain in the shoulder while lifting up the smallest 15-ounce can. He testified that if the pain manifested itself with lifting a 15-ounce can, it did not necessarily indicate anything with regard to causation of the underlying injury. When asked about the job description provided to him by Petitioner during her interview and whether she discussed having to perform any work activity at or above her shoulder, Dr. Biafora responded that she did not. He testified that Petitioner did not tell him anything in her description that would lead him to believe that the work activity itself caused a labral tear. He testified that he would have no reason to believe that the job description provided to him verbally by Petitioner was missing any information and further testified that he would consider the job description given to him by Petitioner to be thorough. He testified that he did not have any reason to doubt the activities that Petitioner verbally told him during the IME. (RX1).

On redirect, Dr. Biafora testified that he examined Petitioner on February 26, 2018. He testified that it was his understanding that Petitioner treated with Dr. Li after his IME. He testified that he was not aware whether Petitioner returned to work at any point in time after February 26, 2018 and suffered any type of work injury. He testified that it was his understanding that the only alleged date of accident was that of September 29, 2017. (RX1).

On further cross examination, Dr. Biafora agreed that Petitioner was shorter than average. He testified that the employer had not shown him any pictures of Petitioner standing next to the line in question and seeing the height of her shoulder versus the conveyor belt, but further testified that he actually asked Petitioner to stand up to how him. He testified that the description of Petitioner's job that he dictated was based on Petitioner showing him exactly what she did and that while she did not have the cans in front of

her, she was physically showing him where the conveyor was, where the cart was, where she was dumping items and what position her arms were in. (RX1).

On further cross examination, Dr. Biafora testified that the height of the conveyor belt was that of Petitioner's waist. He testified that Petitioner stated that it was at the level of her abdomen and that she demonstrated it to him. He testified that from what she was demonstrating to him when he evaluated her, Petitioner placed the cans from the conveyor to the cart and that it seemed when she was placing them on the cart, it was about the level of her abdomen. He testified that as Petitioner placed them on the cart, at times it reached near her chest. When asked how many cans she would be required to lift at certain times, Dr. Biafora responded that from what Petitioner told him, she described grasping a few cans per minute. When asked if Petitioner was required to push the cans down the conveyor belt multiple cans at a time, Dr. Biafora responded that from what Petitioner told him, she would hold back some cans with her left arm as they were coming down. (RX1).

Pictures of Sample Cans were entered into evidence at the time of arbitration as Respondent's Exhibit 2. The Wage Audit was entered into evidence at the time of arbitration as Respondent's Exhibit 3. Petitioner's 2018 Work Attendance was entered into evidence at the time of arbitration as Respondent's Exhibit 4. Various Photographs of the Morton Location were entered into evidence at the time of arbitration as Respondent's Exhibit 5A1, 5A2, 5B, 5C and 5D, respectively.

The Surveillance Video was entered into evidence at the time of arbitration as Respondent's Exhibit 6. The Arbitrator notes that the video depicts that on July 20, 2018 at 14:27:54, Petitioner was seen carrying two children's bicycles, one with her right arm and one with her left arm, as she walked toward the house, and that upon her return to the vehicle at 14:28:51, Petitioner did not appear to be favoring one arm over the other and was able to open the passenger-side door of the SUV with her right arm without apparent difficulty. (RX6).

The Job Video was entered into evidence at the time of arbitration as Respondent's Exhibit 7. The Arbitrator notes that the video was unclear for approximately one minute during the last three minutes' worth of streaming when the individual was shown taking the temperature of one of the large cans of pumpkin. (RX7).

The Settlement Contract and IWC Information for 13 WC 3289 & 13 WC 6340 was entered into evidence at the time of arbitration as Respondent's Exhibit 8. The Settlement Contract Lump Sum Petition and Order for 13 WC 3289 & 13 WC 6340 reflect that the alleged dates of accident were that of July 2, 2012 and January 9, 2013, that the accidents were that of carrying a box and falling on arm and repetitive trauma, and that the body parts affected were that of the right arm and hand and the left arm and hand. The documentation further reflects that the cases were settled for 19.0118% loss of use of the right hand and 20% loss of use of the right arm for the date of accident of July 2, 2012, as well as 10% loss of use of the left hand and 23% loss of use of the left arm for the date of accident of January 9, 2013. The Settlement Contract Lump Sum Petition and Order was approved on September 26, 2013. (RX8).

The medical records of IWIRC were entered into evidence at the time of arbitration as Respondent's Exhibit 9. The records reflect that Petitioner was seen for physical therapy on October 11, 2012, at which time it was noted that she was a 20-year-old Latina cleaner for USA Tech presenting with a history of right wrist pain and constant right upper extremity symptoms from cervical to fingers. It was noted that Petitioner reported an original onset of September 20, 2012 due to no apparent reason, and that the cervical to hand symptoms had been present since July 2, 2012 when her arm was jerked while tandem-carrying a box and her co-worker dropped their end. It was noted that Petitioner reported that her symptoms lessened/abolished with rest, medications and tight application of her cock-up splint, and that the symptoms worsened with use of the right arm in all directions, caregiving for her children and right side lying. It was also noted that Petitioner reported that her sleep was frequently disturbed by her current symptoms and that continued use

worsened her symptoms as well. At the time of the September 20, 2012 visit with Dr. Hauter, it was noted that Petitioner was seen for initial evaluation of a right hand injury. It was noted that Petitioner stated that the injury had been ongoing since July 2, 2012, that she was released by IWIRC on September 19, 2012 with non-work-related right hand pain and ganglion cyst and was to be seen by her primary care physician, and that she stated that she went to Methodist Medical Group on Main and was told that it was work-related and that they could not see her. It was noted that Petitioner stated that three days ago her right arm started to swell again, that she denied any specific injury to cause the continued swelling and that the pain was rated 9/10 at initial onset and was now 9/10. It was also noted that Petitioner described her symptoms as burning pain from the right hand to her neck and tingling in the right first digit when resting her hand, that she had been taking over-the-counter Ibuprofen for symptom relief and that she was given a wrist brace by her supervisor at work to wear. The assessment was noted to be that of (1) degenerative disease of the right wrist; (2) right wrist sprain - resolved. It was noted that an MRI would be obtained for the ganglion and that the injury described on July 2, 2012 was not consistent with Petitioner's current symptoms or development of a ganglion at this area on the right wrist. Petitioner was recommended to undergo an MRI of the right wrist and was instructed to not use the right hand or arm. Petitioner was also dispensed Meloxicam and Tramadol, as well as a non-cock up wrist brace. (RX9).

The records of IWIRC reflect that Petitioner was seen on September 26, 2012, at which time it was noted that she returned for evaluation of her right wrist sprain and ganglion cyst on the right wrist. It was noted that Petitioner stated that her symptoms had not really improved and that she still had burning and numbness in her wrist. It was noted that Petitioner was there for her MRI results and that she rated her current pain level at 8/10. It was noted that Petitioner was currently taking Meloxicam and Tramadol, that she was on work restrictions that she could not use her right arm and that she stated that her employer was compliant with the restrictions that were given. It was also noted that Petitioner was also complaining of numbness and tingling of the fingers and forearm. The assessment was noted to be that of (1) ganglion cysts of the right wrist; (2) degenerative joint disease of the right wrist, not work-related. Petitioner was referred to an orthopedic surgeon and was instructed to continue Meloxicam and discontinue Tramadol. At the time of the October 11, 2012 visit, it was noted that Petitioner stated that her symptoms had remained the same since her previous visit and that she saw Dr. Anane-Sefah on October 8th. It was noted that Petitioner stated that before doing surgery to remove the ganglion cyst, the doctor wanted her to have physical therapy and also a nerve conduction study. It was noted that Petitioner stated that she was concerned about the pain that she was having in the right neck and arm, and that she wanted to make sure there was no nerve damage before doing surgery. It was noted that Petitioner rated her current pain level at 8/10 with sharp, burning from the right neck down into her fingers, and that there was increased sharpness and burning at the cyst area of her right wrist and tingling in all the fingers. It was also noted that Petitioner was currently taking Tylenol ES and wearing a wrist brace. The assessment was noted to be that of (1) ganglion cysts of the right wrist, which are multi-lobulated and consistent with slow development over time as with degenerative disease; (2) degenerative joint disease of the right wrist, not work-related; (3) symptom magnification. Petitioner was recommended to undergo an MRI of the cervical spine and to return to work with restrictions of minimal use of the right hand and arm. (RX9).

The records of IWIRC reflect that Petitioner was seen on October 18, 2012, at which time it was noted that she stated that her symptoms included right thumb pain that extended to her right shoulder and neck, that the pain was sharp and burning, and that it was with a pain level of 9/10. It was noted that Petitioner was currently taking Tylenol and over-the-counter Ibuprofen as needed, and that she wore a wrist brace which was helping. It was noted that Petitioner had had an MRI of the cervical spine, that Petitioner stated that her pain was limiting her daily activities and that orthopedics was also evaluating her and providing work restrictions. The assessment was noted to be that of (1) ganglion cysts of the right wrist; (2) degenerative joint disease of the right wrist, not work-related; (3) symptom magnification. Petitioner was recommended to follow-up with orthopedics as scheduled and to follow work restrictions per orthopedics. At the time of the November 1, 2012 visit, it was noted that Petitioner stated that her wrist

was not good and that she had undergone nerve conduction studies and was told that she needed surgery for carpal and cubital tunnel. It was noted that Petitioner stated that while they were doing surgery they were going to remove two cysts in her wrist as well, that she was still having sharp pain and burning sensations up her entire arm, and that her thumb really hurt. It was noted that Petitioner had an increase in pain if not braced, that she stated that she was beginning to have the same symptoms in the left wrist and thumb, and that orthopedics also restricted her to no repetitive movement with the left extremity. It was also noted that Petitioner stated that she cleaned parts and demonstrated a back and forth motion without radial or ulnar deviation and wrist in neutral position without flexion or extension. The assessment was noted to be that of (1) ganglion cysts of the right wrist; (2) degenerative joint disease of the right wrist, which was the cause of the ganglion cysts; (3) symptom magnification; (4) carpal tunnel syndrome, that Petitioner had worked for four months at the time of onset and that she demonstrated no ergonomic hazardous positioning known to cause carpal tunnel; (5) cubital tunnel syndrome, with Petitioner not having described prolonged ulnar nerve stretch with her job activity demonstration. Petitioner was recommended to follow-up with orthopedics as scheduled. Petitioner was also released by IWIRC. (RX9).

The records of IWIRC reflect that Petitioner was seen on July 9, 2012 for initial evaluation of a right hand injury. It was noted that Petitioner stated that the injury occurred on July 2, 2012, that she stated that she and a manager were lifting a box with about 30 parts in it, that she was not sure how much it weighed, and that she stated that they were lifting the box up onto a table when the manager dropped her end of the box, causing Petitioner's right hand to be hyperextended. It was noted that Petitioner described symptoms of sharp burning in the right wrist with numbness in the right 4th digit, and that in the past couple of days she had developed sharp, burning pain up the arm into the right shoulder and neck. It was noted that Petitioner stated that she had been taking over-the-counter Ibuprofen for pain relief. The assessment was that of a right wrist strain. Petitioner was dispensed a wrist brace, a ThermalSoft Gel cold pack, Tylenol ES and Ibuprofen. Petitioner was also recommended to do wrist range of motion exercises four times a day. At the time of the July 16, 2012 visit, it was noted that Petitioner stated that her symptoms had improved, that her symptoms included achy pain with pressure at the right wrist and up into the right shoulder, and that she rated her current pain level at 5/10. It was noted that Petitioner was currently taking Tylenol ES and over-the-counter Ibuprofen as needed, and that she was wearing a wrist brace and icing. The assessment was noted to be that of a resolved right wrist strain. Petitioner was recommended to continue Ibuprofen as needed with food and to do wrist exercises in warm water and brace as needed only. (RX9).

The records of IWIRC reflect that Petitioner was seen on July 27, 2012, at which time it was noted that she stated that her symptoms had improved, that her range of motion had increased and that her symptoms included some intermittent tingling in the wrist at the end of her shift. It was noted that Petitioner rated her current pain level at 2-3/10 and that she was taking Ibuprofen as needed. It was noted that Petitioner's job position required her to perform a lot of repetitive movements by cleaning parts, that she was working 8-12 hours, that she denied any wrist pain but noted that her wrist was tired by the end of the long work day, and that she sometimes took some Tylenol or Ibuprofen when she got home. The assessment was noted to be that of a resolved right wrist strain. It was noted that home stretches were reviewed to prevent future problems with the wrist and arm with repetitive movements. Petitioner was placed at maximum medical improvement. At the time of the July 30, 2012 visit, Petitioner was seen for a determination of her final impairment rating. It was noted that the work-related diagnosis was found to be an impairment class 0 with 0% whole person impairment. Petitioner was discharged at that time. (RX9).

The records of IWIRC reflect that Petitioner was seen on September 19, 2012, at which time it was noted that she was seen for a right wrist strain. It was noted that Petitioner stated that her symptoms had gotten worse since her last office visit and that there was not a new injury to her right wrist. It was noted that Petitioner stated that about one week prior she noticed a lump on her right wrist and started to have pain the day before, that she also stated that she had swelling in the right hand/fingers with burning and

sharp sensations from the right wrist into the right shoulder, and that she also had tightness in the neck, that she had numbness from the fingers into the right wrist and that it was intermittent. It was noted that Petitioner also stated that when she was resting her right hand her right thumb would start to "jump." The assessment was noted to be that of (1) right hand pain, not work-related; (2) ganglion cyst, not work-related. Petitioner was released from care at IWIRC and was recommended to follow-up with her primary care physician for evaluation and treatment. (RX9).

The records of IWIRC reflect that Petitioner was seen on October 3, 2017, at which time it was noted that she was seen for initial evaluation of right shoulder pain. It was noted that Petitioner stated that the injury occurred on September 30, 2017 and that she stated that she was performing her job grabbing cans of different size/weight and then throwing the cans away when she started to notice pain in the right shoulder that would not go away. It was noted that Petitioner's pain got so bad that she went to OSF emergency room on September 30, 2017, that her pain was rated 9/10 at initial onset and that it was now 8/10. It was noted that Petitioner described her symptoms as burning, stabbing and numbness and tingling, and that she had been taking Cyclobenzaprine and over-the-counter Ibuprofen for symptom relief. It was noted that Petitioner stated that she worked at Nestle and checked cans every 30 minutes for temperature and weight, that she stated that she stopped the line with her left hand and used her right hand to lift about 4-6 cans onto her cart, that she demonstrated this motion as lifting below her chest level and that the biggest can was a 1-gallon can. It was noted that Petitioner denied an injury, that she stated that she started having some right shoulder pain and then the pain started traveling down her right arm to her right thumb, and that she noted some pain in the neck and difficulty with range of motion of the neck. The assessment was noted to be that of cervical pain. It was noted that it was suspicious for a C6 nerve root syndrome. It was noted that Petitioner denied an injury at work and that Dr. Hauter was unable to relate it to her job at Nestle. Petitioner was recommended to follow-up with her primary care physician and was released from IWIRC. Petitioner was also deemed to be unable to work due to the non-work-related medical problem until released by her primary care physician, and was recommended for a fitness for duty evaluation after release by her primary care physician but before return to her job at Nestle. (RX9).

CONCLUSIONS OF LAW

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

The Arbitrator finds that Petitioner has failed to prove that she sustained accidental injuries that arose out of and in the course of her employment with Respondent on September 29, 2017, and that her current condition of ill-being is causally related to her work activities.

At the outset, the Arbitrator notes that it is undisputed that Petitioner worked as a seasonal employee and began working approximately two months prior to the alleged accident date of September 29, 2017. The Arbitrator further notes that it is further undisputed that Petitioner is alleging a repetitive trauma accident and not a specific, acute injury.

In so concluding that Petitioner failed to prove that she sustained accidental injuries that arose out of and in the course of her employment with Respondent, the Arbitrator finds that Petitioner's job duties were varied in nature. In addition to the undisputed fact that Petitioner had only been on the job for two months in the 2017 season before alleging an accident, the Arbitrator notes that Petitioner in her histories throughout the medical records claimed that her shoulder injury was caused by the lifting of cans. (PX2; PX4). The job video demonstrated, however, that the vast majority of the job tasks did not, however,

involve lifting. (RX7). The Arbitrator notes that the individual in the job video was shown performing a variety of tasks including, but not limited to, checking the temperature of each size of the cans (which required waiting for the results to be read on the thermometer), walking, pulling a cart and entering information into a computer by typing. (*Id.*). The Arbitrator further notes that Petitioner herself during direct examination also described a variety of tasks while performing her job duties for Respondent. The Arbitrator further notes that based on the job video, the only time that the largest cans of pumpkin were lifted by the individual was when they were moved from the table near the production line to the cart, from the cart to the scale then back to the cart, and then from the cart to the dumpster. (*Id.*). Furthermore, the Arbitrator finds to be significant the fact that the video demonstrates that all lifting by the individual was done below shoulder height. (*Id.*). While the Arbitrator acknowledges that Petitioner is of short stature at 4 feet 9 inches, the Arbitrator further notes that Dr. Biafora testified that Petitioner did not describe any activity to him that was either at or above shoulder level. (RX1).

The Arbitrator further notes an inconsistency between Petitioner's subjective description of the cans as being "heavy" in the medical records and the actual weight of the cans of pumpkin at issue. The Arbitrator notes that the evidence at the time of arbitration revealed that the smallest can of pumpkin weighs less than one pound, that the medium can of pumpkin weighs approximately two pounds and that the largest can of pumpkin - even considering the difference between net weight and gross weight - weighs less than seven pounds. (RX2). In addition, the Arbitrator notes that the physical activity required to move even the largest can does not appear to be "repetitive" as the video depicts the lifting of the heaviest cans of pumpkin for a period of time of less than 90 seconds throughout the entire nearly 15-minute video. (RX7). Furthermore, the Arbitrator notes that Petitioner herself testified that each quality control cycle was 30 minutes in length, and the Arbitrator finds to be significant Mr. Wurmnest's testimony that there were no prescribed tasks for a quality control employee after a cycle was completed and before the next cycle started. The Arbitrator further notes that even Petitioner herself testified on cross examination that the entire process had to be done every 30 minutes and that she could complete this task in approximately 15-20 minutes.

Furthermore, the Arbitrator admittedly questions the credibility of Petitioner. The medical records and testimony proffered by Petitioner demonstrated a subjective history that she worked with heavy cans at a fast pace during her work for Respondent. While Petitioner was quick to characterize the job as "repetitive," the Arbitrator finds that this characterization was contradicted by the testimony of Mr. Wurmrest and the job video. (RX7). Additionally, while Petitioner made a point at the time of arbitration to note that the labels on the cans depicted net weight and that they were actually heavier, there was witness testimony from Mr. Wurmrest which revealed that that the empty weight of the cans added merely a few ounces to the total can weight for each size of can. Petitioner also claimed at the time of arbitration that there were no other employees present to perform the quality control job, that she was not given breaks or a meal and that she was required to work quickly through the quality control cycle just so that she could have time to eat. Mr. Wurmnest, however, directly contradicted this testimony noting that not only were breaks and lunches given, but that another employee was available to cover for the main quality control employee during such breaks and lunches. Petitioner also testified that the dumpster used to dispose of the sample cans was higher than depicted in the photograph submitted into evidence as Respondent's Exhibit 5D. In response, however, Mr. Wurmrest confirmed that the depicted dumpster height was accurate and that any other dumpster would have actually been shorter than the one depicted in the photograph. As such, the Arbitrator places minimal evidentiary weight on Petitioner's testimony in this matter.

As to the issue of causation, the Arbitrator notes at the outset that Petitioner's attorney apparently chose to attend Dr. Biafora's deposition telephonically instead of traveling to the deposition, and that the deposition transcript revealed that a dispute arose during the course of the deposition concerning Respondent's presentation of actual cans of pumpkin to Dr. Biafora during his testimony. While Petitioner asserted a *Ghere* objection to any testimony related to the actual cans of pumpkin, Respondent asserted that the IME report authored by Dr. Biafora discussed the fact that not only were the cans described to Dr.

Biafora but that the weights of the cans were included in the IME report, and that *Ghere* did not apply because Dr. Biafora already included an opinion regarding the cans in his IME report and the presentation of the actual cans during the deposition did not constitute a new opinion.[3] As Petitioner did not dispute the assertions of Respondent that not only were the cans described to Dr. Biafora but that the weights of the cans were included in the IME report, the Arbitrator overruled Petitioner's objection and denied Petitioner's Motion to Strike.

That said, having considered and reviewed the entirety of the medical testimony proffered by both Dr. Li and Dr. Biafora in this matter, the Arbitrator finds the opinions of Dr. Biafora to be more persuasive than those proffered by Dr. Li. While Dr. Li testified that there was a causal connection between Petitioner's work activities and her condition of ill-being in the right shoulder, the Arbitrator notes that Dr. Li appears to have had less understanding of the specific physical requirements of Petitioner's job than Dr. Biafora. Furthermore, the evidence reflects that Dr. Li was also mistaken as to the weight of the cans of pumpkin and indicated on numerous occasions during his deposition that he could not believe that the cans weighed only 6 pounds, 10 ounces. (PX5). The Arbitrator further notes that Dr. Li appears to have significantly relied upon Petitioner's subjective complaints and her characterization that her job was repetitive in nature in finding a causal connection. Dr. Biafora, on the other hand, was provided with a written job description in addition to interviewing Petitioner about her physical activities and being made aware of exactly how much each can of pumpkin weighed. (RX1). The Arbitrator finds to be highly persuasive the fact that Dr. Biafora asked Petitioner to physically demonstrate the motions involved with performing the quality control job, and as a result thereof finds his testimony that Petitioner was not required to work with weight at or above shoulder to be very significant given his personal observations of Petitioner. (*Id.*). As a result thereof, the Arbitrator finds Dr. Biafora to have had a better understanding of the physical requirements of Petitioner's job, and therefore gives his opinions greater weight than those proffered by Dr. Li.

Based upon the foregoing and the record as a whole, the Arbitrator concludes that Petitioner has failed to prove that she sustained accidental injuries that arose out of and in the course of her employment with Respondent on September 29, 2017, and that her current condition of ill-being is causally related to her work activities. All benefits are denied. The remaining issues of medical bills and prospective medical treatment are moot, and the Arbitrator makes no conclusions as to those issues.

[3] The Arbitrator notes that Dr. Biafora's IME report was not proffered into evidence by Respondent at the time of arbitration, nor was it attached to and/or included with Dr. Biafora's deposition transcript. (RX1).

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

Linda Daniel,
Petitioner,

19IWCC0488

vs.

NO: 12 WC 35537

Chicago Board of Education,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of temporary disability, permanent disability, medical, 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 June 26, 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: SEP 9 - 2019
o7/17/19
DLS/rm
046

Deborah L. Simpson

Barbara N. Flores

CONCURRENCE IN PART AND DISSENT IN PART

I concur in part and dissent in part with the decision of the majority. I concur with the majority in affirming the Decision of the Arbitrator with regard to all issues except the award for

Petitioner's low back injuries. However, I respectfully dissent from the majority's decision affirming and adopting the Arbitrator's §8(d)2 award of only 8% person-as-a-whole for her lumbar spine injuries.

Petitioner had objective findings indicating a disc injury at the L5-S1 level as reflected in years of medical records and physicians' evaluations. The causal connection between Petitioner's pathology and her accident, and her ongoing condition of ill-being is further corroborated by the original findings of Dr. Singh, Respondent's Section 12 examiner, in his first three reports. Petitioner submitted to various exams between 2012 and 2016 with Dr. Singh and he ultimately issued six reports that are wholly paradoxical in their conclusions from one series to the next. From his first report dated December 12, 2012 through his addendum report dated June 17, 2013, Dr. Singh opined that Petitioner would benefit from a fusion at L5-S1 for isthmic spondylolisthesis, which was aggravated by the accident at work. Petitioner continued to undergo conservative treatment. Then, Petitioner returned to Dr. Singh and he issued three more reports. The first report dated October 12, 2015 suddenly found that Petitioner exhibited all five Waddell signs. Dr. Singh also noted that Petitioner's "reluctance to seek treatment is also suggestive of the fact that she is not in as much discomfort as she proclaims based on the lack of objective findings." It is within the province of any expert to change his opinions based on a change in data and such changes may well prove persuasive for an expert's ultimate opinion given a particular set of facts, but the medical evidence in total here does not support Dr. Singh's wholly antithetical opinions in 2015 and 2016. To the contrary, in this case it appears that Petitioner's objective condition remained the same, or worsened, but Dr. Singh seems to have weighed in on her choice as a patient to forego invasive surgery as a sign of malingering. Dr. Singh's ultimate opinions do not resonate with the remainder of the medical evidence in the record and are not persuasive.

Under the facts of this case I would have increased the award of permanent partial disability for Petitioner's lumbar spine condition of ill-being to 15% person-as-a-whole under §8(d)2. Therefore, I respectfully dissent from that part of the majority's decision which affirmed the Decision of the Arbitrator regarding the §8(d)2 award of only 8% person-as-a-whole for Petitioner's low back injuries.

Marc Parker

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

19IWCC0488

DANIEL, LINDA
Employee/Petitioner

Case# **12WC035537**

CHICAGO BOARD OF EDUCATION
Employer/Respondent

On 6/26/2018, 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 2.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0786 BRUSTIN & LUNDBLAD LTD
CHARLES E WEBSTER
10 N DEARBORN ST SUITE 700
CHICAGO, IL 60602

1886 LEAHY EISENBERG & FRAENKEL
SANDY ECHEVESTE
33 W MONROE ST SUITE 1100
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

Linda Daniel
Employee/Petitioner
v.

Case # **12 WC 35537**

Chicago Board of Education
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 **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago** on **March 27, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

N. ☒ Is Respondent due any credit?

O. ☐ Other:

Findings

On **9/28/2012**, 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 $**57,733.88**; the average weekly wage was $**1,110.27**.

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

Respondent shall be given a credit of $**181,812.73** for TTD, $**0** for TPD, $**0** for maintenance, and $**116,365.91** for §8(j) medical benefits, and **$10,000.00** for two PPD Advances, and **$15,450.45** for TTD overpayment for other benefits, for a total credit of $**323,626.09**.

Respondent is entitled to a credit of $**116,365.91** under §8(j) of the Act, which is duplicative of the above stated credit.

Order

Respondent shall pay Petitioner total temporary disability benefits commencing September 29, 2012 through October 17, 2016, **211 & 2/7** weeks, at a rate of **$740.18/week**. Respondent shall be given a credit of **$181,812.73** plus **$15,450.45** credit overpayment of TTD for temporary total disability benefits that have been paid.

Respondent shall pay Petitioner permanent partial disability benefits of $**666.16**/week for **119.3 weeks**, because the injuries sustained a permanent partial disability related to her **right shoulder of 15% of a person-as-a-whole**, 75 weeks; a permanent partial disability to her **low back of 8% of a person-as-a-whole**, 40 weeks; and a permanent partial disability of **2% of her right leg**, 4.3 weeks, as provided in §8(d)2 of the Act.

Petitioner failed to prove that she was entitled to §19(k) or §19(l) penalties or §16 attorney fees.

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

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

Signature of Arbitrator

June 25,2018
Date

JUN 2 6 2018

INTRODUCTION

This matter was heard before Arbitrator Steven J. Fruth. According to the Request for Hearing Stipulation, Arbitrator's Exhibit #1, the disputed issues were: ***F:*** Is Petitioner's current condition of ill-being causally related to the injury?; ***J:*** Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?; ***K:*** What temporary benefits are in dispute? TTD/TPD; ***L:*** What is the nature and extent of the injury?; ***M:*** Should penalties and fees be imposed upon Respondent?; ***N:*** Is Respondent due any credit?

Petitioner presented evidence of a vocational rehabilitation evaluation.

STATEMENT OF FACTS

Petitioner Linda Daniel was born August 30, 1955. She has a high school diploma and attended Mississippi Valley State University for two years. Petitioner began working for Respondent Chicago Board of Education in 1978.

Petitioner worked as a School Clerk at Bogan High School. Her job duties included working in the main office, and waiting on parents and teachers that came to the office. Petitioner made copies for the teachers, delivered letters to teachers at the principal's request during mass mailings, prepared transcripts for students who graduated, and did general telephone and typing tasks. She testified that to prepare transcripts she had to go into the storage area to pull the transcript and this required her to go on a six-foot ladder, sometimes up to the ceiling, open drawers, pull that year's transcript which go date back to 1955, make copies, certify the transcript and give it to the person requesting it.

Petitioner testified that sometimes a teacher would ask her for at least 2,500 copies, and that she had to deal with a machine that sometimes would jam. When the machine jammed, she had to find where that jam is in the machine and get on her knees to clear the jam. Petitioner testified that Bogan is a very large school and some days she made at least 10,000 copies. Her other duties include being a hall monitor between classes and lunch room duties. She testified she used a cart when she delivered copies to the teachers. She also testified she typed the yearly graduation program, that she had to type in the students' names and sometimes she typed all day.

Petitioner testified that has survived cancer twice, including breast cancer. She had a radical mastectomy with resultant right arm lymphedema and weakness. Chemotherapy did not present any problems with her return to work. She testified that she did not have any low back, right knee, or right shoulder problems prior to September

28, 2012. Before September 28, 2012, she would "step" or go dancing every two weeks, and said she was a "great stepper."

On September 28, 2012, Petitioner testified she was delivering letters for a mass mailing from the superintendent to students' parents that day. As she was walking down the stairs from the second floor, she slipped and fell down a flight of stairs. Petitioner testified that the security guard told her there was dish soap on the stairs and some other people had also fallen that day. She heard that a student had put the dish soap on the stairs. She slipped and fell about 2:15 PM, the end of the day.

Petitioner testified that the flight of stairs she fell down is in an old building and that she fell down 10 to 12 steps. She realized something was happening when she started tumbling down the stairs and she was trying to hold on to the stair railing with her right hand to keep from falling, but she could not hold on so she kept sliding. As she got ready to step on the stairs, she slipped on the top of the second floor stairs, her feet slipped from under her, she just went down, "boom, boom, boom" down the stairs.

Petitioner testified that as she slipped down the stairs she hit the back of her head on the stairs, her back, her buttocks, and as she was landing, she hit her right knee. She also hurt her right shoulder by trying to hold onto the railing. She had immediate pain in her back, shoulder, and right knee

Petitioner testified that a security guard helped her up, put her in a chair, and took her to the office where they took the Incident Report. She testified that as she completed the Incident Report, she noticed she had back pain, that a knot was forming on the back of her head, and that her lower back and right knee was bruised. Petitioner testified that her shoulder was hurting but her back that was hurting more.

Petitioner was driven home by a friend. She testified that she took some Tylenol and went to bed. However, in the middle of the night she had more pain. She called a girlfriend the next morning who drove her to the University of Chicago Hospital [UofC] to be examined (PX #19). Petitioner testified that in the emergency room she was in "excruciating" pain from her back her right shoulder, the knot in the back of her head, and that her right knee was swollen and bruised.

UofC records note Petitioner gave a history of 5/10 pain after falling down 8 stairs because of soap on the steps (PX #19). She complained of right shoulder, neck, back, chest, and right leg pain. She gave a history of breast and cervical cancer. Petitioner had right-sided lower back pain and pain on the right with straight-leg raise. The clinical exam was otherwise unremarkable. A CT of the lumbar spine showed degenerative disc disease and spondylolisthesis at L5-S1 along with bony encroachment of the bilateral L5-S1 foramina. Petitioner was discharged with a diagnosis of lumbago, prescriptions for Norco and Valium, and directions to follow up with Tony Hampton.

Following the emergency room, Petitioner testified she made an appointment to see her primary doctor, Dr. William Imlach at Advocate Medical Group [Advocate]. Petitioner testified that Dr. Imlach put her on a regimen of pain medication. Dr. Imlach referred her for physical therapy to help her back and knee pain. Petitioner testified she also had to have right shoulder surgery that was performed by Dr. Aribindi. She testified that the right shoulder surgery was very painful and she was in a restraint for a week and a half. Following her right shoulder surgery, Petitioner was on heavy medication for her shoulder pain.

Petitioner saw Dr. Necholas Aboughannam October 2, 2012 at Advocate, complaining of back pain since fall 4 days before (PX #1). Petitioner reported that she fell down stairs at work at in a Chicago public school. She complained of right-sided lower back pain which radiated into her right leg while both standing and sitting. She was seen in the ER of UofC and was told there were no fractures. It was noted that her current medications included Naproxen. Examination revealed tenderness and spasm over the right lower back. Straight-leg raise was positive on the right. Right shoulder motion was abnormal and painful. Dr. Aboughannam diagnosed shoulder tendonitis and lumbar radiculopathy. He ordered physical therapy, medication for pain and spasm, and advised follow-up with "PCP Hampton."

Petitioner saw Dr. Tony Hampton at Advocate October 8, 2012 (PX #1). She was complaining of back pain and pain in both shoulders. She reported that walking and standing caused pain. However, it was noted that her complaints were not related to work activities or workers' compensation. The focus of the encounter was the right shoulder. There were no notes regarding radicular leg pain or an assessment of the low back.

Petitioner returned to Dr. Hampton February 6, 2013 with complaints of back pain and shoulder pain. It was again noted that her complaints were not related to work activities or workers' compensation. Again, the focus of the encounter was the right shoulder. There were no notes regarding radicular leg pain or an assessment of the low back. Petitioner was not taking all prescribed medications (Meloxicam and Gabapentin) but was taking Vicodin. Petitioner then reported that she was not interested in pain medications due to side effects.

Petitioner saw Dr. Mark Gerber October 11, 2012 (PX #1). She gave a history of her fall at work "September 29, 2012" [*sic*]. Dr. Gerber noted her history of breast and ovarian cancer. Petitioner complained of right shoulder pain and low back pain which radiated into the right leg. On exam Petitioner had bilateral positive straight-leg signs, Patrick's positive on the right, and Braggard's reproduced left leg radicular pain at 30°. Waddell's were negative. Dr. Gerber noted Petitioner's right leg limp. Lumbar ranges of motion were limited and muscle strength was reduced. There were no neurological

abnormalities. Dr. Gerber noted there were no signs of malingering. He diagnosed lumbar sprain and shoulder strain.

Petitioner continued to see Dr. Gerber at Fullerton Drake Medical Center (RX #7), where she received physical therapy through January 2013. Petitioner last saw Dr. Gerber February 13, 2013. Petitioner had positive straight-leg and Braggard's on the right. While lumbar range of motion was improved it was still less than normal. Muscle strength was still less than normal. On February 13 Dr. Gerber noted Petitioner could attempt full duty work.

Dr. Richard Kiang performed a lower extremity EMG/NCV on Petitioner November 15, 2012, on referral by Dr. Gerber (PX #3). The stated basis was 8/10 low back and right leg pain. Dr. Kiang noted Petitioner's history of breast and endrometrial cancer without recurrence. He also noted MRI findings of L5-S1 disc dehydration and height loss. He further noted L5 was 5mm offset over S1 with chronic spondylosis and bilateral foraminal stenosis.

Dr. Kiang noted normal sensory nerve conduction in the lower extremities. He noted normal motor nerve conduction bilaterally in the peroneal and tibial nerves. Lower extremity reflexes were also normal. Monopolar EMG showed moderate abnormalities in the right extensor hallucis, peroneus longus, and lower paraspinal muscles. Dr. Kiang diagnosed moderately severe acute right L5 radiculopathy, likely due to moderate biforaminal stenosis at L5-S1. He recommended physical therapy 3 times a week for 8 weeks, caudal epidural injections, and nerve root injections.

Petitioner had an FCE at Best Practices Physical Therapy November 29, 2012 (PX #12). She testified that she used her best efforts. The FCE was noted to be valid and reliable. The clinician noted that Petitioner did not present with self-limiting behavior and in fact was motivated during testing. Petitioner stated she wanted to return to work but was fearful she would not be able to tolerate work due to her ongoing condition. Petitioner was found able to perform sedentary work due to her 5-pound lift/carry limitation. It was noted Petitioner's job as a clerk fell within light physical demand, one category above sedentary. The clinician noted Petitioner could benefit from work conditioning.

Petitioner presented to Advocate December 21, 2012 with cold and flu symptoms. There were no documented complaints of right shoulder, low back, or right knee pain

Petitioner returned to Dr. Hampton February 6, 2013 with complaints of back pain and shoulder pain. It was again noted that her complaints were not related to work activities or workers' compensation. Again, the focus of the encounter was the right shoulder. There were no notes regarding radicular leg pain or an assessment of the low back. Petitioner was not taking all prescribed medications (Meloxicam and Gabapentin)

but was taking Vicodin. Petitioner then reported that she was not interested in pain medications because of side effects.

Petitioner was seen February 17, 2013 by Dr. Patrice Burch at Advocate for a fall when her right knee buckled (PX #1). There was no documentation of shoulder or back complaints.

Petitioner continued to treat at Advocate through 2013 and 2014 (PX #1). Dr. Imlach first saw Petitioner March 12, 2013. Dr. Imlach noted she was a new patient but had been in the system for a long time. He noted that Petitioner reported she fell in September 2012 when her knee buckled as she was going down a flight of stairs. She presented with complaints of significant right shoulder pain and low back pain. Petitioner reported she's feels pain after prolonged walking or sitting which has impacted her activities of daily living. She denied numbness or tingling in her arm or leg. On examination Dr. Imlach noted tenderness to palpation in both shoulders as well as abnormal motion in both shoulders, but later noted both shoulders had normal, full range of motion. He also examined Petitioner's right knee, finding muscle spasm and pain on motion of the knee. Dr. Imlach diagnosed right supraspinatus sprain and lumbar radiculopathy.

Petitioner continued to treat at Advocate through 2013 and 2014. Dr. Imlach provided treatment for Petitioner's complaints and served as a referral gatekeeper. Petitioner continued to complain of pain in both shoulders, right worse than left, and chronic low back pain which radiated into the right leg. She also complained of paresthesia and weakness in the right leg. She reported that her leg would give out and cause her to fall. Pain wakes her up from sleep. From time to time Petitioner would consult for complaints relating to cold and flu symptoms. On June 10, 2014 Petitioner requested a written letter showing proof of care that her lumbar radiculopathy was disabling her from work (PX #1).

Petitioner was seen at University of Illinois Hospital [U of I] by Dr. Brian Schwartz March 25, 2013. Dr. Schwartz was supervised by attending physician Dr. Samuel Chmell. Petitioner complained of right knee pain, back pain, and shoulder pain since a fall down stairs at work. The principal complaint was intermittent episodes of knee instability. She denied having any problems with her knee before her fall. On exam right knee motion was guarded. Petitioner had an equivocal McMurray's sign but Lachman, anterior drawer, and posterior drawer were negative. The knee was stable with varus and valgus. X-rays showed mild arthritis. A possible meniscus tear was suspected and an MRI was ordered.

Petitioner was examined for a §12 IME by orthopedist Dr. James Cohen of Illinois Bone and Joint Institute June 4, 2013 (RX #19). The IME was limited to Petitioner's right shoulder. Petitioner reported that she slipped and fell down stairs September 28, 2012.

She reported her emergency room consultation at the University of Chicago, where she had a "whole body scan." Petitioner gave a history of her care beginning with Dr. Hampton and continuing with Dr. Imlach and Dr. Aribindi. Dr. Aribindi recommended shoulder surgery. In addition, Dr. Cohen reviewed Petitioner's records from Drs. Gerber, Aribindi, and Chmell, as well as work conditioning notes, and a right shoulder MRI report from April 4, 2013.

On examination Dr. Cohen noted that Spurling testing did not reproduce shoulder pain. She had active and passive flexion and abduction to 90°, which were less than normal. She had internal rotation to the upper lumbar region. Petitioner was tender over the trapezius, subacromial space, the AC joint, and the biceps tendon. Dr. Cohen noted that Petitioner may have had some residual limitation of motion from her prior radical mastectomy. Dr. Cohen believed some of Petitioner's right shoulder condition was related to her accident. He recommended a steroid/lidocaine injection and physical therapy to improve motion, which was limited. He did not recommend surgery until he had an opportunity to review the MRI images. He did not recommend surgery at that time but did note that Petitioner could work as a clerk with avoiding lifting over 5 pounds and any overhead use of the right arm.

Dr. Cohen examined Petitioner again pursuant to §12 on December 19, 2014. Petitioner reported that she had not had the injection in physical therapy he had recommended but, instead, had right shoulder arthroscopy September 23, 2013. Petitioner had 6 months of postoperative therapy. She complained of continuing shoulder pain and was working on a home exercise program. She also reported she had continuing back pain with tingling down her leg. In addition to the clinical examination Dr. Cohen reviewed updated records of Dr. Aribindi, which included notes from Dr. Lippman relating to lumbar epidural injections and recommendations for lumbar surgery.

On examination Dr. Cohen found Petitioner's shoulder range of motion was improved over the previous exam. He opined that Petitioner suffered a rotator cuff and slap tear of the right shoulder from her work accident on September 28, 2012. He related her current right shoulder condition to the work accident. He found the work accident was a contributing factor to her current right shoulder pain and decreased motion. He further opined that the work accident caused a permanent aggravation of her condition. Dr. Cohen noted Dr. Aribindi's full duty release regarding the right shoulder in February 2014 but also noted Petitioner's restrictions with elevation of her arm above 90°. Dr. Cohen finally opined that Petitioner could work with limitations of no overhead activity with the right arm.

Dr. Cohen assessed Petitioner's impairment in accord with the Sixth Edition AMA Guidelines. He found a 7% upper extremity impairment, which equated to a 5% whole person impairment.

Dr. Ram Aribindi examined Petitioner on June 24, 2013 at Southland Orthopaedics (PX #4). Petitioner complained of persistent pain and weakness in the right shoulder since her fall downstairs at work "September 28, 2013" [*sic*]. On examination Petitioner had diminished range of motion and a positive Hawkins impingement sign. Examination of the left shoulder was normal. After review of the MRI, showing a full thickness tear of the supraspinatus at its insertion, Dr. Aribindi diagnosed a right rotator cuff tear, impingement syndrome, and bursitis/tendinitis (PX #4). Dr. Aribindi performed arthroscopic right shoulder labral and rotator cuff repair September 23, 2013. He also performed an acromioplasty to correct impingement and a synovectomy. The post-operative diagnoses were right shoulder posterior labral superior tear, synovitis, impingement, and rotator cuff tear.

Petitioner testified her right knee was still bothering her after her right shoulder surgery, and as time went by her right knee would swell and make a popping noise when she walked. She testified that sometimes her right knee just gives out completely, that when she was able to go back to church she fell a couple times in church because her knee didn't give her warning, and that in the middle of the night when she has gotten up to use the bathroom her knee just goes out.

Petitioner was referred for physical therapy to Athletico for her shoulder and back. She testified the therapy included heat on her back. She was told to do different exercises for her back and that she also did exercises for her knee. She did strengthening exercises for her knee but they were painful causing pain to be "gyrating from my buttocks down to my toes on the right side."

Petitioner was evaluated for her back injury at Athletico on June 11, 2013 (PX #8). Petitioner gave her history of a fall down stairs while at work on September 22, 2012. She complained of low back pain and right leg pain and right shoulder pain, which according to Petitioner an MRI showed a rotator cuff tear. Therapy for her back but that was delayed due to her shoulder surgery. She received post-operative physical therapy for her right shoulder throughout 2013 and into January 2014. Although Petitioner still had reduced strength and range of motion, she was discharged from therapy for her shoulder on January 22, 2014, having met goals.

Petitioner was assessed for physical therapy for her low back on January 27, 2014 and then began therapy for her low back. She received physical therapy for her low back at Athletico through November 2014 without achieving much progress in her condition.

It was noted on August 21, 2014 Petitioner presented with her usual complaints of back pain but also reported that she had taken a long car trip of 12 hours each way.

Petitioner consulted Dr. Caleb Lippman November 20, 2013 (PX #1). She testified that he examined her and gave her an "electric shock" in her leg. He checked how far she

could raise her arm after her shoulder surgery and how far she could bend her back. Dr. Lippman's clinical notes documented Petitioner's complaints of back pain which radiated into her right buttock, the back of the right thigh and calf, and around the outside of the ankle since her fall at work. She also complained of numbness in the fourth and fifth toes of the right foot. She reported her leg had given out 10 to 12 times. She also said she had not had physical therapy or epidural injections. On exam Dr. Lippman found normal strength in the legs without atrophy. Sensation to light touch was intact. Reflexes were equal and symmetric. Dr. Lippman diagnosed sciatica as a result of the fall she reported in history. Dr. Lippman recommended lumbosacral MRIs with and without contrast in addition to plain x-rays in flexion and extension views.

Petitioner testified that Dr. Lippman recommended injections for her back. When Petitioner returned to Dr. Lippman January 8, 2014 he reviewed the MRI report and compared to an MRI in April 2013. He noted that "things look worse." Dr. Lippman noted that Petitioner's L5–S1 degenerative disease contributed to her significant back pain. He noted that her back pain had been getting worse. Since Petitioner had not tried nonoperative measures he gave her a prescription for physical therapy. On February 25, 2014 Dr. Lippman noted Petitioner had a grade 1 L5–S1 spondylolisthesis with biforaminal stenosis. He had not yet seen the original films of the latest MRI.

Petitioner was back to Dr. Lippman February 26, 2014 with the original images of her MRI. Dr. Lippman noted degenerative disc disease at L5-S1 with decreased height and grade 1 spondylolisthesis, biforaminal stenosis, and modic changes. He noted that Petitioner was suffering from chronic back pain which was getting worse. He felt it was reasonable to offer surgery and recommended an L5–S1 fusion. Petitioner deferred a decision about surgery until she could talk the matter over with her daughter, her oncologist, and Dr. Imlach.

Petitioner returned to Dr. Lippman July 30, 2014 (PX #1). He noted she had tried and failed nonoperative measures, so he scheduled Petitioner for an anterior fusion. Petitioner cancelled because her daughter, who moved to Hawaii, was unable to be with her. Because of her prior cancer surgery, Petitioner was familiar with the demands of the recovery stage. Dr. Lippman gave a prescription for physical therapy twice a week for six weeks and also referred Petitioner for pain management, but noted that she no neurologic issues other than back pain.

Petitioner testified that Dr. Donkoh performed 3 injections for her low back and 2 "burning" of the nerves. She had relief for a week from the injections but then the pain returned. She also said the burning of the nerves did not help much.

Dr. Yaw Donkoh evaluated Petitioner September 12, 2014 at Advocate Christ Medical Center (PX #2). Petitioner gave a history of low back pain for the previous 2 years but which had worsened in the past 2 months. She reported that physical therapy

was ongoing. Petitioner reported that Dr. Lippman had recommended either surgery or injections, so Petitioner chose to try injections first. Petitioner complained of lumbar pain involving the right side down to the toes. She also complained of numbness in the right leg. Petitioner described 6/10 pain which was throbbing sharp and numbing. Dr. Donkoh reviewed Petitioner's December 2013 MRI. Dr. Donkoh found no neurological abnormalities on examination. He noted abnormal radiologic studies. Dr. Donkoh diagnosed low back pain with radicular symptoms. A lumbar epidural steroid injection (ESI) was planned.

Dr. Donkoh performed an ESI at L5-S1 under fluoroscopy October 13, 2014. Right transforaminal ESIs at L4-5 were performed November 10, 2014 and March 17, 2015. Dr. Donkoh performed right medial branch blocks at L3-4, L4-5, and L5-S1 under fluoroscopy June 9, 2015. All procedures were performed at Advocate Christ Medical Center (PX #2). There were no records within Petitioner's Exhibit #2, Advocate Christ Medical Center, of a "burning" or ablation procedure.

Petitioner testified that her attorney's referred her to Ms. Lisa Helma of Vocamotive for counselling. Petitioner testified that she looked for quite a few jobs at various places and that she would submit her application and resume online. She testified she was told she was too old, not qualified, and did not have enough experience. Petitioner testified she was looking to get a job at Midway Airport but was not qualified for any of the jobs she applied for because of the pain in her back. She was told she was not qualified for the job because of the pain in her lower back. Similarly, Petitioner testified she was told she was not qualified for a job as a receptionist at Cook County Hospital because it requires moving a lot of places, and she was not able to do that for long periods of time.

Petitioner then identified Plaintiff's Exhibit #13, a record of job searches she did between March and August 2016. She testified she has continued to do a job search going to various stores in Hyde Park where she lives including new restaurants, Marshall's, Whole Foods, and Treasure Island with no call backs. Petitioner testified that she has not been offered assistance from the Board of Education, Sedgwick, or CCMSI in finding a job or conducting a job search. She testified that she asked her cousins to help her find work but did not find anything.

Petitioner testified that at Respondent's request she saw Dr. Kern Singh for §12 IMEs. She testified that she gave a complete and accurate history to Dr. Singh. Dr. Singh examined Petitioner December 12, 2012, May 28, 2013 and October 17, 2016. In addition, he prepared IME addenda reports June 17, 2013 and October 27, 2015 after review of additional medical records.

Dr. Singh's December 12 report was admitted as Respondent's Exhibit #6. Dr. Singh reviewed Petitioner's medical history through review of records from Drs.

Aboughannan, Hampton, Gerber, and Kiang. At the IME Petitioner complained of low back pain 9/10 radiating into her right posterior thigh since her fall down stairs at work. She reported increased pain with standing sitting and that it wakes her up from sleep. She reported she is only able to sit stand or walk for 10 minutes at a time. Petitioner's history of breast and ovarian cancer was noted. On examination Dr. Singh found normal muscle strength in the lower extremities. Reflexes were symmetrical. Dr. Singh noted 5 negative Waddell findings. Dr. Singh noted Petitioner's November 5, 2012 lumbar MRI revealed L5–S1 spondylolisthesis with chronic L5 spondylosis. A November 5, 2012 EMG revealed acute right-sided L5 radiculopathy.

Dr. Singh diagnosed isthimic L5-S1 spondylolisthesis. He opined that Petitioner's condition was aggravation of an underlying degenerative condition and that her prognosis was good. He further opined that Petitioner was capable of light duty work with less than 10 pounds lifting, less than 10 pounds push/pull, and minimal bending, kneeling, stooping, or squatting. Dr. Singh recommended 2 to 4 weeks of work conditioning, but noted Petitioner was not at MMI and did not have permanent restrictions.

On re-examination May 28, 2013 (RX #5), Dr. Singh observed the same clinical findings as from December 12, 2012. He reviewed Petitioner's April 25, 2013 MRI, which revealed L5-S1 spondylolisthesis with severe bilateral narrowing at L5-S1. Dr. Singh opined that Petitioner required a L5-S1 fusion which was causally related to the work-related injury which had aggravated a pre-existing condition.

Dr. Singh's IME addendum (RX# 4), noted his review of the records of Drs. Gerber, Imlach, and Chenelle. He continued with his recommendation for surgery and added that Petitioner should be off work.

At the re-examination by Dr. Singh October 12, 2015 (RX #3), Petitioner reported she had not had surgery and that she did not want to have surgery. She also reported that no treatment thus far had provided any significant relief. On examination Petitioner's objective clinical presentation was as before but at this exam Petitioner demonstrated 5 positive Waddell findings. Dr. Singh noted his previous recommendation of an L5-S1 fusion based on what he believed were Petitioner's anatomic pain complaints. At this session he noted that Petitioner had no anatomic pain complaints. He noted her pain complaints were diffuse and that her reluctance to seek treatment was suggestive that she was not in as much discomfort as she stated.

In light of Petitioner's essentially normal motor and sensory examination without neurological deficits Dr. Singh diagnosed lumbar muscular strain and isthimic spondylolisthesis. He then assessed a 5% impairment of a whole person in accord with the 6th Edition AMA Guidelines.

Dr. Singh's October 27, 2015 IME addendum (RX #2) noted his review of additional records from Drs. Gerber, Hampton, Imlach, Schwartz, Cohen, Aribindi, Lippman, and Donkoh. He noted care and treatment for her right shoulder complaints and ultimate arthroscopy for right rotator cuff tear and impingement syndrome. He also noted the diagnosis of a partial right knee meniscus tear. Dr. Singh also noted the right medial branch blocks and radiofrequency ablation performed by Dr. Donkoh. Dr. Singh did not change any of his previous opinions based on review of these records.

Dr. Singh performed the third IME of Petitioner's lumbar spine October 17, 2016 (RX #1 & RX #13). Dr. Singh reviewed his earlier records along with additional records from Drs. Imlach, Lippman, and Donkoh, as well as physical therapy records. At the IME Petitioner complained of 10/10 back pain. She repeated that she did not want to have surgery but that her pain was still intractable. She reported she was unable to work and that she is only able to sit stand or walk for 10 minutes at a time. Again, Petitioner reported that no treatment had provided any relief. On exam, Petitioner's objective clinical signs were as before. She demonstrated 5 negative Waddell signs.

Dr. Singh opined that Petitioner's medical care to that point was not causally related to her work accident. He opined that her medical care to that point had been excessive, especially in light of the non-anatomic nature of Petitioner's pain complaints. He noted that Petitioner was at MMI and could return to full duty work without restriction. He also opined that Petitioner did not require further medical treatment.

Dr. Singh conducted a new AMA rating due to his belief Petitioner is not currently symptomatic and her anatomic pain complaints. He opined that, in accord with the 6th Edition of AMA Guidelines, Petitioner had a 0% lumbar spine impairment.

Petitioner was examined by orthopedist Dr. Blair Rhode December 19, 2015 for assessment of impairments in her right shoulder and low back (PX #17). [The Arbitrator notes that PX #17 is not the complete report due to incomplete copying. PX #17 also includes Petitioner's counsel's December 22, 2016 letter to Dr. Rhode, which included reports from Dr. Chmell and Dr. Singh, requesting an appointment for Petitioner for an AMA Impairment Rating evaluation.] Dr. Rhode noted that he reviewed records from Advocate Medical Group and Drs. Imlach, Aribindi, and Chmell. He also reviewed records from Athletico, Best Practices Physical Therapy, Vocamotive, Petitioner's job search, and Dr. Singh's IME reports. In addition, Dr. Rhode reviewed the depositions of Dr. Imlach and Dr. Chmell. Applying standards from the 6th Edition of AMA Guidelines Dr. Rhode found a 5% impairment of the right shoulder and a 12% impairment of the lumbar spine, equating to a 15% impairment of a whole person.

Dr. Imlach prepared a narrative report May 20, 2016 (PX #6). The report was a summary and overview of Petitioner's case. Dr. Imlach recounted Petitioner's history of a fall downstairs in September 2012 and his 2013 evaluation of her ongoing right shoulder

and back pain. Dr. Imlach reviewed his referral for an MRI of the shoulder which showed a rotator cuff tear and his referral of Petitioner to Dr. Aribindi. Dr. Imlach noted Dr. Aribindi's surgical repair of the rotator cuff September 23, 2013. Dr. Michael also summarized his referral of Petitioner to Dr. Lippman for complaints of low back pain. Dr. Lippman recommended fusion of L5–S1 which Petitioner declined.

Dr. Imlach noted that on the day of his report Petitioner continued to complain of back pain. He noted she suffered from reactive depression and anxiety secondary to her fears relating to the limitations of her ongoing back pain and the financial consequences of her inability to work. Dr. Imlach opined that Petitioner's fall in September 2012 contributed to her shoulder and back injuries. He opined that Petitioner would not have needed shoulder surgery but for her fall or that she would have ongoing back pain but for her fall. He concluded that Petitioner remained disabled at that time and was unable to work in any capacity, and further, that he did not anticipate a change in her functional status.

Petitioner testified that if she does her laundry today, she can't cook because she is in excruciating pain in her lower back. She said after she does her laundry "the next day probably consists of the couch because I am constantly on my pain meds, and I have to rest up, put heat on my back, try to get myself together for the next day." She testified she cannot lift something over her head using her right hand or right arm and that in her job as a school clerk for the Board of Education she did have to do overhead lifting from time to time. Additionally, Petitioner testified that she cannot do her job as a school clerk because to do transcripts you have to pull, to do copying you have to lift, and pull, and that from time to time she had to use a ladder to get transcripts.

Petitioner testified at hearing that she had, "pain shooting down from like the lower part of my back through my buttocks down to my toes on the right side." Petitioner testified that while walking, "my knee give out, and I end up on the floor which is embarrassing, and my knee pops a lot, it hurts, it's in pain a lot, most of the time I try to keep a bandage on it, to keep it with a pad on it to keep it from hurting."

Petitioner also testified that sitting in the hearing room chair was uncomfortable because the chair was hard. She testified it is very difficult to stoop because it is hard to bend her knee and once she gets down it is hard for her to get up because of her back. Petitioner testified she can't kneel and cannot do her job as a school clerk because she cannot kneel at the copying machine. She also testified it hurts to reach with her right arm so she cannot do her job as a school clerk because she cannot pull or push.

Petitioner testified that her attorney referred her back to Dr. Chmell. She consulted Dr. Chmell September 22, 2016 for evaluation of her complaints (PX #11). According to his report Dr. Chmell noted Petitioner's work history as a school clerk for Chicago public schools for 13 years. He recounted Petitioner's injuries to her low back

right leg right shoulder and right knee when she fell down a flight of stairs September 28, 2012. Petitioner complained of persistent right shoulder pain. She had been diagnosed with a torn rotator cuff which she had surgery and extensive physical therapy. Petitioner also complained of persistent low back pain which radiated down her right leg all the way to the foot, along with numbness and tingling. She had had physical therapy, medication, and epidural injections, as well as "burning" of nerves. Lastly, she complained of persistent pain and swelling in the right knee for which she received medication and therapy. Petitioner complained that her ongoing pain which affected activities of daily living. She reported episodes of her right leg "giving out."

On examination Dr. Chmell found an abnormal gait with a right-sided limp. Examinations of the cervical and thoracic spines were normal. Dr. Chmell found marked loss of lumbar lordosis. Thoracolumbar ranges of motion were diminished. Straight-leg raise was positive on the right at 65° and negative on the left. Dr. Chmell right leg circumference was less than the left and that right knee circumference was greater than the left. There was diminished range of motion in the right knee as well as diminished muscle strength. Examination of the shoulders demonstrated diminished range of motion on the right compared to the left. Muscle strength and reflexes were intact and equal.

Dr. Chmell reviewed Petitioner's records from University Medical Center, Advocate Medical Group, Advocate Christ Medical Center, Best Practice Physical Therapy, Gynecologic Cancer Institute of Chicago, and Southland Orthopaedics. In his letter to Petitioner's attorney September 22, 2016 (PX #11) Dr. Chmell noted his diagnoses included right shoulder torn rotator cuff status post-surgical repair, traumatic aggravation of degenerative disc disease of the lumbosacral spine and aggravation of L5–S1 spondylolisthesis with right lower extremity radiculopathy, and traumatic aggravation of osteoarthritis right knee. Dr. Chmell further opined that Petitioner's injuries to her right shoulder, lumbosacral spine, right leg, and right knee were related to her fall at work on September 28, 2012. Dr. Chmell also opined that Petitioner had reached MMI but that she also had a significant permanent impairment and disability affecting her right shoulder, her right knee, her lumbosacral spine, and her right lower extremity. He opined that Petitioner could not return to her previous job as an administrative assistant in required permanent restrictions in her daily activities, rendering her fully disabled for gainful employment.

On cross-examination, Petitioner testified she was hired by the Chicago Public Schools on November 6, 1978, and has worked the entire time for the Chicago Public Schools, except for a break in service in 1999 for breast cancer treatment.

Petitioner testified that on the day of her accident she slipped on dish soap that was on the stairs, she could not say whether the soap was all over the stairs but it was on

the second-floor landing. A security guard, Lamont Fields, told her it was dish soap and that a couple of students had fallen that day also.

Petitioner testified that the dish soap was on a step near the top of the stairs. She had nothing in her hands and that when she fell, her head, her back, and her buttocks. When she got to the first floor landing her knee hit the floor. She did not lose consciousness.

Petitioner further testified she felt immediate 7/10 pain, which was "pretty bad." She testified that the security guard was not walking down the stairs in front of her, and did not recall a security guard named Andrew Bynes helping her up. She testified that she does not know whether the staircases and hallways are cleaned every day.

Petitioner testified her accident happened at the end of the school day and that Marvin Barry drove her home in her car. At home, she took Tylenol but her pain was at a 7-8/10. The next day Petitioner was driven by her girlfriend to the University of Chicago's Emergency Room, where she gave a history of her fall and complained of pain in her back, her shoulder, and her knee. She showed the doctors all her bruises and scrapes. While at the emergency room a CT scan and x-rays were performed.

Petitioner testified she followed up with her primary care physician, Dr. Imlach, on October 2, 2012 (PX #1), but testified that her prior primary care physician was Tony Hampton, M.D. at the Beverly Clinic, part of the Advocate Medical Group. She has been a long-time patient at the Beverly Clinic.

Petitioner testified she gave Dr. Imlach a history of falling down stairs. She told him she hurt her back and bumped her head, but did not lose consciousness. Her back and shoulder had basically the same pain.

Petitioner further testified on cross-examination that after seeing Dr. Imlach, her attorney referred her to Dr. Mark Gerber, an orthopedic surgeon at Fullerton Drake Medical Center. Dr. Gerber began treating her for both her back and her shoulder with physical therapy at Best Practice Physical Therapy. He ordered an FCE also. Dr. Gerber referred Petitioner to Dr. Kiang for injections. The injections were initially not performed due to concerns regarding her past chemotherapy but eventually she was cleared for the injections.

Petitioner saw Dr. Kern Singh at Midwest Orthopedics 3 times for IMEs. She confirmed that during this time period she was concurrently going for physical therapy to Athletico for her shoulder and back and to Best Practice just for her back.

On cross-examination, Petitioner confirmed that on February 12, 2013, Dr. Gerber released her to return to work full duty, but she stopped going to see Dr. Gerber "for other issues."

Petitioner also confirmed that on February 17, 2013, Dr. Tony Hampton released her to return to work full duty without restrictions. On March 15, 2013, Dr. Hampton again released Petitioner to return to work full duty with no restrictions. She switched to Dr. Imlach because she was still in pain.

Petitioner testified she recalled seeing Dr. Imlach on March 22, 2013 if the medical records reflect she did. She denied that she told Dr. Imlach that her knee buckled as she went down the stairs. When asked if Dr. Imlach's records are wrong, she testified, "I'm not saying his records are incorrect. Dr. Imlach probably misunderstood it."

Petitioner testified that her attorney sent her to see Dr. Samuel Chmell on March 25, 2013 to evaluate her right knee. When asked whether Dr. Chmell kept her off work for her knee Petitioner testified that Dr. Imlach kept her off work. Petitioner did not recall whether Dr. Chmell wrote her an off-work note. Petitioner testified that Dr. Chmell never provided any treatment for her right knee, low back, or right shoulder.

Petitioner testified that she has always received $810.66 in weekly TTD benefits every two weeks. She testified that at the time of the hearing she is still receiving benefits.

Petitioner further testified that Dr. Imlach ordered an MRI of her right shoulder and then referred her to Dr. Aribindi. She denied that her physical therapy also included treatment for her lymphedema. On further cross-examination she admitted that because of her right breast cancer surgery she developed lymphedema that caused decreased range of motion and swelling in her right arm and right shoulder. Petitioner also denied that she had gone through pre-operative physical therapy to try to reduce the swelling and decreased range of motion caused by the lymphedema.

Following her right shoulder surgery, Petitioner testified she had her right arm in a sling for approximately 2 weeks. Her daughter came in and helped her with household chores. Petitioner testified that on October 25, 2013, Dr. Aribindi released her to return to work with a restriction of, "no overhead use with your right arm." She testified she did not try to return to work at all, "because you cannot return to work with restrictions with CPS."

Petitioner also testified that Dr. Imlach referred her to Dr. Lippman for evaluation of her low back. When she saw Dr. Lippman her low back pain was 8-9/10. Dr. Lippman recommended anterior fusion surgery.

On further cross-examination Petitioner acknowledged that on December 3, 2013 she told the physical therapist that she had been away for a week at Thanksgiving. She testified she went on a two-hour flight to visit her mom. Petitioner also testified on cross-examination that on January 3, 2014 Dr. Aribindi released her to return to work with no overhead lifting and no lifting greater than 10 to 15 pound restrictions. Petitioner testified

that Dr. Imlach continued to keep her off work because of her back and because of her pain but that on February 1, 2014 Dr. Imlach released her to work with no restrictions.

Petitioner testified she assumed the back surgery was approved and the surgery was scheduled for June 26, 2014 to be performed by Dr. Lippman. She reported her low back pain was at 8-9/10 when her low back surgery was scheduled. However, she was going to wait 4 months to have the low back surgery because her daughter was not available to be with her.

Petitioner testified that her gynecologist was against the low back surgery because of her prior surgeries. She testified that she thinks she shared the gynecologist's concerns with Dr. Imlach and Dr. Lippman. Petitioner testified she told her physical therapist and Dr. Imlach she was uncertain about having the surgery because she does not have anyone to take care of her and because her daughter does not live here. She denied that she told Dr. Lippman her daughter moved to Hawaii but has only visited there. She pushed her low back surgery, back to July and then to August because she would have no one around to help her, but again denied she told Dr. Lippman her daughter had moved to Hawaii.

On further cross-examination Petitioner denied telling Dr. Imlach she stopped going to therapy because it was not helping. She testified that she stopped going to therapy because it was cancelled. When was asked again if it was her decision to stop going to therapy to which she replied, "It didn't help, so, I suppose I did say it wasn't helping." She denied asking Dr. Imlach on April 10, 2014 to no longer write prescriptions for therapy. She stated that if Dr. Imlach's records state that they are wrong.

Petitioner did not recall that Dr. Lippman had released her to return to work full duty on May 5, 2014. On July 30, 2014, she told Dr. Lippman she did not want back surgery and just wanted to go with physical therapy and try pain management.

Petitioner denied that on June 10, 2014 she asked Dr. Imlach to write a letter stating she was permanently disabled because she cannot tell a doctor what to write. She further testified that, she would never ask Dr. Imlach to write a letter to say she was permanently disabled, if she is not.

Petitioner denied that on August 21, 2014 she told her physical therapist that she just took a long car trip and it was 12 hours each way. She testified that if the Athletico records say that they are wrong.

Petitioner testified that the injections and the burning of the nerves only provided relief for about a week and then the pain would kick right back in. She told Dr. Donkoh several times that the injections were not really working.

Petitioner acknowledged that on January 13, 2015 she told Dr. Imlach her back pain was 10/10. Approximately one month later, on February 27, 2015, she reported her

back pain was a 10.5/10. She testified that on September 18, 2015 she "probably" told Dr. Imlach she did not want surgery of any kind. She added that she did not want back surgery because "a friend of her just died from back surgery."

Petitioner testified that she last saw Dr. Dankoh October 9, 2015, and that Dr. Dankoh recommended that the best thing to manage her pain was physical therapy and some moderate medical management. Dr. Dankoh recommended follow-up in 4 months, but she did not return.

On further cross-examination Petitioner testified she first met with Ms. Helma at Vocamotive on October 21, 2015, a meeting arranged by her attorney. She gave Ms. Helma a history of her accident and her background and told Ms. Helma she does not want to have surgery. She understood that her attorney had arranged the meetings with Ms. Helma to help her case.

Petitioner testified that when she met with Ms. Helma her back pain was between 8 and 9. She testified that Ms. Helma never tested her computer skills, typing, or keyboarding as a part of the evaluation. Petitioner further testified that when she met with Ms. Helma she was still under active medical treatment.

Petitioner testified that she was aware that Dr. Imlach wrote a report on her behalf but that she was not aware that her attorney asked Dr. Imlach to re-write that report. Her attorney never showed her that new report.

On further cross-examination Petitioner testified she returned to Dr. Chmell September 22, 2016 at her attorney's direction. Dr. Chmell examined her back and knee. She told Dr. Chmell when she does laundry she is "done for the rest of the day."

Petitioner was asked whether she had ever applied for Social Security Disability. Petitioner's objection was sustained. On further cross-examination Petitioner was asked whether she had begun collecting her pension. Petitioner's objection was sustained.

Petitioner testified that she still receives $810.66 per week in Temporary Total Disability with some occasional minor delays. Petitioner stated her checks were terribly late, sometimes a month late, but not recently.

Petitioner testified that through the date of the hearing she has received $181,812.73 in TTD, which is on-going. She testified that Dr. Imlach has not been paid, but did agree that so far a total of $116,365.91 of her medical bills have been paid.

Petitioner testified she requested two advances on permanency, each for $5,000.00, July 1, 2014 and September 26, 2015, to satisfy liens on her condo to help save her condo. She testified she was receiving her weekly TTD benefit of $810.66 when she asked for and received her two advances on permanency.

Regarding her job search, Petitioner testified her attorney told her to prepare the five-month job search for this hearing. She was not sure that her "job search" was ever sent to the insurance company or to the defense attorney. Petitioner testified she did not provide this job search to Ms. Helma of Vocamotive, but stated, "We talked about it."

On redirect examination Petitioner testified that as the principal's personal secretary, she typed all of his correspondence, which takes up 65% of her work day. Petitioner further testified that she continued to do a job search after August 2016.

On recross-examination Petitioner testified she did not submit any job searches to her attorney after August 2016.

Lisa Helma testified on behalf of Petitioner. Ms. Helma is a Certified Rehabilitation Counselor who provides vocational rehabilitation services to individuals with disabilities since 2008. She is a certified rehabilitation counselor with a Master's Degree in rehabilitation counseling. Ms. Helma testified from her November 25, 2015 Initial Evaluation Report (PX #7) and January 18, 2017 Addendum Report (PX #15)

Ms. Helma completed her initial evaluation of Petitioner on October 21, 2105. She noted that Petitioner was 60 years old, that she sustained an injury on September 28, 2012, that she had right rotator cuff surgery, that she had 3 nerve block injections, and that nerves in her back had been "burned." Petitioner reported that she had not had surgery on her right knee and also had complaints with her the left knee due to overcompensation.

Ms. Helma testified that Petitioner's treating physician was Dr. Imlach, a general practitioner. Dr. Imlach referred Petitioner to a specialist regarding back surgery, but that Petitioner did not want to have back surgery. Ms. Helma further testified that Petitioner denied participating in any type of physical or occupational therapy any type of physical therapy. Petitioner reported that Dr. Imlach had not released her to return to work in any kind of capacity and that Dr. Imlach stated she was permanently disabled in any capacity.

Ms. Helma testified that Petitioner accidentally threw out the muscle relaxers prescribed by Dr. "Danko" [*sic*] and could not get another prescription. Petitioner had seen Dr. Kern Singh for 4 Independent Medical Examinations and that initially Dr. Singh agreed with Dr. Imlach regarding her surgeries but was not sure of what Dr. Singh had stated during his last IME.

Ms. Helma testified that Petitioner reported that she was unable to perform two activities in one day, and if she was going to do laundry, she would be unable to cook.

Petitioner denied completing a Functional Capacity Evaluation as well as the use of a TNS [*sic*] Unit.

Ms. Helma testified that Petitioner reported she was independent with activities of daily living and was then only capable of cooking quick meals due to difficulties standing for long periods of time. Petitioner also reported to Ms. Helma that her right foot was dragging. Petitioner reported she was capable of sitting for one hour before she would need to get up and move around. She also reported to Ms. Helma that she was capable of standing for 35 to 40 minutes.

Petitioner reported that she had a difficulty elevating her right arm, and that she would feel pain due to her right shoulder, her mastectomy and her lymphedema. Ms. Helma testified that Petitioner had graduated high school and attended college without graduating. Petitioner did complete a CNA program. Petitioner reported that she had had training in computers, payroll, and budgeting. Petitioner was sent for training every 6 months to learn new programs. She could type 40-50 words per minute and was familiar with Microsoft Word, Word Perfect, Microsoft Office, and spreadsheets.

Ms. Helma testified that Petitioner is currently receiving Workers' Compensation benefits, that medical benefits were still available to her, and that Petitioner was denied for Social Security Disability. Ms. Helma testified that Ms. Daniel was not receiving her pension.

Ms. Helma testified that the only medical record she cited in her report was the December 4, 2014 note from Dr. Imlach. Ms. Helma testified that later she reviewed the depositions of Drs. Chmell and Imlach. She recited Dr. Chmell's opinion that Petitioner was totally disabled and was unable to perform any work at all, including sedentary work. She testified that Dr. Imlach opined that if his restrictions were accommodated, then Petitioner could possibly work in a sedentary capacity. Ms. Helma testified these restrictions included no bending, no stooping, no twisting, no lifting over 10 pounds no standing or walking for over 15 minutes consecutively and that she would need to stretch because she could only sit for only 20 minutes.

Ms. Helma testified that Petitioner had been denied Social Security Disability. She testified that Dr. Imlach wrote a letter to the Social Security Administration regarding Petitioner's inability to work.

Ms. Helma testified that Dr. Imlach did have a Functional Capacity Evaluation dated November 29, 2012, placing Petitioner in the sedentary physical demand category.

Ms. Helma testified that it is her opinion that Ms. Daniel cannot return to work and therefore did not have access to any type of occupation. Ms. Helma based her opinion on the 2012 FCE. She also based her opinions on the fact that none of Petitioner's physicians had released her to return to work.

On cross-examination Ms. Helma testified that she was hired by Petitioner's attorney Mr. Webster to conduct an evaluation of Petitioner. She has performed 10 evaluations for Mr. Webster and his law firm. Ms. Helma denied the purpose of her evaluation is to increase the value of a claim.

Ms. Helma acknowledged that Petitioner told her she had never had a Functional Capacity Examination.

Ms. Helma testified that Petitioner's attorney never provided her with medical records from Dr. Mark Gerber. She testified that neither Mr. Webster nor Petitioner ever told her that Petitioner treated with Dr. Gerber at Fullerton Medical Center. Ms. Helma further testified she was not aware that Petitioner was treated by Dr. Gerber. She testified she was not aware that Petitioner had had physical therapy at Best Practice.

Ms. Helma testified that Petitioner never told her that Dr. Gerber had released Ms. Daniel to work full duty. Ms. Helma testified that Petitioner never told her that Dr. Tony Hampton at the same facility as Dr. Imlach had released her to return to full duty work twice. Ms. Helma testified that Petitioner's attorney did not provide her with Dr. Aribindi's records and that she was not aware that Dr. Aribindi had released Petitioner to return to work full duty without restrictions. Ms. Helma testified she did not believe that Dr. Lippman actually released Petitioner to return to work.

Ms. Helma testified that Petitioner told her that her right foot was dragging and but never saw Petitioner dragging her right foot.

Ms. Helma testified that the FCE placed Petitioner in the sedentary category, and that Petitioner's job as a school secretary was at the sedentary physical demand level. She never saw a formal job description for Petitioner's job as a school secretary.

Ms. Helma testified that Petitioner's attorney did not provide her with any of Dr. Kern Singh's IME reports. She was not aware that Petitioner's lumbar fusion surgery had been approved.

Ms. Helma testified she was not aware that Dr. Chmell was not a treating physician, but only an IME hired by Petitioner's attorney. She testified that she only had Dr. Chmell's evidence deposition transcript to review.

Ms. Helma testified that she did not see Petitioner's "job search" from March through August 2016.

Dr. William Imlach gave his evidence deposition September 6, 2016 (PX #10). Dr. Imlach is a doctor of osteopathic medicine. He is board certified in family medicine. He testified from his records from Advocate Medical Group (PX #1) and his May 20, 2016 narrative report (PX #6).

On direct examination Dr. Imlach testified he first saw Petitioner March 12, 2013. She presented with a history of right-sided back pain since a fall in September 2012 when her knee buckled going down a flight of stairs. Her principal complaints were low back pain and right shoulder pain. On examination Petitioner had pain at the end of range of motion in the shoulder and weakness in the shoulder. There was pain to palpation and tenderness in the right paraspinal region of the back. Dr. Imlach was unable to view the CD of an MRI because of incompatibility with his computer. He diagnosed back pain with radiculopathy and a sprained right supraspinatus tendon the shoulder. He was able to view the shoulder MRI report on a follow-up visit April 12, 2013. The report showed a chronic full thickness tear of the distal rotator cuff at its insertion, tendinopathy and thinning of the remaining rotator cuff tendon and severe AC joint osteoarthritis. He then diagnosed a complete tear of the rotator cuff tendon and lumbar radiculopathy. He referred Petitioner to an orthopedist and ordered a lumbar MRI.

Dr. Imlach next saw Petitioner May 15, 2013 and reviewed the lumbar MRI. The MRI showed a grade 1 anterior spondylolisthesis of L5 on S1 with bilateral spondylosis. The MRI also showed disc desiccation and diffuse bulging at L5–S1, more prominent in the right with swelling on the right-sided nerve root. On June 5 petitioner reported that she still had back pain. She had not seen the pain specialist Dr. Imlach had recommended. Petitioner had seen Dr. Aribindi who recommended physical therapy. Petitioner returned June 21, 2013. She reported she had two weeks remaining on her physical therapy. Dr. Imlach recommended completion physical therapy. Due to Petitioner's lumbar radiculopathy Dr. Imlach increased dosage of hydrocodone.

Dr. Imlach testified that Petitioner returned July 22 after seeing Dr. Aribindi, who had recommended. Dr. Imlach performed a pre-operative surgical evaluation September 16, 2013. He testified he had written excused work notes on the assumption Petitioner's condition was work related. Petitioner had seen Dr. Caleb Lippman by the time Dr. Imlach next saw Petitioner October 28, 2013. Dr. Lippman's report noted his assessment that Petitioner's sciatica was related to her fall.

Dr. Imlach testified he continued to see Petitioner through 2014. In addition to continuing pain medication he started Petitioner on duloxetine (Cymbalta) for back pain and resumed physical therapy. On February 27, 2014 Dr. Imlach noted that Dr. Lippman had recommended surgery. On April 10 Dr. Imlach noted that Petitioner declined surgery because there was no one to take care of her afterward. On June 10, 2014 Petitioner reported that her leg sometimes gave out so she was walking with a walker.

On December 3, 2014 Petitioner reported that she had two epidural injections but was reluctant to proceed with the third. Dr. Imlach advised petitioner to have the third injection. He also recommended another EMG. On February 27, 2015 Petitioner reported that she had had the third epidural injection and that her pain then was 10.5 out

of 10. On April 23, 2015 Petitioner reported 5–6/10 pain. On July 23 Petitioner reported 8/10 pain. Dr. Imlach referred her to Dr. Farhat for a neurological assessment.

Dr. Imlach testified that at a follow-up on September 18, 2015 Petitioner again stated she was not interested in surgery. He ordered a new MRI for the neurological consultation. He also testified that he wrote a letter to the Social Security Administration stating petitioner was unable to work in any capacity. He opined that Petitioner's inability to work was related to her fall at work in 2012. Dr. Imlach testified there was nothing new in Petitioner's presentation on December 14, 2015; February 1, March 21, April 18, May 20, and August 19, 2016.

Dr. Imlach did opine that Petitioner suffers from depression and chronic pain due to the injuries from her fall. His opinion is based on Petitioner's history that she was asymptomatic before her fall. Dr. Imlach added that he did not believe it was advisable for Petitioner to undergo the surgery recommended by Dr. Lippman due to her depression, anxiety, and lack of support at home.

Dr. Imlach reiterated the work restrictions he set forth in his May 20, 2016 narrative report: no bending stooping twisting her lifting over 10 pounds, no standing or walking for over 15 minutes, no lifting over 10 pounds with right upper extremity, and no overhead work. He opined, coupled with Petitioner's emotional state, she was not capable of returning to work in any capacity whatsoever. He did not recall what were Petitioner's job duties.

On cross-examination Dr. Imlach noted he found no evidence of Petitioner's malingering. He did opine that she was at MMI for both her shoulder and her back. Dr. Imlach did note that degenerative x-ray findings were expected with an average 58-year-old person.

Dr. Samuel Chmell gave his evidence deposition December 2, 2016 (PX #14). Dr. Chmell is a board-certified orthopedic surgeon. He testified from his file: notes from March 25, 2013 (PX #5) and his narrative report to Petitioner's counsel September 22, 2016 (PX #11).

Dr. Chmell noted Petitioner's complaints on March 25 included right knee pain, back pain, and shoulder pain after a fall down stairs at work. On examination Dr. Chmell found slightly diminished range of motion and medial joint line tenderness in the knee. He diagnosed osteoarthritis of the right knee and ruled out a torn meniscus. He opined that Petitioner's fall down stairs at work caused her right knee pain, back pain, and shoulder.

Dr. Chmell testified that he took a history from Petitioner. She had worked as an administrative assistant at Bogan High School. She injured her low back, right leg, right

shoulder, and right knee when she fell down a flight of stairs September 28, 2012. Dr. Chmell noted Petitioner's emergency department treatment with follow-up with Drs. Imlach and Aribindi. Petitioner also reported ongoing treatment with a pain specialist. Petitioner reported her job duties as involving intermittent walking and sitting as well as sorting, carrying, and lifting. She said she was pretty much always moving on the job but that she was unable to return to work since her injuries.

Petitioner reported that she had been diagnosed with a torn rotator cuff for which she had surgery and extensive physical therapy. She also complained of persistent low back pain radiating into her right leg all the way down to the foot, with numbness and tingling she had received physical therapy, medication, and epidural steroid injections, as well as a "burning of the nerves." Her right knee and pain and swelling were treated with medication and therapy. Petitioner reported pain every day in her low back, her right leg, her right knee, and her right shoulder and arm. She reported that since her injuries she has struggled to perform activities of daily.

Dr. Chmell reiterated his examination findings as reported in his September 22 Petitioner's attorney. He noted petitioner's right-sided limp and a marked reduction of lumbar lordosis. Straight-leg raise positive on the right at 65° and negative on the left. Low back motion was diminished. He noted swelling and effusion in the right knee but not the left. There was medial and lateral joint line tenderness in the right knee. He also noted right thigh atrophy. Dr. Chmell found crepitus, a positive impingement sign, and reduced range of motion of the right shoulder.

Dr. Chmell opined that these conditions and the shoulder surgery were related to the fall she gave in history. He added that the shoulder surgery was necessary because of the fall. He further added that the epidural injections were also necessary and causally related to the fall. Dr. Chmell also concurred with Dr. Kern Singh's recommendation of back surgery. Dr. Chmell opined that Petitioner is permanently, fully, and totally disabled due to her limited capacity to walk and stand; lift, carry, and reach; and being on three different medications that alter her ability to think, to stay away, and stay on task. He noted that Petitioner is on to narcotics, Vicodin and Tramadol, as well as duloxetine, generic of Lyrica.

Dr. Chmell testified that Petitioner is a fall risk due to her right knee condition and the right leg radiculopathy. She should not be climbing ladders or stairs and should limit her walking to even surfaces. Petitioner would need to change positions frequently because she can't or shouldn't sit more than 15 to 20 minutes. In addition, he opined that she should spend a good part of her day recumbent. Finally, Dr. Chmell opined that Petitioner could not perform sedentary work.

On cross-examination Dr. Chmell testified that he performs about two IMEs a month, 60% for defense and 40% for plaintiffs. He noted that at the March 25, 2013

encounter he recommended an MRI of the right knee and follow-up in one to two weeks. Petitioner did not follow up. Dr. Chmell acknowledged that the September 22, 2016 encounter was an independent medical work with medical exam but not for treatment. He acknowledged that there was no instability and petitioner's knee. He also noted there was no arthritis in the shoulder but there was arthritis in the acromioclavicular joint. Dr. Chmell did note that the functional capacity evaluation November 29, 2012 noted petitioner was unable to meet minimal functional capacity of stooping and the 75°. He noted that the FCE restrictions, particularly a 5-pound limit, indicated petitioner could not return to her previous job, which he noted was more than just sedentary. Dr. Chmell also noted a misprint on his September 22 report regarding Petitioner's right shoulder strength. He believes Petitioner's strength was less than grade 5.

On redirect examination Dr. Chmell testified that the restrictions set forth in the FCE were reasonably reliable.

CORRECTED CONCLUSIONS OF LAW

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

The Arbitrator finds that Petitioner proved that her claimed conditions of ill- being in her right shoulder, low back, and right knee were causally related to her fall down stairs at work September 28, 2012.

The Arbitrator notes that Petitioner's complaints of pain and disability in her right shoulder and low back were well documented in her medical records immediately following her fall. There is evidence that Petitioner had pre-existing degenerative conditions in both her shoulder and her back. She testified that he had no prior complaints or problems with her low back, despite the pre-existing degenerative conditions. Petitioner acknowledged that she had had ongoing limitations and restrictions with her right shoulder since her prior surgery for breast cancer and resultant lymphedema. Similarly, there was evidence of pre-existing osteoarthritis in Petitioner's shoulder.

While no treating physician specifically opined that the fall aggravated or exacerbated these pre-existing conditions, Dr. Singh opined that Petitioner's work-related fall in fact did aggravate Petitioner's pre-existing degenerative lumbar spine. Dr. Cohen opined that Petitioner sustained a torn rotator cuff because of her fall at work. There was credible evidence by competent medical opinions that Petitioner's low back and right shoulder injuries were causally connected to her fall on September 28, 2012

Similarly, the circumstantial chain of events regarding Petitioner's right knee complaints proved a causal connection. Petitioners voiced complaints about her knee in

her initial clinical encounter in the emergency department of University of Chicago Hospital. It is apparent that Petitioner sustained a sprain or strain to her knee.

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

It is not genuinely disputed that Petitioner was injured in her fall at work September 28, 2012. It is not genuinely disputed that Petitioner was diagnosed with a right shoulder rotator cuff tear and a SLAP tear which required surgery and post-operative physical therapy. It is not genuinely disputed that Petitioner sustained a low back injury of some sort to her lower back. Whether Petitioner sustained a sprain/strain to her low back which aggravated a pre-existing degenerative condition, as opined by Dr. Singh, or an injury of another sort is disputed. It is also disputed whether Petitioner sustained a permanent injury to her low back.

The evidence is clear that Petitioner sustained a torn rotator cuff and slap tear her right shoulder as a result of her fall down stairs at work. Her medical care and treatment for that injury ended January 22, 2014. Clearly the medical intervention to cure or relieve the effects of that injury was reasonable and necessary. Respondent is responsible for payment of professional fees and charges for medical care provided to petitioner by University of Chicago Medical Center, Advocate Medical Group, which includes charges for care provided by Drs. Hampton, Imlach, and Aribindi, and Athletico up to and including January 22, 2014.

The reasonableness and necessity of medical care following an injury is dependent on an accurate diagnosis. An accurate diagnosis is highly dependent on the accuracy and reliability of the patient's history. There are questions about the accuracy and reliability of Petitioner's complaints and history about her low back given to physicians she saw over time. In this matter Petitioner's credibility is questionable due to various and numerous contradictions and inconsistencies in the evidence:

1) Dr. Imlach noted on March 12, 2013 that Petitioner reported that she fell when her knee buckled as she was going down a flight of stairs. Dr. Imlach reiterated Petitioner's history of knee buckling in his narrative report of April 8, 2016. Petitioner testified unequivocally that her fall was not because of her knee buckling.
2) Dr. Imlach noted that he wrote the April 8, 2016 narrative report at Petitioner's request. Petitioner testified unequivocally that she did not request a letter stating she was permanently disabled. Further, Ms. Helma testified that Petitioner reported that Dr. Imlach had written a letter in support of Petitioner's application for Social Security disability benefits to

the effect that she was permanently disabled. The Social Security letter could only have been written at Petitioner's request.

3) Petitioner testified that her pain upon presentation to University of Chicago Emergency Department was "excruciating." The clinical record noted that her reported pain varied from 2 to 6 on a scale of 10, which does not equate to "excruciating."
4) Petitioner testified that before her fall at work on September 28, 2012 that she had not had prior complaints of back or shoulder or knee pain. On presentation to Advocate Medical Group on October 2, 2012 it was noted that Petitioner was already taking Naproxen. Naproxen is drug prescribed for pain relief and reduction of joint inflammation and swelling. Petitioner was prescribed only Norco and diazepam (Valium) on her discharge from University of Chicago Emergency Department. There is no clinical record of when or by whom Naproxen was initially prescribed. It raises the question of whether Petitioner was on Naproxen before her fall.
5) Petitioner contends that she is unable to return to any form of work. Nonetheless, Petitioner was released to return to work full duty by Drs. Gerber, Hampton, Aribindi, and Kern Singh.
6) Petitioner testified that she had not had any complaints with her low back before her work-place accident. Petitioner's November 5, 2012 lumbar MRI noted L5-S1 grade 1 spondylolisthesis, chronic L5 spondylolysis, and moderate biforaminal stenosis. These obviously pre-existing degenerative conditions are often and frequently pain generating. While people with these types of degenerative conditions can be asymptomatic; more likely than not, such conditions are symptomatic.
7) Dr. Kern Singh noted in his IMEs that Petitioner displayed nonanatomic pain complaints, including 5 positive Waddell signs on one occasion.
8) Petitioner exaggerated and magnified pain complaints when she complained of 10.5/10 pain.
9) Petitioner testified that Dr. Lippman administered an "electric shock" to her right leg. There is no notation in any record that Dr. Lippman administered any treatment approximating an "electric shock' of any sort.
10) On October 12, 2015 Petitioner reported to Dr. Singh that because of her back pain she is only able to sit, stand, or walk for 10 minutes at a time. However, Petitioner told Ms. Helma of Vocamotive that she can sit for 1 hour, stand for 35 to 40 minutes at a time, and walk for 40 to 50 minutes.
11) On October 21, 2016 Petitioner reported to Ms. Helms that she had not had an FCE, when in fact she had had an FCE at Best Practices Physical Therapy on November 29, 2012.
12) Petitioner told Dr. Lippman and Ms. Helma that she had not had physical therapy when her medical records clearly document physical therapy for her

shoulder both before and after her surgery, as well as therapy ordered for her back.

13) Petitioner told Ms. Helma that she had developed a foot drag. There is no note in any of Petitioner's medical record indicating that she had an affect approximating or resembling a foot drag or foot drop.

The record is replete with evidence of unsuccessful medical care of a wide variety of modalities. As stated above, the record is also replete with numerous and repeated inconsistencies and contradictions. Even so, Petitioner had objective abnormalities in her lumbar spine for which orthopedic surgeons, including Respondent's examining §12 physician, recommended fusion surgery. Nonetheless, Petitioner declined the surgical option. Instead, as noted above, she submitted to medical treatment from which she realized no benefit. Continuing ineffective medical intervention without relief or success raises questions of the reasonableness and necessity of that medical intervention.

Petitioner was referred by her attorney to Drs. Blair Rhode and Samuel Chmell. Neither of these physicians was provided a full and accurate history by Petitioner. Neither of these physicians had the advantage of reviewing Petitioner's entire body of medical records. But for Dr. Chmell's supervisory role in Petitioner's encounter at the University of Illinois Hospital, neither Dr. Rhode nor Dr. Chmell saw Petitioner for the purposes of medical care or treatment. Rather, they were consulted for purposes of litigation. As such, any professional fees were neither reasonable nor necessary for the cure or relief of Petitioner's injuries.

As noted above, Petitioner's credibility is questionable. However, it is noteworthy that she underwent a series of epidural steroid injections and medial branch block injections through June 2015. The Arbitrator takes note that people do not submit to such procedures if they are not experiencing some degree of genuine pain. Petitioner failed to prove that the medical care provided after June 2015 was reasonable or necessary to cure or relieve the effects of the injuries she suffered in her work accident. Therefore, the Arbitrator finds that the medical care provided to Petitioner through June 2015, even though ineffective, was reasonable and necessary.

Respondent's §12 examining physician, Dr. Kern Singh, came to differing opinions after each of his successive 3 IMEs. In the end, Dr. Singh opined on October 17, 2016 Petitioner was at MMI and that she did not require any further medical care. He further opined that she could return to full duty work without restrictions. Despite Dr. Singh's changing opinions, the Arbitrator finds Dr. Singh's final opinions expressed October 17, 2016 to be persuasive.

Therefore, Respondent is also responsible for payment of professional fees and charges for medical care provided to Petitioner through June 2015. All professional medical fees and charges shall be adjusted in accord with the medical fee schedule provided in §8.2 of the Act.

Petitioner submitted invoices from Vocamotive totaling $1540.00, (PX #16). The Arbitrator as previously noted that the opinions of Lisa Helma were unpersuasive and unreliable based on the inaccurate and reliable history by Petitioner. Based on this flawed foundation the arbitrator finds Petitioner failed to prove that she is entitled to payment of Vocamotive invoices.

K: What temporary benefits are in dispute? TTD/TPD

Petitioner is entitled total temporary disability benefits for as long as the total temporary incapacity lasts. That temporary incapacity is determined by whether a claimant's physical condition has stabilized or have reached maximum medical improvement (MMI).

Petitioner testified she has always received her TTD in the amount of $810.66 from the start of her claim through the date of the hearing on March 27, 2017. Petitioner testified that through the end of January of 2017 she has received a total of $181,812.73 in weekly TTD benefits (Arbitrator's Ex. #1 & RX #11).

The medical evidence established that Petitioner's physical condition had stabilized by June 2015. Petitioner, although continually treated by various physicians, had realized no substantial progress in her condition by June 2015. She had received continued medical care which resulted in no improvement in her clinical condition or subjective complaints.

Although Petitioner was found by various physicians, including treating physicians, to be able to return to full duty work, no physician specifically found Petitioner at MMI until Dr. Kern Singh noted so October 17, 2016. In light of all the contradictions and inconsistencies within the medical evidence and trial testimony, the Arbitrator finds Dr. Singh's MMI opinion credible and persuasive. Therefore, the Arbitrator finds that Petitioner is entitled to TTD benefits from September 29, 2012 through October 17, 2016, 211 & 2/7 weeks.

Petitioner's Average Weekly Wage was $1,110.27, equating to a TTD rate of $740.18/week.

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

Petitioner sustained injuries to three distinct parts of her body: the right shoulder, the lower back, and the right knee. Petitioner's permanent partial disability from each of these injuries was assessed in accord with section 8.1 b(b) of the Act;

(i) Dr. James Cohen performed an AMA impairment rating of Petitioner's right shoulder and arm on December 19, 2014. He found a 7% impairment of the upper extremity which equated to a 5% whole person impairment. Dr. Blair Rhode found a 5% impairment of the upper extremity on December 19, 2015.

Dr. Kern Singh performed to AMA impairment assessments of Petitioner's low back, October 12, 2015 and October 17, 2016. On October 12, 2015 Dr. Singh opined that Petitioner had a 5% impairment of a whole person with regard to her back. However, on October 17, 2016 he opined that Petitioner had a 0% impairment. Dr. Rhode found a 12% impairment of a whole person when he performed his AMA impairment assessment on December 19, 2015.

No AMA impairment rating was offered in evidence with regard to Petitioner's right knee.

In evaluating what weight to give to the proffered AMA ratings the Arbitrator notes the wide variety of impairment ratings for each affected body part. The Arbitrator notes that Dr. Rhode apparently based his assessments on medical records, depositions, and other non-clinical documents. It seems clear that Dr. Rhode's opinions were based on evidence other than what was revealed in a clinical examination in accord with AMA guidelines. Accordingly, the Arbitrator gives no weight to Dr. Rohde's AMA impairment ratings. Dr. Singh, after three IMEs, change his opinions of impairment from 5% to 0%. The Arbitrator notes Dr. Singh's findings of non-anatomic complaints of pain throughout the series of is IMEs. It is also noted that Dr. Singh shifted from an opinion that Petitioner needed lumbar fusion surgery to a later opinion that she need ed no further medical care. Nonetheless, the Arbitrator can give only little weight to Dr. Singh's impairment ratings due to their inconsistency. No AMA rating was offered in regard to Petitioner's right knee. The Arbitrator can give no weight to this factor for Petitioner's knee.

(ii) Petitioner was employed as a clerical administrative assistant. The FCE noted this was a light demand employment. It was noted otherwise as sedentary employment. Petitioner's description of her job duties was more in tune with light demand rather than sedentary. The Arbitrator gives moderate weight to this factor.

(iii) Petitioner was 56 years old at the time of her accident. She had a statistical life expectancy of 27 years at that time. In light of her current limitations with her right shoulder, Petitioner is likely to experience continued pain and limitation in her right shoulder. The evidence supports the inference that Petitioner has returned to a baseline condition with regard to her low back. She will have continuing problems with her back due its degenerative condition and not necessarily due to the accident. Therefore, the Arbitrator gives greater weight to the right shoulder condition and lesser weight to the low back condition. Considering the limited evidence regarding the right knee, the Arbitrator gives little weight to this factor.

(iv) Petitioner has not returned to gainful employment since her workplace injury. As noted above, the Arbitrator found little credible evidence to support petitioner's claim that she is totally unemployable. She was counselled by Ms. Helma of Vocamotive, who opined that Petitioner was unemployable. There was no evidence that Petitioner contacted Respondent to attempt to return to work even on a trial basis within any of the restrictions set forth by her various physicians. It is noteworthy that the stated restrictions were inconsistent and that the inconsistencies were never reconciled.

Drs. Imlach and Chmell also opined that Petitioner was unemployable. These opinions were founded on the subjective reports of a person with a history of unreliable and inaccurate reporting, thus rendering these opinions unpersuasive. Dr. Singh credibly opined that Petitioner could return to full time work without restrictions. The Arbitrator gives moderate weight to this factor.

(v) Petitioner's medical history following the work accident on September 28, 2012 is long and complicated. As noted above, Petitioner is not a credible witness but is one who sustained objective injuries. Petitioner suffered a torn rotator cuff and SLAP tear in her right shoulder which clearly required surgical repair. The Arbitrator gives great weight to this factor in regard to the shoulder.

She had a degenerative lumbar spine which was aggravated by her accident. Petitioner denied having any back-related symptoms before her accident. The Arbitrator finds this unlikely due to the extent of the pre-existing condition. Various surgeons from time to time recommended fusion surgery which Petitioner declined, although she did agree to interventional injections. The surgical recommendations were based on objective radiologic findings and subjective complaints. As already noted, Petitioner's reliability in making subjective complaints is questionable, particularly in light of the shifting nature of her presentations at IMEs by Dr. Singh. Dr. Singh found her to be at MMI with her back and able to return to full time work. The evidence suggests that Petitioner's current claimed disability is actually based on a return to her pre-accident baseline. The Arbitrator gives moderate weight to the aggravation of Petitioner's pre-existing degenerative lumbar spine.

Petitioner also sustained a sprained right knee. She had scant medical intervention for that injury. The Arbitrator gives little weight to this factor.

In light of all the evidence, including the above five factors, the Arbitrator finds that Petitioner sustained a permanent partial disability related to her right shoulder of 15% of a person-as-a-whole, 75 weeks; a permanent partial disability to her low back of 8% of a person-as-a-whole, 40 weeks; and a permanent partial disability of 2% of her right leg, 119.30 weeks.

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

The Arbitrator finds that Petitioner failed to prove that she is entitled to penalties and attorney's fees. Petitioner's counsel acknowledged that the penalty and fees petition filed November 26, 2013 was not served on Respondent or Respondent's counsel who had filed an Appearance. Further, the petition for penalties and fees filed November 26, 2013, the only Petition within the case file, was not served on the Arbitrator. In addition, prior petitions for penalties and fees, although some of which were served on Respondent, had

not been served on the Arbitrator, see Petitioner's Exhibit #18. Rule 9020.70 (b) [formerly Rule 7020.70] states that motions are to be served on the Arbitrator and the attorneys of record or unrepresented parties.

Petitioner's Petition for Penalties and Fees is denied for want of proper notice.

N: Is Respondent due any credit?

Petitioner testified she always received her TTD weekly benefits amounting to $810.66 from the first day eligibility through the date of the hearing. Petitioner testified that through the end of January 2017 she had received a total of $181,812.73 in weekly TTD benefits (RX #11). The Arbitrator notes that Petitioner's correct TTD rate is $740.18 (66 2/3% of $1,110.27 AWW). Respondent is due a credit for the overpayment of weekly TTD.

1. Respondent is due a credit for overpayment of TTD: $810.16 - $740.18= $70.55 TTD overpayment per week. TTD paid October 5, 2012 through January 16, 2017 = 219 weeks. 219 weeks x $69.36 =$15,189.84 in TTD overpayment.
2. Respondent is due a credit of $10,000.00 representing two cash advances on permanency (TPD) each for $5,000.00 July 2, 2014 and October 23, 2014 (RX #10).
3. Respondent is due a credit for any medical bills it paid after June 2015, Petitioner was released to full duty work on October 17, 2016, Respondent paid $116,365.91 in medical bills (RX #12).

Steven J. Fruth, Arbitrator

June 25, 2018

STATE OF ILLINOIS)	
) SS.	
COUNTY OF McHENRY)	

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WENDY K. WESOLEK,

Petitioner,

19IWCC0489

vs.

NO: 14 WC 34381

COUNTY OF McHENRY,

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 all issues, and being advised of the facts and law, reverses the Decision of the Arbitrator and finds that Petitioner failed to prove her current condition of ill-being was causally related to her repetitive work activities manifesting on June 17, 2014.

I. *Findings of Fact*

Petitioner began working for Respondent as an adult probation officer in 1991. When this matter proceeded to hearing on June 7, 2018, Petitioner held the title of low risk transfer administrative case worker, but in May and June of 2014, she was a standard adult probation officer. In May 2014, Petitioner advised Respondent's risk management coordinator, Beverly Beyer, that she was going to see her doctor for carpal tunnel symptoms that she related to her job duties. Petitioner testified that prior to June 2014, she had experienced tingling and her fingers in both hands were going numb. Petitioner had a prior left-hand carpal tunnel surgery in 2009, and was therefore, already aware of the symptoms associated with carpal tunnel syndrome.

Petitioner testified that in 1995, Respondent had started utilizing computers more and implemented different systems for entering case notes. Respondent thereafter got a new computer system called "R2" in 2008 that was created to completely move away from handwritten case notes. Petitioner began to type all her case notes and noticed left wrist symptoms within a year after Respondent's change to the R2 system. While using that system in 2008, Petitioner typed at

least six hours per day. Her other duties included filing, drug testing that involved "ripping things" and unscrewing urine cup caps, performing breathalyzer tests with a hand-held machine, and putting on ankle bracelets, which involved the manual manipulation of Petitioner's hands and wrists.

Thereafter, in 2014, Petitioner's caseload increased and caused her to work more on the computer, type more, and complete more reports. Petitioner testified that from February to April of 2014, she was on her computer at least six hours per workday doing half narrative typing and half data entry. Petitioner indicated that the job description admitted into evidence as Respondent's Exhibit 2 was consistent with her job duties in 2014.

Petitioner's workdays were seven and a half hours in 2014. Aside from the six hours per day she spent typing, Petitioner met with clients, conducted home visits, took handwritten notes during the intake process, twisted her hands while performing urine analyses, filed papers, performed breathalyzer tests, and participated in court appearances. Petitioner testified that she went into the field two to three times per week for the home visits that lasted fifteen minutes to a half-hour. Petitioner conducted most of these home visits while driving on her way home after already working her full normal workday. Petitioner further averaged two to three 15-minute meetings per day in her office with probation clients, one hour of filing per week, two 5-minute court appearances per week, 15 drug tests per week, and two breathalyzer tests per week.

Petitioner testified that she began to connect her carpal tunnel symptoms to her employment in February or March of 2014. She perceived that her symptoms became greater as her workload increased and she spent more time on the computer. When Petitioner presented to Dr. Dana Tarandy of Mercy Health System on June 17, 2014, she reported her left hand had been doing well after its carpal tunnel release five years prior, but she now had increased pain, numbness, and tingling after using her hand to work on her deck. Dr. Tarandy diagnosed Petitioner with left recurrent carpal tunnel syndrome along with right carpal tunnel syndrome. A subsequent EMG confirmed Petitioner's bilateral carpal tunnel syndrome, and when Petitioner returned on July 2, 2014, Dr. Tarandy indicated that Petitioner had elected for operative treatment. Petitioner subsequently underwent a left carpal tunnel release on July 25, 2014 and a right carpal tunnel release on September 26, 2014.

At the time of the hearing, Petitioner testified her left hand was back to being slightly tingly while her pinky and ring fingers were "heading towards numb again." She testified that her right hand had a "slight amount of tingliness" also. However, Petitioner conceded that she had a good result overall from both her surgeries and was able to continue doing her job.

The parties deposed Dr. Tarandy on October 28, 2015. Dr. Tarandy testified that when he began treating Petitioner in June 2014, he was aware of Petitioner's prior left-hand carpal tunnel surgery, but it did not play a role in her developing left carpal tunnel syndrome again. Dr. Tarandy opined that Petitioner's repetitive overuse type of work, and specifically its typing, caused her bilateral carpal tunnel syndrome. He testified that he did not know what percentage of the day Petitioner spent typing, but it was a significant amount that encompassed five to six hours out of an eight-hour day. Dr. Tarandy also did not know if it was consistent typing or if Petitioner was allowed breaks, nor did he know the height of Petitioner's keyboard or how she typed. He testified

that perhaps Petitioner's wrists were flexed a little when she typed, but he was not sure. Dr. Tarandy also could not recall if he reviewed an actual job description for Petitioner, but he testified he had known Petitioner for a long time and therefore knew her job duties. Nevertheless, he could not recall whether Petitioner ever told him that she thought her job was the source of her problems.

Subsequently, at Respondent's request, Dr. Peter Hoepfner, a board-certified orthopedic surgeon, performed a records review and authored a narrative report dated August 3, 2016. Dr. Hoepfner found that there was no evidence Petitioner's job duties had caused her carpal tunnel syndrome. He emphasized that a preponderance of medical evidence had refuted the claim that computer typing was a known cause of carpal tunnel syndrome. Dr. Hoepfner further stated that Petitioner's job description included none of the known occupational risk factors associated with carpal tunnel syndrome, such as sustained forceful wrist flexion or extension and vigorous squeezing or gripping. He explained that the work activities listed in Petitioner's job description did not require the vigorous, sustained, forceful use of the hands with the wrist flexion and extension necessary to be causative of Petitioner's condition.

When the parties deposed Dr. Hoepfner on August 6, 2017, he testified consistent with his narrative report. Dr. Hoepfner further testified that several well-documented studies had reflected the lack of any causal connection between computer use or keyboarding and carpal tunnel syndrome. He clarified that the preponderance of medical evidence he based his opinion on included the following four journal articles, which were attached as exhibits to his deposition: 1) The Frequency of Carpal Tunnel Syndrome in Computer Users at a Medical Facility published by the Journal of Neurology; 2) Computer Use and Carpal Tunnel Syndrome: A 1 Year Follow-Up Study published by the Journal of the American Medical Association; 3) Carpal Tunnel Syndrome and the Use of Computer Mouse and Keyboard published by BioMedical Central; and 4) Computer Work and Musculoskeletal Disorders of the Neck and Upper Extremity: A Systematic Review also published by BioMedical Central.

Dr. Hoepfner testified that these journal articles showed there was evidence-based medicine and peer-reviewed literature to support the notion that keyboard use did not cause carpal tunnel syndrome. He summarized that the studies had all concluded that the extensive use of the keyboard or mouse did not lead to a higher likelihood of the people within the samples developing carpal tunnel syndrome as opposed to the general public. Dr. Hoepfner explained that the preponderance of hand surgeons also shared a similar perspective that light office sedentary work and computer use are not causative factors.

This matter proceeded to hearing on June 7, 2018. In the Decision issued on July 24, 2018, the Arbitrator found that Petitioner sustained repetitive trauma injures that arose out of and in the course of her employment manifesting on June 17, 2014. The Arbitrator further found that Petitioner's current condition of ill-being was causally related her repetitive work activities. Petitioner was awarded 7.5% loss of use of the right hand and 20% loss of use of the left hand. However, for the left hand, Respondent was given a credit of 12.5% related to a prior settlement and the award was reduced accordingly to 7.5% loss of use of the left hand.

II. *Conclusions of Law*

Following a careful review of the entire record, the Commission reverses the Decision of the Arbitrator and finds that Petitioner failed to prove the current condition of her bilateral hands is causally related to her repetitive work activities manifesting on June 17, 2014.

The Commission first recognizes that Petitioner's testimony regarding her job duties is corroborated by Respondent's job description admitted into evidence as Respondent's Exhibit 2. Because there was no evidence to the contrary, Petitioner's testimony establishes that she was performing repetitive job duties that arose out of and in the course of her employment.

However, in considering the issue of causal connection, the Commission is persuaded by the opinions of Dr. Hoepfner over the opinions of Dr. Tarandy. The Commission finds that the presented medical literature supported Dr. Hoepfner's conclusion that such computer usage is not causative of carpal tunnel syndrome. Dr. Hoepfner testified that the journal articles disclosed in his deposition had all determined that extensive use of a keyboard or mouse did not lead to a higher likelihood of the study participants developing carpal tunnel syndrome as compared to the general public. The four journal articles that Dr. Hoepfner presented lend credibility to his contention that the preponderance of medical evidence fails to support a causal connection in Petitioner's case. The Commission further acknowledges that Dr. Tarandy failed to reference any specific competing medical literature in support of his contrary causation opinion. There was no evidence presented to show why the manner in which Petitioner typed might have been an exception to the medical literature provided.

Dr. Hoepfner's opinion gains additional persuasiveness because he was provided with Petitioner's job description to consider, while Dr. Tarandy was not. Dr. Tarandy testified that he knew Petitioner's job description because he had known and treated Petitioner for a long time. However, Petitioner's job duties were never documented in any of the treatment records provided from Dr. Tarandy's office. Dr. Tarandy also could not recall if Petitioner ever told him that she believed her job was the problem behind her symptoms. He did not know if Petitioner was engaged in consistent typing or if she took breaks, nor did he know the height of Petitioner's keyboard or how she typed. Dr. Tarandy further testified that perhaps Petitioner's wrists were flexed when she typed, but he was not sure. The Commission finds Dr. Tarandy's testimony showed an unfamiliarity with the actual extent of Petitioner's job duties, and such unfamiliarity hinders the Commission's ability to rely on Dr. Tarandy's opinion.

Although the Commission acknowledges that neither Dr. Tarandy nor Dr. Hoepfner demonstrated an all-inclusive understanding of Petitioner's typing situation, it gives weight to the fact that Dr. Hoepfner saw Petitioner's job description whereas Dr. Tarandy's treatment records never discussed any of Petitioner's work duties. There was also no clear medical causation opinion offered that related any of Petitioner's other duties, such as the twisting of urinalysis lids, to the development of her carpal tunnel syndrome.

For these reasons, the Commission relies on Dr. Hoepfner's opinion and reverses the Decision of the Arbitrator accordingly. As the Commission has found Petitioner failed to prove a causal connection between her current condition and repetitive work activities, all other issues are

rendered moot and all benefits are hereby denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated July 24, 2018, is hereby reversed as stated herein.

IT IS FURTHER ORDERED that Petitioner's current condition of ill-being concerning her bilateral carpal tunnel syndrome is not causally related to her repetitive work activities manifesting on June 17, 2014.

IT IS FURTHER ORDERED that all benefits under the Illinois Workers' Compensation Act are 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 the Circuit Court.

DATED: SEP 9 - 2019

Deborah L. Simpson

Barbara N. Flores

DLS/met
O- 7/17/19
46

DISSENT

I respectfully dissent from the decision of the majority. I would have affirmed and adopted the decision of the Arbitrator in which she found that Petitioner met her burden of proving her employment duties for Respondent were a cause of her bilateral carpal tunnel syndrome.

In reversing the well-reasoned decision of the Arbitrator, the majority has determined that the opinions of Respondent's record review physician, Dr. Peter Hoepfner, are more credible/persuasive than those of Petitioner's long-time, treating physician, Dr. Dana Tarandy. Dr. Hoepfner opined that Petitioner's job duties did not cause or contribute to Petitioner's bilateral carpal tunnel syndrome. His opinions were based, in large part, upon his review of Petitioner's job description and a few journal articles, which he testified, found keyboarding did not contribute to or cause carpal tunnel syndrome. The majority places significant weight on the articles Dr. Hoepfner cited and the fact that he was provided Petitioner's job description to consider. It finds Dr. Tarandy's opinions less persuasive because he did not cite specific literature or actually see Petitioner's job description while treating her. Further, he could not recall if Petitioner took breaks during her typing, the height of her keyboard or how she typed.

In my opinion, Dr. Hoepfer's testimony was not persuasive or credible. He admitted on cross examination that "hours of use" was an important aspect of the studies discussed in the

articles he cited. He also admitted that the studies involved workers keyboarding approximately two hours per day. Although he had been provided Petitioner's job description for review, when asked if he knew how many hours a day Petitioner keyboarded he answered, "That I don't know." As noted by the majority, Petitioner spent 5 to 6 hours a day typing for several years. Further, Dr. Hoepfer was also unaware of the number of times per day that Petitioner performed tasks other than keyboarding: performing urinalyses (turning jar lids), attaching ankle bracelets, applying braces.

In my view, the Arbitrator was correct in finding Dr. Tarandy more persuasive and credible. Dr. Tarandy had performed several surgeries on Petitioner over many years. He was aware of her job activities from his long-term association with her as a patient. While he could not recall specifics, he knew that Petitioner typed 5 or 6 hours a day for several years and believed that it was a cause of her bilateral carpal tunnel syndrome. The Petitioner testified that she typed at least 6 hours a day for several years and that she noticed pain, tingling and numbness when typing. Her testimony was not rebutted.

Workers' Compensation is a remedial statute intended to provide financial protection for injured workers, and it is to be liberally construed to accomplish that objective. *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 529, 505 N.E.2d 1026, 106 Ill. Dec. 235 (1987); *Pathfinder Co. v. Industrial Comm'n*, 62 Ill. 2d 556, 563, 343 N.E.2d 913 (1976); *Jacobs v. Industrial Comm'n*, 269 Ill. App. 3d 444, 447, 646 N.E.2d 312, 206 Ill. Dec. 945 (1995). Under the facts presented in this case, I would have affirmed the Arbitrator's decision in favor of Petitioner.

Therefore, I respectfully dissent from the majority's decision.

Marc Parker

Marc Parker

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RONALD GARDANIER,

Petitioner,

19IWCC0490

vs.

NO: 15 WC 20030

STATE OF ILLINOIS,
DEPT. OF TRANSPORTATION,

Respondent.

DECISION AND OPINION ON REVIEW

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

We find that Petitioner is entitled to a statutory loss award for 50% of the right middle finger. However, he is not entitled to a hand award. Furthermore, under the facts of this case, we find that it was not unreasonable for Respondent to dispute the statutory loss award and Petitioner is not entitled to penalties and attorney's fees.

Although the Arbitrator's decision implied that Petitioner was entitled to a statutory loss award, we explicitly find that he is. The March 9, 2015 emergency room record indicates, "Amputation is to the right 3rd distal phalanx just distal to DIP. Pt brought in the amputated fingertip in a Ziploc bag on ice." *Px2.* The impression listed on the x-ray report is "Amputation of the soft tissue tuft as well as the distal aspect of the distal phalanx of the right third finger along with an avulsion fracture which is oblique in origin off the distal lateral aspect of the distal phalanx." *Px2.* Dr. Talerico's March 13, 2015 Operative Report states, "I removed devitalized small fragments of bone, then used a rongeur to flatten and debrided the exposed fractured ends

of the distal phalanx. ... I was able to mobilize this full-thickness flap that was the skin and subcutaneous tissue distally to cover the exposed distal phalanx and to merge this at the distal aspect of the sterile matrix." *Px1.* In his decision, the Arbitrator wrote, "the middle finger on Petitioner's right hand is visibly about one-half inch shorter than the middle finger on the left hand." *Dec. at 3.* This is also consistent with the R.N.'s notation in the emergency room records that the amputation was approximately 1.5 to 2 cm. Based on these factors, we find Petitioner sustained a partial amputation of the distal phalanx of the middle finger, which was substantial enough to be considered equal to the loss of 50% of that finger under §8(e)8 of the Act.

The above notwithstanding, we also find that Respondent had a reasonable basis to dispute whether Petitioner's amputation caused enough bone loss to constitute a "statutory" amputation such that the benefit for 50% loss of the finger was immediately payable. In *McMorran & Co. v. IC*, 290 Ill. 569 (1919), the Supreme Court found that the Commission erred in awarding a statutory loss amount where the claimant lost only a small portion (one-sixteenth of an inch) of a distal phalanx and the loss did not interfere with use of the distal joint. In contrast, in *Macon County Coal Co. v. IC*, 367 Ill. 458 (1937), the Supreme Court reinstated the Commission's award of 50% of the right second finger as a statutory loss where one-third of the bone of the distal phalange was removed by the doctor and the finger was 3/8 of an inch shorter than the corresponding finger on the left hand. The Court found that the Commission's award was not against the manifest weight of the evidence and distinguished *Macon* from *McMorran* "where only a small tip (one-sixteenth of an inch) of the finger bone was destroyed." *Id. at 460.*

The issue in both of those cases was whether a "substantial" portion of the bone was lost. As it relates to the case at bar, the determination of whether a partial amputation of Petitioner's distal phalanx constitutes a "statutory" loss is dependent upon a factual finding by the Commission (subject to review under the manifest weight standard) that the amputation was substantial enough.

Petitioner argues that if the 3/8 inch shortening of the finger in *Macon* is a 50% statutory loss, then the "approximately ½ inch" shortening of his own finger *must* be a statutory loss as a matter of law. However, the Act and the case law is clear that the statutory loss is based on "bone loss;" not "length loss." Petitioner's brief states, "In *Macon*, much like in the current case, there was no concrete or absolute measure of bone loss from any of the Petitioner's treating professionals. No one definitively stated that a certain measured amount of material was missing from the bone itself." *P-brief at unnumbered page 2 of Argument.* However, this is inaccurate because, in *Macon*, there was a clearly identified loss of one-third of the *bone* although it was not stated in inches.

In Petitioner's case there was no documentation of any specific *bone loss* either as a percentage *or* in inches. And, there are some records which could be interpreted as indicating the bone loss was not substantial. For example, on March 10, 2015, Dr. Crovetti's examination indicated Petitioner's nail plate was still present and he was able to "fully flex and extend at the DIP joint." *Px1.* Clearly, only a portion of Petitioner's distal phalanx was amputated because, otherwise, the nail plate would be gone and there would be nothing remaining to "flex and extend." On May 1, 2015, Dr. Talerico noted Petitioner had full motion, excellent function, and

the nail plate was growing across the sterile matrix.

Furthermore, to require a bright-line test that compares Petitioner's half-inch loss of *finger length* to the 3/8 inch loss of *finger length* in *Macon*, presumes that there are no differences in finger length between various people. This is simply not true. One person may have very large hands and long fingers and another person may have very small hands and short fingers. A half-inch reduction in one person's finger length might translate into a significantly less "substantial" loss of *bone* than that same half-inch reduction in another person.

Respondent eventually paid $13,004.93 for the "statutory loss" award prior to the hearing. *T.27; ArbX3, Ex. D.* However, we find that under the facts of this case, where there was no specific medical documentation regarding the amount of actual *bone loss* Petitioner sustained, it would not have been unreasonable for Respondent, to have waited until a determination had been made by the Arbitrator (and ultimately the Commission) that Petitioner's amputation was substantial enough to qualify as a "statutory" amputation under §8(e)8. Therefore, we vacate the Arbitrator's award for penalties under §19(l) and §19(k) of the Act and for attorney's fees under §16 of the Act.

Finally, we find that it was inappropriate for the Arbitrator to make an award under §8(e)9 for the right hand. Petitioner did not cite any case or decision to support an award for *both* the loss of use of a finger (statutory or otherwise) *and* the loss of use of the hand itself based on that same finger. Petitioner also did not cite to any case or decision awarding loss of use of the hand for a partial distal finger amputation. Section 8(e)9 of the Act states:

> The loss of 2 or more digits, or one or more phalanges of 2 or more digits, of a hand *may* be compensated on the basis of partial loss of use of a hand, provided, further, that the loss of 4 digits, or the loss of use of 4 digits, in the same hand *shall* constitute the complete loss of a hand. *Emphases added.*

In other words, the loss of two or more digits *may* be given a hand award and the loss of four digits *shall* be given a hand award. However, the Act does not provide that the partial loss of one phalange (as Petitioner sustained) may be given a hand award. Furthermore, even if it was possible to give a hand award in this case, the evidence does not support it.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $684.47 per week for a period of 19 weeks, as provided in §8(e)8 of the Act, for the reason that the injuries sustained caused the statutory 50% loss of the distal phalanx of the right middle finger.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall receive credit for $13,004.93 already paid towards the above award.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award for the right hand under §8(e)9 of the Act is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's awards for

penalties under §19(l) and §19(k) of the Act and for attorney's fees under §16 of the Act are hereby vacated.

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

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

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: SEP 9 - 2019

Maria Elena Portela
Maria E. Portela

Thomas J. Tyrrell
Thomas J. Tyrrell

L. Elizabeth Coppoletti
L. Elizabeth Coppoletti

SE/
O: 8/27/19
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GARDANIER, RONALD
Employee/Petitioner

Case# **15WC020030**

ST OF IL DEPT OF TRANSPORTATION
Employer/Respondent

19IWCC0490

On 11/27/2017, 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 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:

4835 MARKHAM M JEEP & ASSOC PC
JASON HAUCK
200 N MARTIN L KING JR AVE
WAUKEGAN, IL 60085

5782 ASSISTANT ATTORNEY GENERAL
KELLY KAMSTRA
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1430 CMS BUREAU OF RISK MANAGEMENT
WORKERS' COMPENSATION MANGER
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

NOV 27 2017

STATE OF ILLINOIS)
)SS. **19IWCC0490**
COUNTY OF **LAKE**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

RONALD GARDANIER
Employee/Petitioner

Case # **15** WC **20030**

v.

Consolidated cases: **N/A**

STATE OF ILLINOIS, DEPT. OF TRANSPORTATION
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **Waukegan, Illinois**, on **10/25/17**. 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. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other ______

FINDINGS

On **03/09/15**, 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 $**59,320.73**; the average weekly wage was $**1,140.78**.

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

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

ORDER

Respondent shall pay Petitioner the sum of $**684.47**/week for a further period of **15.375** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **7-1/2% loss of use of Petitioner's right hand.**

Respondent shall pay to Petitioner additional compensation in the amount of **$6,502.46** under Section**19(k)** of the Act; **$10,000.00** under Section **19(l)** of the Act; and attorney fees in the amount of **$3,901.48** under Section **16** 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

11/20/17
Date

ICArbDec p. 2

NOV 27 2017

Attachment to Arbitrator Decision
(15 WC 20030)

STATEMENT OF FACTS

Petitioner, Ronald Gardanier, testified that he had been employed by Respondent, The State of Illinois Department of Transportation, at the time of an undisputed accident at work on March 9, 2015. His general job duties at that time included mechanical work, maintenance and repair of Respondent's vehicles and equipment, installing "mow decks" and other general maintenance to vehicles, implements and equipment.

Petitioner testified that on March 9, 2015, he was working on a tractor used for mowing grass. At that time, he was installing a "mow deck" to the tractor. The "mow deck" is operated through the tractor's PTO system, or power take-off system, and is operated by the drive shaft of the tractor itself. He stated that while installing the "mow deck" to the tractor with a co-worker, his finger was crushed by a stubborn u-joint when the assembly was being connected. His co-worker was applying force to allow the u-joint to slide onto the PTO, and when it moved suddenly, his finger was caught in the assembly.

Petitioner testified that he knew immediately that his finger had been "pinched" but didn't realize the severity of the injury until he looked at it. At that time, he realized that he had lost a portion of his finger. He retrieved that portion of his finger in hopes that it could be re-attached. There were witnesses to the accident, and his supervisor was informed immediately. Petitioner testified that he was immediately taken to Advocate Condell Hospital.

Records from Advocate Condell Hospital show Petitioner was treated by Dr. Talerico on the day of the work place accident. The history noted he presented with an amputation to the right 3rd distal phalanx just distal to the DIP joint. Also noted was that Petitioner brought in the amputated fingertip in a Ziplock bag on ice. He was diagnosed with partial amputation of his right middle finger. He was treated with antibiotics and released to his home. There was no surgical procedure performed on that day. (PX2, pp. 15-18 of 58)

Petitioner returned to Dr. Talerico's care on Marh 10, 2015. At that time, a surgical procedure was scheduled which when completed on March 13, 2015 consisted of 1.) irrigation and debridement of skin tissue and bone right long finger distal phalanx and 2.) Local V-Y advancement flap with wound closure. The post-operative diagnosis was crush injury, right long finger with complex wound and exposed distal phalanx. (PX1, p. 5)

Petitioner continued his treatment with Dr. Talerico. On April 6, 2015, the doctor noted Petitioner wanted to go back to work. As such, Dr. Talerico returned him to full duty work. On May 1, 2015 Dr. Talerico's chart note indicate Petitioner was doing as expected. Petitioner reported that his pain was controlled. He complained of numbness on pad of the finger as well as intermittent swelling. Dr. Talerico released Petitioner from his care. (PX1, p. 19)

At trial the Arbitrator viewed Petitioner's right and left hand for visual comparison. The Arbitrator notes that the middle finger on Petitioner's right hand is visibly about one-half inch shorter than the middle finger on his left hand.

Petitioner testified that he continues to experience complaints related to his work injury of March 9, 2015. Petitioner explained that because of the Y-flap procedure that he underwent (which consists of using skin from an adjacent area of the finger to wrap tightly and aid in the closure of the wound), he cannot tell which part of his finger is undergoing sensory provocation. He testified that when he feels the sensation of touch on the tip of

his finger, the actual part of his finger that is being utilized is the adjacent area. He further testified that the tip of his finger is very painful when "banged" during work and recreational activities. When Petitioner was asked whether he would tap his finger on the desk for the Arbitrator, he declined to participate in such an action due to the anticipated pain it would cause.

Petitioner testified that the type of pain he feels is "nerve pain" and that medications does not help with that pain. He rarely, if ever, takes pain medication to combat his pain complaints. Petitioner provided that he simply "deals" with the pain. Petitioner also testified that his right middle finger is more sensitive to the elements, especially cold weather. Petitioner testified that he still suffers from pain, sensitivity, numbness, and tingling in his right middle finger.

Petitioner testified that he is no longer able to use his middle finger for fine manipulation when he is unable to visually see the operation he is attempting. Petitioner provided that his line of work often demands fine manipulation when he participates in the maintenance of vehicles and machinery. Petitioner testified that he has lost grip strength in his right hand due to his work place accident. Petitioner testified that although he is right-hand dominant, he has been forced to undertake workplace and recreational tasks increasingly more with his left hand.

Petitioner testified that he no longer participates in the sport of bowling. Petitioner further testified that he can no longer use a bow and arrow without the aid of an intervening device, a "release," because of the condition of his right finger. Petitioner testified that he can no longer operate the brake lever on his motorcycle with his fingers, the way he did prior to his workplace accident. He is now forced to use his entire hand to operate that brake lever.

Lastly, Petitioner testified that he did not receive a payment from Respondent for the Statutory Loss of 50% of the use of his right middle finger until "the middle of this year" and "maybe May of this year", i.e., May of 2017. (see photocopy of statutory loss payment check at AX3, Exhibit D).

In support of the Arbitrator's decision with respect C.) Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds as follows:

As a result of a work place accident on March 9, 2015, Petitioner sustained a partial amputation of his right middle finger. Petitioner underwent surgery on March 13, 2015 consisting of 1.) irrigation and debridement of skin tissue and bone right long finger distal phalanx and 2.) Local V-Y advancement flap with wound closure. The post-operative diagnosis was crush injury, right long finger with complex wound and exposed distal phalanx.

The medical records reflect that Petitioner suffered injury to his right middle finger/hand while working for Respondent on 03/09/15. No evidence was introduced indicating that Petitioner injured his right middle finger/hand prior to 03/09/15 or since 03/09/15.

Based on the above, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to his workplace accident on 03/09/15.

In support of the Arbitrator's decision with respect to L.) What is the nature and extent of the injury, the Arbitrator finds as follows:

In determining the level of permanent partial disability for injuries incurred on or after September 1, 2011, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to the most current edition of the AMA's "Guides to the Evaluation of Permanent Impairment"; (ii) the

occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; (v) evidence of disability corroborated by the treating medical records. (820 ILCS 305/8.1b)

No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. (820 ILCS 305/8.1b)

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 neither party offered an AMA impairment rating by any physician. 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 maintenance technician at the time of the accident and that he was able to return to work at near his prior capacity after completion of treatment for said injury. The Arbitrator notes that Petitioner has ongoing complaints relative to his ability to perform his job functions with his injured right (dominant) hand, and can no longer use it in the same manner that he could prior to his injury, including impaired ability to execute fine manipulation. The Arbitrator gives moderate 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 Petitioner is close to the sixth decade of his life, he will live with his disability for a shorter period than an younger individual. 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 Petitioner testified that he continues to work for Respondent in his same capacity. It does not appear that his injury affected her earning capacity. As such, the Arbitrator therefore gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner sustained an injury to his right middle finger/(dominant) hand which resulted in a partial amputation. Petitioner underwent surgery on March 13, 2015 consisting of 1.) irrigation and debridement of skin tissue and bone right long finger distal phalanx and 2.) Local V-Y advancement flap with wound closure. closure of the wound. The post-operative diagnosis was crush injury, right long finger with complex wound and exposed distal phalanx. Petitioner continued under the care of his treating physician, Dr.

Talerico until May 1, 2015 when he was released at maximum medical improvement. Dr. Talerico's chart note provides that Petitioner was doing as expected. Petitioner reported that his pain was controlled. He complained of numbness on pad of the finger as well as intermittent swelling. Petitioner credibly testified that he continues to suffer tingling, numbness, sensitivity, pain, lack of grip strength, lack of ability to complete tasks requiring fine manipulation, and that he has had to rely on his left (non-dominant) hand to complete more tasks than he had to before. Petitioner testified that when performing tasks with his right hand, he is unable to do so when he cannot see his hand because of the abnormal nerve configuration in his finger. The "flap closure" procedure that he underwent as treatment for his partial amputation has caused a certain amount of "nerve confusion" and he can no longer trust that he is accurately doing or touching. This nerve confusion has caused him to rely on his left (non-dominant) hand in an increasing and persistent manner since his original workplace accident. Petitioner further testified that since the partial amputation of his right middle finger he has discontinued and/or altered his behavior outside of the workplace. Petitioner no longer participates in the sport of bowling. Petitioner testified that when using a bow and arrow, he has had to alter the manner in which he shoots, using a "release" device, as he lacks the grip strength and sensitivity in his right (dominant) hand to operate a bow and arrow the way he could prior to his accident. Petitioner testified that he has also altered the way that he uses his right hand when operating his motorcycle. He no longer has the strength present in his hand to operate the brake lever with his fingers and must use his entire hand/grasp to operate the brakes. The Arbitrator finds Petitioner's testimony credible and convincing. The Arbitrator notes that the middle finger on Petitioner's right hand is visibly about one-half inch shorter than the middle finger on his left hand. The Arbitrator therefore gives greater weight to this factor.

Based on all the above, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 7-1/2% loss of use of the right hand pursuant to §8(b)2 of the Act.

In support of the Arbitrator's decision with respect to Section M, the Petition for Penalties and Fees, the Arbitrator finds as follows:

Based upon the Arbitrator's findings of the existence of a work place accident resulting in an injury that was causally related to that accident, and the lack of evidence proffered by Respondent to rebut any of Petitioner's claims, the Arbitrator finds that the delay in payment of Statutory Loss payments due to Petitioner under the Act was both unreasonable and vexatious. Respondent has the duty to immediately compensate an undisputed claim when a statutory loss is involved, such as the amputation of a finger. "…Individuals who receive amputations should be immediately compensated when no dispute exists as to whether the injury arose out of and in the course of employment." Lester v. Industrial Commission, 256 Ill.App.3d 520 (1993). "If an employer delays paying compensation, the employer has the burden of showing that it had the reasonable belief that the delay was justified." Id. In this case, the employer offered no reason or excuse to justify the delay of over 2 years in the payment to Petitioner for the statutory loss he sustained.

The Arbitrator finds that Respondent offered no good-faith arguments at trial indicating that there was a genuine controversy pertaining to the payment of benefits under the Act. Respondent sent a Statutory Loss payment to Petitioner in the form of a check, dated May 3, 2017, in the amount of $13,004.93.. Petitioner's work place injury occurred on March 9, 2015, and his medical treatment was discontinued on May 1, 2015. The resulting delay in payment of mandatory Statutory Loss was more than twenty-one months.

Based on the above, the Arbitrator finds that Respondent shall pay to Petitioner additional compensation in the amount of $6,502.46 (50% of $13,004.93) under Section19(k) of the Act; $10,000.00 (the accrued-daily penalties in this case would amount to over $18,000, satisfying the maximum amount of $10,000) under Section 19(l) of the Act; and attorney fees in the amount of $3,901.48 (20% of the statutory loss payment of 13,004.93 and $6,502.46 Section 19(k) penalty) under Section 16 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 COOK	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

AMADOR CASAS,

Petitioner,

vs. NO: 08 WC 036905

CHEVYS' FRESH MEX,

19IWCC0491

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 wage differential,under Section 8(d)1 and nature and extent, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Petitioner sustained a work-related accident in January 2008 that resulted in injuries to both knees and left him with restrictions that have prevented him from returning to his prior employment as a waiter and bartender for Respondent. He was compensated at varying rates by Respondent depending upon the nature of his assignment. For example, Petitioner was paid a higher hourly rate for tending bar versus serving tables. In addition to his hourly compensation paid by Respondent, he earned income from tips which generally exceeded his hourly rate of pay.

Evidence was presented at hearing to determine what Petitioner would be earning presently in the full performance of his duties for Respondent in the same classifications that he had at the time of the injury. Several witnesses presently employed by Respondent testified to the present hourly wages in the various job classifications of bartender, cocktail server, and waiter. Documentary evidence in the form of pay stubs were introduced as well as W2 statements that reflected income earned from tips.

19IWCC0491

Petitioner's former co-worker, Mr. Jose Antonio Barcenas was called as a witness by Petitioner. Mr. Barcenas is presently employed as a waiter for Respondent and has worked there for 21 years. Mr. Barcenas' current earnings were utilized as the benchmark in making the determination of what Petitioner would currently be earning with Respondent by virtue of his longevity and the similarity of work experience to that of Petitioner.

The Commission finds that in Petitioner's prior employment with Respondent he worked 35.86 hours per week. The evidence shows that 75% of Petitioner's time (26.895 hours per week) was spent waiting tables and serving cocktails. For this work, Mr. Barcenas is presently paid $4.95 per hour. Petitioner's earnings as a server at present would total $133.13 per week.

The evidence adduced at hearing established that the remaining 25% of Petitioner's work week was spent as a bartender (8.965 hours per week). At present, Mr. Barcenas' pay stubs reflect that he is paid $9.75 per hour by Respondent for tending bar. Petitioner's weekly earnings as a bartender would total $87.41 per week.

The Commission modifies the Arbitrator's calculation of Petitioner's projected earnings as a bartender from $10.25 per hour down to $9.75 per hour based upon review of Mr. Barcenas' pay stubs and testimony.

Petitioner's weekly earnings if he were still working for Respondent, exclusive of tips would be $220.54. Petitioner's annual earnings, exclusive of tips, would total $11,468.00.

The evidence shows that a significant percentage of Petitioner's earnings were derived from tip compensation he received from patrons. The Commission adopts the Arbitrator's reliance upon Mr. Barcenas' current tip compensation ($28,980.95 annually) as the appropriate benchmark for determining what Petitioner would presently be earning in tips. Petitioner's current weekly earnings including tips would be $777.86. Petitioner's total annual earnings at present would be $40,449.03.

On September 2, 2014 Petitioner returned to the labor market and began working as a cashier at Walmart. His earnings have varied periodically based upon his hourly wage and the number of hours worked. The Commission modifies the Arbitrator's award of wage differential to reflect the variations in Petitioner's earnings from his employment at Walmart.

In the time period from September 2, 2014 through January 1, 2016 Petitioner averaged 25.36 hours per week and was paid $8.65 per hour. His weekly earnings were $219.39. The wage differential for the period commencing September 2, 2014 through January 1, 2016 was therefore $372.31 per week.

Commencing January 2, 2016 through February 19, 2016 Petitioner averaged 15 hours per week at an hourly rate of $9.25, totaling $138.75 per week. Petitioner's wage differential for this period was $426.07 per week.

Petitioner received a raise to $10 per hour on February 20, 2016. Commencing February 20, 2016 through April 17, 2017 he worked an average of 15 hours per week. Petitioner's weekly earnings totaled $150.00. His wage differential for this time period is $418.57 per week.

From April 18, 2017 to present Petitioner has worked an average of 15 hours per week at $10.20 per hour. He earns $153.00 per week. The wage differential to be applied commencing April 18, 2017 and continuing through the duration of Petitioner's disability is $416.57 per week. Petitioner's cause of action accrued on January 7, 2008, prior to the 2011 Amendments to the Workers' Compensation Act took effect. Respondent is entitled to a credit of $68,529.22 for payments previously made.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the following wage differential benefits pursuant to Section 8(d)(1) of the Act:

a) The sum of $372.31 per week for 69 3/7 weeks for the period commencing September 2, 2014 through January 1, 2016;

b) The sum of $426.07 per week for 6 6/7 weeks for the period commencing January 2, 2016 through February 19, 2016;

c) The sum of $418.57 per week for 60 2/7 weeks for the period commencing February 20, 2016 through April 17, 2017;

d) The sum of $416.57 per week commencing April 18, 2017 for the duration of Petitioner's disability

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $425.00 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.

19IWCC0491

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for any and all amounts paid 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 $8,000.00. 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: SEP 10 2019
o-7/17/19
SM/msb
44

Stephen J. Mathis

Douglas McCarthy

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

CASAS, AMADOR Case# **08WC036905**

Employee/Petitioner

19IWCC0491

CHEVY'S FRESH MEX

Employer/Respondent

On 7/17/2018, 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 2.14% 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:

0293 KATZ FRIEDMAN EAGLE ET AL
CHRISTOPHER W MOSE
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

1109 GAROFALO SCHREIBER HART ETAL
DANIEL L GRANT
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF **COOK**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED
ARBITRATION DECISION

AMADOR CASAS
Employee/Petitioner
v.
CHEVY'S FRESH MEX
Employer/Respondent

Case # **08** WC **36905**

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 **SEPTEMBER 5, 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 **WAGE DIFFERENTIAL UNDER SECTION 8(d)(1)**

FINDINGS

On **JANUARY 7, 2008**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**36,812.88**; the average weekly wage was $**707.94**.

On the date of accident, Petitioner was **33** years of age, ***married*** with **2** dependent children.

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

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

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**68,529.22** for other benefits, for a total credit of $**68,529.22**.

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 Respondent shall pay to the Petitioner the sum of $425.00 for medical expenses, subject to the fee schedule, pursuant to Sections 8(a) and 8.2 of the Act. (See *Arbitrator's Exhibit* 1); and

2) The Respondent shall pay to the Petitioner the sum of $451.69 per week from September 2, 2014, and continuing for the duration of his disability, pursuant to Section 8(d)(1) of the Act, subject to the credit the Respondent shall receive, as described above, for amounts previously paid.

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

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

Signature of Arbitrator

JULY 17, 2018
Date

JUL 17 2018

AMADOR CASAS v. CHEVY'S FRESH MEX

08 WC 36905

*** CORRECTED ***

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter was tried before Arbitrator Steffenson on September 5, 2017. The issue in dispute was the Petitioner's entitlement to entitlement to wage loss differential benefits. (*Arbitrator's Exhibit* 1). The parties requested a written decision, including findings of fact and conclusions of law, pursuant to Section 19(b). (*Arbitrator's Exhibit* (hereinafter, *AX*) 1).

FINDINGS OF FACT

The Petitioner was employed as a waiter and bartender in the Respondent's restaurant. While he was working on January 7, 2008, he slipped on water and twisted his right knee. He felt immediate pain. He sought treatment with Dr. Thomas Karnezis, who concluded the Petitioner had torn his meniscus. He performed surgery on May 1, 2008 and discovered patellofemoral chondromalacia. He debrided the meniscus tear and performed a lateral retinacular release and microfracture due to narrowing in the joint compartment. The Petitioner had no improvement with surgery and Dr. Karnezis provided a Synvisc injection which provided temporary partial relief. Dr. Karnezis recommended surgery and the Petitioner sought an additional opinion from Dr. Chadwick Prodromos at Illinois Sports Medicine and Orthopedic Center.

Dr. Prodromos felt that X-rays showed the Petitioner's knee joint was nearly bone on bone and recommended a distal femoral osteotomy. The Respondent's Section 12 physician, Dr. Pietro Tonino agreed. (*Petitioner's Exhibit* 11). Dr. Prodromos performed surgery on February 12, 2009. On May 14, 2009, Dr. Prodromos performed surgery to remove the external fixator and pins. The Petitioner improved slowly after this procedure and Dr. Prodromos felt he was suffering from scarring in the patellofemoral compartment. He provided the Petitioner with another Synvisc injection. On April 21, 2010, an MRI showed a recurrent lateral meniscus tear and advanced chondromalacia in the lateral compartment of the Petitioner's right knee. Dr. Prodromos considered further surgery but recommended the Petitioner first lose weight and undergo additional physical therapy.

19IWCC0491

On October 6, 2010, Dr. Prodromos noted that the Petitioner's knee was hurting more, ordered the Petitioner to stop physical therapy because it might be hurting his knee, stated the Petitioner was at MMI, and asked him to return in four weeks. On November 3, 2010, he noted the knee was slowly worsening even as the Petitioner continued to lose weight; if the Petitioner walked any distance or lifted anything heavy it caused him pain. Dr. Prodromos discussed the possibility of a knee replacement but noted that the Petitioner was still very young and should probably wait until he loses more wait and see how he feels.

On November 10, 2010, Dr. Prodromos noted the Petitioner's left knee had been hurting for a couple of months and was getting worse. He diagnosed chondromalacia from favoring his other knee. On December 15, 2010 he referred the Petitioner to see a Dr. Alex Gordon for consideration of a total knee replacement. The Petitioner saw Dr. Gordon but concluded that he didn't want a knee replacement at that point. An MRI on 10/21/11 showed a meniscus tear and grade 3 chondromalacia. Dr. Prodromos stated that he wanted to get the left knee cleaned up before operating on the left. Dr. Prodromos performed an arthroscopy meniscectomy and microfracture on the Petitioner's right knee on July 31, 2012. (*Petitioner's Exhibit* (hereinafter, *PX*) 8).

The Petitioner underwent a Functional Capacity Evaluation (FCE) on March 1, 2013. This demonstrated that the Petitioner was not able to meet the demands of his job with the Respondent. It was noted that he was not currently working because his employer did not want him to work with a cane. He was unable to walk for more than 10 minutes and used a cane. He could lift 20 pounds and carry 15 pounds for 50 feet, stand for 15 minutes at a time for a total of five hours per day and sit for up to 30 minutes at a time. On March 8, 2013, Dr. Prodromos noted the Petitioner had not improved with the PRP injection, released him with restrictions per the FCE report, and referred him to Dr. Alex Gordon again for consideration of a total knee replacement. (*PX* 13). The Petitioner testified he was told that he is too young for a knee replacement and he did not wish to proceed in that direction. He stated Dr. Prodromos also provided an injection of plasma rich platelets into his right knee, but this provided no relief. The Petitioner then returned to see Dr. Prodromos on December 9, 2013. He reported pain in both knees that was 6 out of 10. Dr. Prodromos recommended another FCE, a possible MRI for subchondroplasty, and a referral to Dr. Brian Cole for a possible second opinion. (*PX* 9 at 17).

The Respondent retained a Certified Rehabilitation Counselor, Mr. Gary Wilhelm, to perform vocational rehabilitation for the Petitioner. In his initial report, Mr. Wilhelm reported the Petitioner left school after the 8th grade when his family returned to Mexico to run a rodeo event business. The Petitioner does not have a GED, but can read and write in both Spanish

and English. He felt the Petitioner had basic computer skills. He also noted that the Petitioner had some limited experience in training other waiters, but was never designated as a supervisor. He recommended job placement services and provided the Petitioner with job leads. (*PX* 12).

The Petitioner found a job at Walmart working as a cashier. According to Mr. Wilhelm's September 30, 2014, report, the Petitioner was earning $8.65 per hour and working 6-1/2 hours per day on average. Mr. Wilhelm reported the Petitioner stated that he was feeling the effects of spending too much time on his feet and not enough time on the stool that was provided to him and he felt his knees were getting worse. The Petitioner said that working an 8-hour shift was too much for his knees to tolerate, and that he felt pressured to speed up the cashiering process so he would move cases of water and beer quickly on the conveyor system. The Petitioner told Mr. Wilhelm that he was considering approaching the Human Resources Department at Walmart and asking them to decrease his hours to tolerate the job; that he couldn't always reach the conveyor belt while sitting and to do the job he needed to stand and bend throughout the day. (*PX* 12).

In his next report on October 31, 2014, Mr. Wilhelm reported the Petitioner continued to experience pain in both knees and his right hip, and that he was waiting to arrange an appointment to see Dr. Roger Chams. The Petitioner also reported that he had asked for his hours to be reduced to 22 hours per week since his knees do not hold up very well if he works more than four- or five-hour shifts. The Petitioner explained that although he has a high stool to sit on, it didn't help when there was a long line of customers. Mr. Wilhelm recommended he be authorized to adjust vocational services to include alternative job placement in sedentary level positions, based upon anticipated recommendations from Dr. Chams. (*PX* 12).

In his Vocational Closure report dated December 2, 2014, Mr. Wilhelm recorded that the Respondent asked him to close his file on November 3, 2014. He also reported that the Petitioner was complaining of increasing pain in both knees and was waiting for authorization to see Dr. Roger Chams. (*PX* 12).

The Petitioner also saw Dr. Roger Chams on February 17, 2015 upon the referral of Dr. Prodromos. Dr. Chams had X rays taken which showed tricompartmental arthritic changes in the right knee. He recommended that the Petitioner continue his restrictions per the FCE and offered to refer the Petitioner to Dr. Peter Thandi for a total knee replacement. The Petitioner declined the referral and Dr. Chams opined that the Petitioner was at MMI. (*PX* 10 at 19).

The Petitioner testified he currently has pain all the time in his left knee and most of the time in his right knee. His pain is at its best when he is off his feet, standing and walking cause pain in both knees, however. He used to wear a knee brace on his right knee but this made his right hip hurt so he stopped wearing it. He testified that he can stand for about 15 minutes before his knees hurt too much and he must sit. He can sit for about a half an hour before he has pain in his back and right hip and his knees get stiff. After standing for four or five hours, he has a sharp pain in his knees, greater in the right than the left.

The Petitioner testified that after he was released by Dr. Prodromos, he went through vocational rehabilitation. He found a job working as a cashier at Walmart. He was given a stool to sit on so he could stand or sit, but he cannot always sit because of the demands of the job. If the items are small, he can scan them while sitting but he must stand for larger items. He testified that he does more standing than sitting when he is working. Initially he worked 32 hours per week. After working there a few weeks, he had to ask to reduce his hours because of pain in his knees. He testified that Gary Wilhelm was aware that he had reduced his hours. Presently he works three days per week, on Monday, Wednesday, and Friday, from 6:00 p.m. to 11:00 p.m. He feels a lot of pain in his knees on the day after he works. He testified that he cannot bend his knees, go up ladders, or run. He limits going up and down stairs. The Petitioner testified he goes to Mexico two or three times every year to visit family.

The Petitioner was hired by the Respondent during the 1990s and worked full time until his injury in 2008. He worked as a waiter and sometimes as a bartender. About half the time he in the restaurant area as a waiter and the other half he worked in the bar as a bartender or a cocktail server. He testified that when he worked there these positions paid the same hourly rate. In addition to this hourly rate he also received tips. Tips were reported to the Respondent and were listed on his pay checks. He acknowledged that a substantial portion of his income came from tips.

The Petitioner's pay checks from January 5, 2007 through January 4, 2008 were submitted into evidence as *Petitioner's Exhibit* 1. These show that initially the Petitioner was paid $3.90 per hour plus tips, and by December 2007, he was $4.50 per hour in addition to tips. He received the same hourly rate each pay period, without any extra pay when he worked as a bartender. During the 27 bi-weekly pay periods, he worked a total of 1936.39 hours, excluding overtime hours, for an average of 35.86 hours per week. In the 52 weeks prior to his injury, he earned a total of $28,980.95 in tips and $7,831.91 in hourly earnings. (*PX* 1).

The Petitioner's former co-worker, Jose Antonio Barcenas, testified on the Petitioner's behalf. Mr. Barcenas is presently employed as a waiter for the Respondent and has worked

there for 21 years. He used to work with the Petitioner and acknowledged that the Petitioner worked in the bar area three or four days a week as a bartender and a cocktail waiter, in addition to working as a waiter in the restaurant.

At present, Mr. Barcenas works primarily as a waiter in the restaurant, and only occasionally works as a cocktail waiter or a bartender. At present, the primary bartender for the Respondent is Francisco Ojeda, and he has been the primary bartender for many years, including when the Petitioner worked there. Additionally, Humberto Leon Chavez sometimes works as a bartender, and he also works as a cocktail server and waiter in the restaurant.

Mr. Barcenas testified that at present he is paid $4.95 as a waiter plus tips. When he was shown his paystubs, he testified that when he worked as a cocktail server he earned $8.25 per hour and $9.75 per hour when he worked as a bartender. His pay stubs for the period from June 26, 2015 through September 2, 2016 were entered as *Petitioner's Exhibit* 3. These show that he worked 1,826.97 hours, excluding overtime hours, during 30 bi-weekly pay periods. During this time, he did not work at all during the two weeks from January 4, 2016 through January 17, 2016 or during the period from April 11, 2016 through April 24, 2016 and it appears he only worked one week during the pay period immediately following, from April 25, 2016 through May 8, 2016. (*PX* 3). Thus, Mr. Barcenas worked for a total of 1,826.97 hours over the course of 59 weeks; this is an average of 30.96 hours per week. He earned a total of $38,205.12, including tips, during this period.

The Petitioner produced the pay stubs of Humberto Leon Chavez for the period from January 8, 2016 through December 23, 2016, as *Petitioner's Exhibit* 4. These show that Mr. Chavez worked a total of 1,757.15 hours, excluding overtime hours, during 26 bi-weekly pay periods. Every time that he worked as a bartender, he was paid $10.25 per hour plus tips. He earned a total of $34,233.02, including tips. This is an average of 33.791.35 hours worked per week.

The Respondent produced as its witness Mr. Steve Signore, who is the current General Manager of the restaurant where the Petitioner worked and has been in this position almost four years, all of which came after the Petitioner's injury. The Petitioner has not worked at the restaurant since Mr. Signore became General Manager. He set the schedule for the employees and their work week would fluctuate. He testified that based upon his review of sales figures, the restaurant had a 26% decline in sales since 2008. He testified that if the sales decrease we would put fewer employees on the floor so the income of the employees would go down. He acknowledged that more senior employees would likely be scheduled for more hours than more junior employees.

Mr. Signore testified that now bartenders make between $6.75 per hour and $8.75 per hour plus tips. The hourly rate depends upon skill level and experience. The main bartender is Frankie Ojeda and he has the highest earnings of approximately $650 per week. The other two bartenders are Humberto Leon Chavez and Nicole Bennett. They are not full-time employees. He believed that Mr. Chavez was hired in 2012.

Mr. Signore denied that cocktail servers make $8.25 per hour. When shown the pay stubs of Mr. Barcenas, he testified that Mr. Barcenas was paid $8.25 per hour as a cocktail server because he was training a new employee and work as a trainer is paid at a higher rate.

Mr. Signore acknowledged that the amount of income that an employee received in tip would vary depending upon the individual. The sum of tips depends upon how well the employee provided service to a customer.

On rebuttal, Mr. Barcenas testified business is good at present though he acknowledged that there are fewer employees than previously. He testified that more senior employees get more hours than less senior employees. Mr. Casas testified that when he worked for the Respondent he was asked to train new employees from time to time, and this is also mentioned in the initial vocational assessment of Gary Willhelm. (*PX* 12). Mr. Barcenas also recalled that when the Petitioner did sometimes train new employees for the Respondent when he was working there.

The Petitioner presented his pay stubs from his job at Walmart, which show how much he earned every two weeks since he began working there on September 2, 2014.

The Respondent presented its list of payments for wage loss benefits to the Petitioner since September 2, 2014. These payments total $68,529.22. (*AX* 1 and *Respondent's Exhibit* 1).

CONCLUSIONS OF LAW

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

Issues L & O: *Nature and extent and wage differential*

The sole issue in dispute is the amount the Petitioner is entitled to receive for a wage differential benefit. The Petitioner has elected to received compensation under Section 8(d)(1)

of the Act, based upon the difference between the average amount he is presently able to earn and the average amount he is earning or is able to earn in some suitable employment and the average amount he would be able to earn in the full employment of his duties in the occupation in which he was engaged at the time of the accident.

To qualify for a wage differential award, workers' compensation claimants must prove: (1) a partial incapacity which prevents him from pursuing his usual and customary line of employment, and (2) an impairment of his earnings. *Greaney v. Industrial Com'n,* 358 Ill.App.3d 1002, 832 N.E.2d 331, 295 Ill.Dec. 180 (2005). The Petitioner has established that his accident resulted in injuries to both knee and this has limited his ability to carry, walk, stand, and sit for prolonged periods of time. He was unable to return to his position with the Respondent and the Respondent provided him with vocational rehabilitation. The Petitioner has also established an impairment of his earnings as his pay stubs from Walmart reflect reduced earnings.

To calculate the amount of a wage differential award to which a claimant is entitled, a determination must also be made as to the average amount which the claimant "is earning or is able to earn in some suitable employment or business after the accident." *Greaney v. Industrial Com'n,* 358 Ill.App.3d 1002, 832 N.E.2d 331, 295 Ill.Dec. 180 (2005). It is axiomatic that liability under the Act cannot be premised on speculation or conjecture but must be based solely on the facts contained in the record. Similarly, an award for loss of earnings cannot be based on speculation as to the employment level or job classification which a claimant might eventually attain. *Forest City Erectors v. Industrial Com'n,* 264 Ill.App.3d 436, 636 N.E.2d 969, 201 Ill.Dec. 537 (1994). "[T]he statute provides that a wage differential should be calculated on the presumption that but for the injury, the employee would be in the full performance of his duties. Accordingly, we hold that the Commission properly elected to compute the wage differential award based in part on the petitioner's classification at the time of the original injury, rather than on the stipulated amount that he had actually earned." *Forest City Erectors, supra,* citing *Old Ben Coal v. Industrial Com'n,* 198 Ill.App.3d at 493, 144 Ill.Dec. at 688, 555 N.E.2d at 1207.

For purposes of calculating the wage differential, it should therefore be assumed the Petitioner would have the same classification that he had at the time of the injury, namely that he would spend one-half of his work as a waiter in the restaurant, one-quarter of his time as a waiter in the bar (a cocktail server) and one-quarter of his time as a bartender but that he would have received the same raises in the rate of pay as the other employees now receive, namely $4.95 an hour as a waiter and $10.25 an hour as a bartender. While Mr. Signore testified that bartenders are only paid between $6.75 to $8.75 per hour, plus tips, this testimony is not credible considering the pay stubs of Humberto Chavez, which clearly show he

was paid $10.25 per hour every time he worked as a bartender. This is the method which has been used to calculate wage differential awards in *Forest City Erectors, supra, Old Ben Coal Co. v. Industrial Comm'n* 198 Ill.App.3d 485, 144 Ill.Dec. 682, 555 N.E.2d 1201(1990), *Greaney v. Industrial Com'n,* 358 Ill.App.3d 1002, 832 N.E.2d 331, 295 Ill.Dec. 180 (2005), and *General Elec. Co. v. Industrial Com'n*, 144 Ill.App.3d 1003, 495 N.E.2d 68, 99 Ill.Dec. 3 (1986). In these cases, the current hourly rate of the claimant's old job was multiplied by the number of hours in a full work week and the resulting number was found to be the amount the average amount he would be able to earn in the full employment of his duties in the occupation in which he was engaged at the time of the accident.

The Arbitrator rejects the Respondent's invitation to utilize the earnings of Humberto Leon Chavez as a model of what the Petitioner would be earning if he were still employed with the Respondent. Such a comparison does not consider that the employees' income is heavily dependent upon the amount they receive in tips from customers and the amount each employee receives will be different. As the Respondent's General Manager acknowledged, how much an employee receives in tips will be based, in large part, on the quality of service he or she provides the customer and this can vary greatly between employees. For example, the Petitioner earned $28,980.95 in tips alone in the 52 weeks before his injury. Mr. Chavez, however, earned only $20,809.76 during the 52 weeks of 2016. It appears that because of the quality of his work the Petitioner earned significantly more money than n tips than Mr. Chavez. It would be speculative at best to assume the Petitioner would have received the same figure in tips as Mr. Chavez.

The Arbitrator further rejects the Respondent's argument the Petitioner would not have worked as many hours as he did before the accident because, as Mr. Signore testified, employees receive fewer hours now because sales have been reduced since 2008. This argument is speculative because there has not been a uniform reduction for all employees equally. As Mr. Signore acknowledged, the more senior employees get more hours than the more junior ones. If the Petitioner were still employed with the Respondent, he would be a more senior employee, and it is unclear that his hours would be reduced. He further acknowledged that as the Petitioner had never worked for him, he could not say how many or how few hours he might have scheduled the Petitioner to work. It is impermissible speculation to assume that a claimant's employment would have changed absent the injury because the statute presumes that but for the injury the claimant would be in full performance of his duties. *Forest City Erectors v. Industrial Com'n*, 264 Ill.App.3d 436, 636 N.E.2d 969, 201 Ill.Dec. 537 (1994) *see also Albrecht v. Industrial* Com'n, 271 Ill.App.3d 756 648 N.E.2d 923 (1995).

To determine how much the Petitioner would be earning in the full performance of his duties, it must be calculated how much the Petitioner would earn in both tips and in an hourly rate (using a higher hourly rate of pay that all employees currently have). It would be speculation to guess whether the Petitioner's income from tips would have gone up or gone down had he not been injured. *See Albrecht, supra.* As such the Arbitrator finds the Petitioner's income from tips should be assumed to be $28,980.95 per year, or $557.32 per week.

With regards to the hourly pay, the Petitioner testified that he worked one-quarter of his time as a bartender and three-quarters of his time as a waiter or cocktail server. A bartender for the Respondent earns $10.25 per hour (per the pay stubs of Humberto Chavez). The average amount of hours he worked prior to his injury was 35.86 hours/week. One quarter of this figure is 8.965 hours; multiplied by $10.25 per hour yields $91.89 per week as a bartender. A waiter, both a regular waiter and a cocktail waiter, presently earn $4.95 per hour. Multiplying $4.95 per hour by the sum of hours the Petitioner worked as a waiter (3/4 of his 35.86 hours per week = 26.895 hours) yields $133.13 in income per week as a waiter.[1]

If the Petitioner were still working for the Respondent for the same number of hours as a waiter/bartender but was receiving the current level of compensation, it would therefore be:

$557.32 per week in tips
$ 91.89 per week as a bartender
$133.13 per week as a waiter

$782.34 total

Thus, the amount that the Petitioner would be able to earn at present in the full performance of his job duties (waiter/bartender) is $782.34 per week.

To determine the level of the Petitioner's wage loss, the figure of $782.34 must be measured against the amount he currently earns on average from Walmart. The pay stubs from the Petitioner's job with Walmart show that from September 2, 2014 through August 18, 2017, he has earned a total of $16,348.80. This is a period of 156 weeks. The Petitioner is therefore able to earn $104.80 per week at his job at Walmart.

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[1] The evidence showed the Respondent would pay a higher hourly rate to senior employees who trained new employees, and that in the past, the Petitioner had worked training new employees. There is no way to determine how often the Petitioner might have been asked to train a new employee or how much the Petitioner might have earned doing so.

Although he is only working part time at Walmart, the Respondent has elected to allow him to continue his employment there and not provide any further vocational rehabilitation. As *Petitioner's Exhibit* 12 shows, the Respondent's vocational counselor recommended on October 31, 2014 that he be authorized to adjust the vocational rehabilitation services to try to find a more suitable job for the Petitioner. However, the Respondent directed him to close his file on November 3, 2014. As such, the Petitioner is performing suitable employment as provided under Section 8(d)(1). *See Lehman v. Halliburton Energy Services, Inc.*, 05 I.W.C.C. 0285, (2005 WL 1325016). While it may not have the highest paying job that he possibly could have found, the Respondent was obviously satisfied with the job as they ordered Mr. McKee to stop his job search and close his file.

The difference between $782.34 per week and $104.80 per week is $677.54 per week. Two-thirds of this difference is $451.69 per week.

The Petitioner's cause of action accrued on January 7, 2008, before the 2011 Amendments to the Workers Compensation Act took effect. At that time, Section 8(d)(1) entitled the Petitioner to weekly payments of a wage differential for as long as the disability may last. The Petitioner, therefore, is entitled to receive $451.69 per week for the period from September 2, 2014, and continuing for the duration of his disability, with the Respondent receiving a credit in the amount of $68,529.22 for payments previously made.

Signature of Arbitrator

JULY 17, 2018
Date

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SAM HOLMES,

Petitioner,

vs. NO: 16 WC 8580

TYLER STAFFING SERVICES,

Respondent.

19IWCC0492

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of accident, and being advised of the facts and 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 Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

The bond requirement in Section 19(f)(2) is applicable only when "the Commission shall have entered an award for the payment of money." *820 ILCS 305/19(f)(2)*. Based upon the denial of compensation 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: SEP 1 1 2019

LEC

O: 8/28/19

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L. Elizabeth Coppoletti

Stephen Mathis

D. Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HOLMES, SAM
Employee/Petitioner

Case# **16WC008580**

TYLER STAFFING SERVICES
Employer/Respondent

19IWCC0492

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:

2004 SCHACTER, JEROME & ASSOC LTD
RICHARD DOMASH
9933 N LAWLER SUITE 100
SKOKIE, IL 60077

0507 RUSIN & MACIOROWSKI LTD
KRISTIN OCA
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 (§(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Sam Holmes
Employee/Petitioner

Case # 16 WC 8580

v.

Consolidated cases:

Tyler Staffing Services
Employer/Respondent

19IWCC0492

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Charles Watts, Arbitrator of the Commission, in the city of Chicago, on 11/29/2017. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☒ What was the date of the accident?

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

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

G. ☐ What were Petitioner's earnings?

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

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

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

K. ☒ What temporary benefits are in dispute?

☐ TPD ☐ Maintenance ☒ TTD

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

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

N. ☐ Is Respondent due any credit?

O. ☐ Other ______

FINDINGS

On 12-18-2015, Respondent was operating under and subject to the provisions of the Act.

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

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

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

In the year preceding the injury, Petitioner earned $21,041.80; the average weekly wage was $404.65.

On the date of accident, Petitioner was _59_ years of age, married, with _0_ children under 18.

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

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

ORDER

The Arbitrator finds that the Petitioner failed to meet his burden of proof with respect to accident and causal connection. 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 of at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

[signature]

January 16, 2018

Signature of arbitrator

Date

JAN 17 2018

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SAM HOLMES,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 16 WC 8580**
	)	
TYLER STAFFING SERVICES,	)	**19IWCC0492**
	)	
Respondent.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

Petitioner testified that at the time of his work accident he was employed with Tyler Staffing Services, the Respondent. Respondent is a job placement company. Petitioner had begun working for Respondent two and a half years prior to his alleged work accident. At the time of Petitioner's alleged accident, he was placed at Intertek, a warehouse that transported goods, as a Transportation Clerk or Warehouse Assistant. Petitioner testified that his job duties as a Transportation Clerk at Intertek included straightening up the warehouse and moving objects such as televisions, computers, and boxes full of clothing. He testified that the heaviest of the boxes he was required to lift weighed up to 150 pounds and that he lifted objects repetitively for eight hours a day. Petitioner admitted he was not claiming a repetitive use injury, but only a traumatic injury.

Petitioner testified he was a full-time employee. He further testified that his job with Intertek through Respondent was a temporary to hire position. Petitioner claimed he was told by Respondent that he would obtain a permanent position within Intertek if he worked there for three months without missing any days from work. Petitioner admitted he did not receive a permanent job offer with Intertek and claimed that this was due to racial discrimination.

Petitioner amended his Application for Adjustment of Claim to allege an accident date of January 11, 2016. (Rx. 3). Petitioner admitted his Application for Adjustment of Claim was amended a second and final time to allege the original accident date of December 18, 2015.

Petitioner testified his work accident occurred on December 18, 2015 and not on January 11, 2016.

On the date of his alleged accident, December 18, 2015, Petitioner testified he lifted a box of clothing weighing at least 100 pounds when he heard his co-worker, Daniel, call out to him. While still carrying the box, Petitioner testified he twisted and heard a pop in his back. Petitioner testified this happened two hours into his shift but that he continued working. Petitioner testified he told Daniel that he hurt his back and Daniel gave him Tylenol. Petitioner first testified he did not himself report his injury to anyone but that Daniel reported the injury for him to Christie Dupont, the safety supervisor. Petitioner claimed that Christie called him into the office and told him to be careful and to let her know if the pain worsened, and to let Andi, the team manager at Intertek, know about the incident. Petitioner testified that he did not return to Ms. Dupont to report any continued or worsened pain. Petitioner testified that he intended to let Andi know that he was injured but never did so because Andi was getting transferred and that she was not at work that day. Petitioner testified that he never did notify her of his work injury.

Petitioner later testified he personally reported his December 18, 2015 work accident on the date of his accident. However, he could not remember the name of the person he reported it to. Petitioner again changed his testimony claiming that he called someone named Michelle at Respondent and reported his injury. He testified that during this conversation he talked about not being hired on as a permanent employee with Intertek.

Petitioner testified that he worked until the second week of January without missing any time from work. Petitioner testified that from December 18, 2015 to January 14, 2016 he experienced back pain but he did not go to the hospital during that time.

Petitioner testified that after his job assignment with Intertek ended he was never contacted by Respondent and did not speak to anyone from Respondent. Petitioner testified that he left multiple voicemail messages that were never returned by Respondent. He later changed his testimony to claim that Maggie at Respondent called him after his job with Intertek and that she stated there were no jobs available for him.

With regards to his current function, Petitioner testified he did not have any pain in his back and that he was not taking any medicine. Upon further questioning from his attorney, Petitioner testified he had a little pain and was taking over-the-counter Aleve for his intermittent back pain. Petitioner testified he was not currently working.

Petitioner's Medical Treatment

Around the second week of January, Petitioner testified his back hurt and he couldn't breathe so he went to Loyola Emergency Department. The records show Petitioner's first visit to the hospital was on January 14, 2016. Petitioner testified he was truthful with his ER doctor regarding his accident. Petitioner testified he told at least four or five people at the hospital that day that he was injured on December 18, 2015. Petitioner also admitted that he told the ER doctor that he twisted his back the previous day at work, which is confirmed by the ER records. (Px. 1) At his ER visit, Petitioner also complained of chest tightness related to exposure to cigarette smoke. *Id.* Petitioner testified that at the hospital he was given muscle relaxers and an injection that provided him with pain relief for multiple hours. He testified that he slept for approximately 2-3 hours.

Petitioner testified that his second visit to Loyola Hospital was on January 26, 2016 where he was evaluated by Dr. Sichin Shah, who also was his primary care provider. Dr. Shah recorded in the medical records that Petitioner's back pain began on January 11, 2016. Petitioner was referred to physical therapy for his back pain and attended the same from January to April of 2016.

Petitioner testified he visited Loyola Hospital on February 8, 2016. The medical records indicate the date of injury was January 11, 2016. (Px. 1). Petitioner then testified he hired an attorney for his workers' compensation case on March 11, 2016. He testified his first Application to the IWCC alleged an accident date of December 18, 2015. (Rx. 2).

Petitioner's next visit to Loyola Hospital was on April 8, 2016. At this time, Petitioner testified that for the first time he told his doctor he injured his back on December 18, 2015. This is the first mention of a December 18, 2015 work accident in the medical records. (Px. 1).

Testimony of Monica Montes

Ms. Monica Montes testified on behalf of Respondent. Ms. Montes testified that her employer was Chase Professionals that also did business as Respondent. She testified her position at Respondent was Branch Operations Manager and that she held the position of Operations Manager at the time of Petitioner's alleged work accident on December 18, 2015. Ms. Montes testified that her job duties remained the same despite her position change from

Operations Manager to Branch Operations Manager. She testified her duties included overseeing the work and performance of 10 recruiters.

Ms. Montes testified Petitioner was placed at Intertek through Respondent and worked as a Transportation Clerk. Ms. Montes further testified Petitioner was employed full time with Intertek and that his job duties included processing inventory, entering data into a computer, and lifting up to 25 pounds. Ms. Montes testified that she was never apprised of any issues with Petitioner's job performance when he worked for Respondent. She testified she never received any complaints about him from the companies at which he was placed.

Ms. Montes testified that an employee of Respondent obtained permanent placement at a company depending on the company's criteria. She testified that most companies use a variety of factors to determine whether they will hire an employee permanently after a temporary assignment, including efficiency, job performance, productivity, discipline issues, knowledge of the job, and attendance. Ms. Montes confirmed that Petitioner was not offered a permanent position with Intertek. She testified this was due to Intertek finding a more qualified candidate for the permanent position. Ms. Montes denied that anyone from Respondent told Petitioner that the permanent job placement was guaranteed. She testified this was not the policy of Respondent. Ms. Montes testified that after Petitioner's assignment with Intertek ended, she and her co-corker, Maggie, offered Petitioner numerous other jobs through Respondent, but Petitioner rejected these jobs, claiming he was "out of commission." Ms. Montes testified Petitioner's employment with Respondent ended on December 30, 2015, which was his last day at Intertek.

Ms. Montes testified that the usual and customary process for reporting work injuries at Respondent involved immediate reporting to the supervisor. After this, a supervisor would notify the corporate office and have a Form 45 First Report of Injury prepared the same day the work accident occurred. She also testified that the employee would be sent for a medical evaluation where a drug and alcohol test would be performed. Ms. Montes testified she first discovered Petitioner claimed a work injury on or around March 28, 2016. She testified that on that date Cheryl at the corporate office notified her that Petitioner was claiming a work injury on December 18, 2015. Ms. Montes further testified that she was unaware that Petitioner claimed a work injury during the time he was employed with Respondent. As was the usual and customary

practice of Respondent, upon being notified of the alleged work injury, the First Report of Injury was completed on March 28, 2016 and is dated the same. (Rx. 4).

Ms. Montes then testified that after discovering Petitioner claimed a work accident, she contacted Andi at Intertek. She testified she e-mailed Andi asking whether she was aware of Petitioner reporting a work accident during his time at Intertek. Andi denied receiving notice of a work accident from Petitioner. Ms. Montes' e-mail conversation with Andi at Intertek confirms this testimony. (Rx. 5). The e-mail supports the testimony that no one at Intertek was notified of a work injury claimed by Petitioner during the time he was employed there. *Id.* Ms. Montes admitted her investigation into whether Petitioner gave notice to his employer only consisted of the email sent to Intertek and a couple of phone calls.

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 the accidental injury both arose out of and occurred in the course of his employment (*Horvath v. Industiral Commission,* 96 Ill.2d. 349 (1983)) and that there is some causal relationship between his employment and his injury. *Caterpillar Tractor Co. v. Industrial Commission, I29 Ill. 2d 52, 63 (1998).* An injury is accidental within the meaning of the Act when it is traceable to a definite time, place, and cause and occurs in the course of employment, unexpectedly and without affirmative act or design of the employee. *Mathiessen & Hegeler Zinc. Co. V. Industrial Board,* 284 Ill. 378 (1918).

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). 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).

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 demeanor of the

19IWCC0492

witness and any external inconsistencies with his 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). While it is true that an employee's uncorroborated testimony will not bar a recovery under the Act, it does not mean that the employee's testimony will always support an award of benefits when considering all the testimony and circumstances shown by the totality of the evidence. *Caterpillar Tractor Co. v. Industrial Commission,* 83 Ill. 2d 213 (1980). 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 ILWC 004187 (2010).

In support of the Arbitrator's Conclusions with respect to (C) Accident, the Arbitrator makes the following findings of fact and conclusions of law:

The Arbitrator has carefully reviewed and considered all medical evidence along with all testimony. Based upon the testimony of Petitioner and the medical evidence, the Arbitrator finds that Petitioner did not sustain accidental injuries that arose out of and in the course of his employment.

Petitioner testified at trial that he sustained a work accident on December 18, 2015.. The Arbitrator finds Petitioner's testimony is untrustworthy and uncorroborated. Moreover, the testimony of Ms. Montes directly contradicts Petitioner's testimony that he suffered a work accident on December 18, 2015.

In further support of this finding, the Arbitrator notes that Petitioner's medical records do not support a December 18, 2015 work accident. The medical records support that Petitioner experienced trouble breathing and back pain after twisting around the second week of January 2016 after which he went to Loyola Hospital ER. The testimony of Ms. Montes established Petitioner was not employed by Respondent in January of 2016 as his last day of work was on December 31, 2015. Petitioner testified he found out he was not receiving a permanent placement at Intertek at the same time he claimed a work accident, around December 18, 2015, which fits in with this timeline.

The Arbitrator finds Petitioner's testimony to be inconsistent with his medical records. Petitioner testified that he suffered a work accident on December 18, 2015. The medical records

indicate a work accident on January 11, 2016. Petitioner did not offer a credible explanation for why the contemporaneous medical records failed to document a work accident on December 18, 2015, while those after hiring an attorney do indicate this date.

The Arbitrator takes the inconsistencies into consideration in assessing Petitioner's credibility and places greater weight on the contemporaneous medical histories in Petitioner's treatment.

For these reasons, the Petitioner failed to meet his burden of proof to establish a work-related accident.

In support of the Arbitrator's Conclusions with respect to (D) Date of the Accident, the Arbitrator makes the following findings of fact and conclusions of law:

The Arbitrator adopts and incorporates the findings of facts herein. While this issue is moot because he Arbitrator finds Petitioner did not suffer an accident in the course and scope of his employment with Respondent on December 18, 2015, Petitioner's testimony with respect to the date of his accident is contradictory. While Petitioner testified his accident took place at work on December 18, 2015, contemporaneous medical records indicate January 11, 2016 as the date on which Petitioner first experienced issues with his back. There is no mention in the medical records dated January 14, 2016, January 26, 2016, or February 8, 2016 of any accident occurring on December 18, 2015. (Px. 1). The first medical record to indicate a December 18, 2015 injury date is in April. *Id.*

Ms. Montes testified Petitioner did not work for Respondent after December 31, 2015. As Petitioner has not alleged an accident date of January 11, 2016, the Arbitrator finds Petitioner did not suffer a work accident on December 18, 2015.

In support of the Arbitrator's Conclusions with respect to (E) Notice, the Arbitrator makes the following findings of fact and conclusions of law:

The Arbitrator adopts and incorporates the findings of facts herein. The Arbitrator finds Petitioner did not meet his burden of proof to show he gave notice to his employer of his alleged work accident within the statutory 45-day period after his alleged accident.

The Arbitrator finds Petitioner's testimony regarding notice to be fraught with inconsistencies. Petitioner first testified his co-worker, Daniel, sent an email to Christie, the

19IWCC0492

Safety Supervisor notifying her of Petitioner's work injury. Petitioner claims Christie called Petitioner into her office and told him to notify Andi, the Team Manager at Intertek, that he was injured. Petitioner testified Andi was not present at work that day so he took no further action.

Petitioner later testified he notified someone at Respondent named Michelle that he was injured at work. Ms. Montes testified that there was no employee by the name of Michelle at Respondent.

Petitioner testified he personally reported his injury to Maggie at Respondent and that she told him to continue working.

Ms. Montes testified that had an injury been reported, Respondent had a process in place for documenting the injury that involved immediately completing a Form 45 and having the injured employee undergo a medical examination. She testified that this was the usual and customary practice of Respondent. The Arbitrator notes that no medical examination took place on December 18, 2015; in fact, Petitioner did not seek medical treatment for his back issues until January 14, 2016. Moreover, the Form 45 First Report of Injury was not completed until March 28, 2016, the date on which Ms. Montes testified she first received notice of a work accident claimed by Petitioner. An email between Ms. Montes and Andi at Intertek confirms that no one at Intertek received notice that Petitioner was claiming a work injury until March 28, 2016.

For these reasons, the Arbitrator finds Petitioner did not give timely notice to his employer of his alleged work accident.

In support of the Arbitrator's Conclusions with respect to (F) Causal Connection, the Arbitrator makes the following findings of fact and conclusions of law:

The Arbitrator adopts and incorporates the findings of facts herein. As the Arbitrator found that Petitioner did not sustain accidental injuries that arose out of and in the course of his employment, the issue of whether such accident caused any injuries is moot.

In support of the Arbitrator's Conclusions with respect to (J) Medical Expenses, the Arbitrator makes the following findings of fact and conclusions of law:

The Arbitrator adopts and incorporates the findings of facts herein. The Arbitrator finds that Petitioner did not sustain a compensable accident on December 18, 2015. Therefore, the Arbitrator denies Petitioner's request for any medical bills from Loyola Hospital.

In support of the Arbitrator's Conclusions with respect to (K) TTD benefits, the Arbitrator makes the following findings of fact and conclusions of law:

The Arbitrator adopts and incorporates the findings of facts herein. As the Arbitrator has found that Petitioner did not suffer a compensable work accident on December 18, 2015, the issue of whether Petitioner was temporarily totally disabled as a result of same is rendered moot.

In support of the Arbitrator's Conclusions with respect to (L) the Nature and Extent of the Injury, the Arbitrator makes the following findings of fact and conclusions of law:

The Arbitrator adopts and incorporates the findings of facts herein. As the Arbitrator has found that Petitioner did not suffer a compensable work accident on December 18, 2015, the issue of the nature and extent of Petitioner's injuries is 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 WINNEBAGO)	☒ Reverse Accident	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MELISSA L. CRIPPEN,

Petitioner,

vs. NO: 14 WC 40268

OGLE COUNTY SHERIFF'S DEPARTMENT,

Respondent.

19IWCC0493

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, causal connection, medical expenses, temporary total disability (TTD) benefits, and permanent partial disability (PPD) benefits, and being advised of the facts and applicable law, reverses the Decision of the Arbitrator and finds that Petitioner did not establish by a preponderance of the evidence that her alleged repetitive duties as an executive secretary caused her right carpal tunnel syndrome.

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:

Job Duties

1) Petitioner testified that she worked for Respondent in 2014 as an administrative assistant/executive assistant to the Sheriff. (T.6-7). Petitioner had worked for Respondent since 2010. (T.7; T.29). Petitioner testified as to her duties: "I handled payroll for all the

sheriff's office employees. I handled sheriff's sales. I handled all the correspondence for the sheriff. I handled all of the union correspondence, workers' compensation, any daily activities that the sheriff deemed me to do. I was at his total discretion." (T.7).

2) Petitioner used a computer for payroll, reporting, letter writing, sheriff's sales, and recordkeeping. (T.8). Petitioner worked a 40-hour week, and spent 80-percent of her day on the computer. (T.8). Using the computer involved keyboarding and mouse work. (T.9). Petitioner added on cross-examination that she also answered phones, made phone calls, typed, and maintained files. (T.34-36). Her work did not involve the use of power tools or vibratory tools. (T.37).

3) Petitioner testified to viewing Respondent's Exhibit 7, a video that showed her in her office at the Ogle County Sheriff's Department. The video was dated October 7, 2014. (T.24-25; RX7). The video showed Petitioner entering payroll by using her right hand to navigate the mouse, and both hands to type on the computer keyboard. She also used her right hand to enter numbers on a calculator. There appears to be no use of force and her hands are flexed upright when typing but not when using the mouse. Petitioner's wrists do hang off her desk when typing on the computer. (RX7).

4) Petitioner's job was terminated after Sheriff Michael Harn lost re-election. (T.14). The new sheriff as of December 1, 2014 was Brian VanVickle. (T.15-16). On December 4, 2014, Petitioner had met with Doug Lockhart, who at that time worked for Respondent as a deputy. (T.17; T.19). Petitioner was informed at that meeting that she had been fired. (T.19). Petitioner was earning $40,500 per year by the time she left Respondent's employ. (T.22).

5) Respondent called Ogle County Sheriff Brian VanVickle as its witness. (T.48). He testified as to his experience with his own executive secretary who had replaced Petitioner. He stated that his executive secretary spent approximately 35 to 40-percent of her time working on the computer. (T.59). "Most of our information still remains pen and paper. I mean all of our files, all of our essentially with the exception of payroll which is done twice a month and takes a morning a month, that is the majority of the computer work that is fixed." (T.59). Sheriff VanVickle stated that Petitioner's work station had not changed from November to December when he became Sheriff. (T.60).

6) Petitioner sought new employment with Morse Electric, an electrical contracting company. She started working for Morse Electric on January 12, 2015. (T.21). As of the date of arbitration, Petitioner continued to be employed by Morse Electric. She earned $18.52 per hour and worked 40 hours per week. (T.22; T.39). Petitioner testified that her duties at Morse Electric involved accounts payable, data entry, clerical work, and reconciling and entering credit transactions. (T.39-40). Petitioner used a desktop computer and mouse at work; this was the same as when she worked for Respondent. (T.40). Petitioner also used a laptop at home. (T.41).

Petitioner's Injury and Medical Evidence

7) Petitioner testified that in August 2014, she noticed that her right hand and wrist began to hurt more. "It would ache into my hand and my thumb and small finger. It would throb. It would go to sleep, tingle." (T.10). Petitioner stated that her symptoms usually occurred while sleeping. "It would wake me from sleeping. Then as it progressed, it would happen during the day also." (T.10). Petitioner believed her work caused her to be symptomatic. "I believe my computer work and using my hands and writing." (T.10-11).

8) Petitioner completed an Illinois Form 45: Employer's First Report of Injury on August 25, 2014. Petitioner noted the complaints to her right hand and wrist that had been ongoing for a year. She indicated that all computer work and paperwork, and any use of the right hand caused her injury. (RX8).

9) Petitioner first sought treatment with her family physician, Dr. Tracy Clay, on August 25, 2014. Petitioner reported right hand numbness, tingling, and pain that had started a year before but was worsening. Although the medical record indicated that this was not a work injury, the record noted that Petitioner used keyboards for a living at the sheriff's department. Petitioner's vitals indicated that she had a high BMI of 28.7, her blood pressure was 153/87, and Petitioner was a former smoker. The record also indicated that counseling and a plan of care was given for hypertension. (PX1; Deposition Exhibit 1). Dr. Clay ordered an EMG/NCV study and she referred Petitioner to Dr. John Gluscic, a board-certified orthopedic surgeon. (T.12; PX1, pg. 5; Deposition Exhibit 1).

10) Petitioner testified that prior to 2014, she had not experienced problems with her right hand or arm, and she had never treated for carpal tunnel. (T.25-26). Petitioner did not suffer from hypothyroidism or diabetes. (T.26). At the time Petitioner worked for Respondent, she did smoke. (T.38). She had smoked on and off for 10 years. (T.38).

11) Petitioner underwent the EMG/NCV study on September 11, 2014 which was consistent with right carpal tunnel syndrome. (T.12; RX1). Petitioner first saw Dr. Gluscic on September 29, 2014. Dr. Gluscic's evidence deposition was taken on October 28, 2016. (PX1, pgs. 9-10; Deposition Exhibit 1). Following the EMG/NCV, Dr. Gluscic diagnosed Petitioner with carpal tunnel and recommended surgery. (T.12-13; PX1, pg. 13; RX1). Dr. Gluscic eventually proceeded with the right carpal tunnel release on December 18, 2014. (T.13; PX1, pg. 14; RX1).

12) After Petitioner's right carpal tunnel release, Petitioner testified that she felt much better. (T.23). "My hand will go to sleep some when I sleep and I have little weakness, residual weakness, but otherwise I don't have the pain when I work with it on the computer now." Petitioner still had problems with decreased strength. (T.23). Petitioner confirmed that she did not have problems with her left hand or wrist. (T.24).

13) On December 29, 2014, Petitioner was released from treatment, but allowed to return on an as-needed basis. (PX1, pg. 15; RX1). Petitioner was released to full duty work. (T.41-42). After Petitioner's last visit with Dr. Gluscic in January 2015, Petitioner has not returned to see him for any problems with her arm or hand. (T.28).

14) Dr. Gluscic testified that Petitioner's treatment had been reasonable and necessary. (PX1, pgs. 16-17). Dr. Gluscic further testified that although Petitioner's work-related activities did not cause her carpal tunnel, "they did aggravate her symptoms and cause her to have more difficulty when she was doing her work-related activity based on her history." (PX1, pg. 18). As to activities that would cause carpal tunnel, Dr. Gluscic testified that it would involve vibratory or impact-type activities, "jackhammers and the like." (PX1, pg. 25).

15) On cross-examination, Dr. Gluscic agreed that when he saw Petitioner on September 29, 2014, he did not review any detailed job description, or had observed Petitioner at work, or receive any ergonomic study of Petitioner's job duties. (PX1, pgs. 20-21). Dr. Gluscic did not note whether Petitioner performed any type of repetitive work, and he did not know how long Petitioner performed each of her job duties. (PX1, pg. 24). However, Dr. Gluscic was aware that Petitioner worked in the sheriff's office. (PX1, pg. 9; 11). When specifically asked if he reviewed the August 25, 2014 medical record that stated Petitioner used keyboards for a living at the sheriff's department, Dr. Gluscic could not remember. (PX1, pg. 19).

16) Petitioner was off work from December 1, 2014 through January 11, 2015. She did not receive TTD. (T.26-27). Dr. Gluscic had testified that he never provided Petitioner with any work restrictions. (PX1, pg. 27).

17) Respondent sent Petitioner for a Section 12 examination with Dr. Sam Biafora, a board-certified orthopedic surgeon, on October 27, 2014. (RX1; RX2, pg. 4). Dr. Biafora's evidence deposition was taken on November 23, 2016. (RX2). Dr. Biafora's description of Petitioner's complaints and treatment to date were consistent with Petitioner's testimony and the medical records. (RX1; RX2). He indicated that as of the date of the Section 12 examination, Petitioner had noticed no improvement in the intermittent numbness and tingling that she had been experiencing. Petitioner also reported occasional aching in the right greater than left hand, and the pain involved all her fingers. Petitioner denied any known injuries. (RX1; RX2, pg. 8).

18) Dr. Biafora noted Petitioner's past medical history of hypertension, and that more than a year ago, Petitioner had stopped smoking a quarter pack of cigarettes per day. Dr. Biafora further noted that Petitioner was taking Metoprolol for hypertension and Lexapro for anxiety. (RX1; RX2, pg. 9). As to Petitioner's work history, Dr. Biafora indicated that Petitioner worked as an executive secretary for Respondent. Petitioner used the computer for approximately 80-85-percent of her work shift, and used the mouse with her right hand. Petitioner also had to write at work. Petitioner had been performing these duties for about four years. (RX1, RX2, pgs. 9-10).

19) Dr. Biafora further reviewed an ergonomic report dated October 17, 2014 and the video job analysis. (RX1; RX2, pgs. 11-12; RX2, Deposition Exhibit 3). The consultant who prepared the ergonomic report indicated that she personally observed Petitioner during her typical work day. The consultant estimated that Petitioner used the computer mouse about 60-65-percent of the time and only 35-40-percent of the time involved keyboard use. Further assessment revealed that the mouse and keyboard use were intermittent and not

rushed, there were breaks "when switching between screens, reading paperwork, or answering the phone and front door." Light forces were required to operate the mouse and to press the keys on the keyboard. Petitioner also held the mouse with a light grasp. Finally, "When using the keyboard, she was observed working with her shoulders relaxed, her right and left hand/arm resting on the desk." (RX2, Deposition Exhibit 3). The report further stated that no "forceful exertions were observed with gripping, pinching, or a combination of forceful gripping with supination/pronation of the forearm." (RX2, Deposition Exhibit 3).

20) Dr. Biafora's examination revealed positive carpal tunnel Tinel's and median nerve compression test on the right; negative carpal tunnel Tinel's and median nerve compression test on the left. Radiographs of both wrists were taken at this examination and revealed no abnormalities. There was approximately 1-mm ulnar positive variance bilaterally. (RX1; RX2, pgs. 10-11).

21) Dr. Biafora diagnosed Petitioner with right carpal tunnel syndrome. (RX1; RX2, pg. 13). He opined that Petitioner's carpal tunnel condition was not caused or aggravated by her job duties as an executive secretary. "Although she reported symptoms related to carpal tunnel syndrome during her work activities, those activities would not aggravate her condition." (RX1; RX2, pg. 14). Dr. Biafora testified that the most common cause of carpal tunnel was idiopathic in nature.

> Activities that may cause or contribute to carpal tunnel syndrome would be those that involve forceful gripping on a repetitive or sustained basis for prolonged periods of time. The use of power tools or vibratory tools may also cause or contribute to carpal tunnel syndrome. Ms. Crippen's work activities as she has described them, as well as those depicted in the job video analysis, do not involve such activities. (RX2, pg. 14).

22) During cross-examination, when asked in general whether computer keyboarding could aggravate the symptoms of carpal tunnel syndrome, Dr. Biafora responded:

> In my opinion, someone may have symptoms related to carpal tunnel syndrome with any activity. If someone has an underlying carpal tunnel syndrome, an activity may cause manifestation of symptoms – cause symptoms to appear during those activities, but that doesn't necessarily mean that those symptoms are causing an aggravation or an exacerbation of that condition. (RX2, pg. 18).

23) Notwithstanding causation, Dr. Biafora opined that the right carpal tunnel release was appropriate and necessary. He did not believe Petitioner was at maximum medical improvement (MMI), but that she could return to work without restriction. (RX1; RX2, pgs. 15-16).

24) As to non-work-related risk factors for carpal tunnel, Dr. Biafora testified that Petitioner was female, overweight, and had a history of smoking. He did not believe Petitioner's hypertension or age were contributing causes. (RX2, pgs. 16-17). Petitioner also did not have hypothyroidism, diabetes, or rheumatoid arthritis as risk factors. (RX2, pgs. 19-20).

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 Arbitrator concluded that Petitioner proved by a preponderance of the evidence that her duties as an executive secretary involved the repetitive use of her right hand, and her condition of ill-being manifested itself on August 25, 2014.

The Arbitrator noted that Petitioner was right-handed, and had worked as a full-time, 40-hour per week, executive secretary for Respondent since December 1, 2010. The Arbitrator further noted that Petitioner became symptomatic in her right hand, thumb, and small finger around August 2014. Prior to 2014, the Arbitrator stated that Petitioner had not experienced right hand symptoms nor did she seek treatment for any carpal tunnel syndrome condition. The Arbitrator found credible Petitioner's testimony that 80-percent of her work involved using the computer and mouse. The Arbitrator further found that Petitioner's testimony was corroborated by the medical records and the history provided to Respondent's Section 12 examiner. The Arbitrator noted that Respondent's job video further depicted Petitioner spending the majority of the video time typing on the computer keyboard.

The Arbitrator did not find Respondent's witness, Sheriff VanVickle persuasive as Petitioner never worked for Sheriff VanVickle, and he never had an opportunity to observe Petitioner at her former job. The Arbitrator also placed no weight on Dr. Biafora's causation opinion, noting that it was contrary to precedents established by the Appellate Court and this Commission.

The Arbitrator further concluded that "[a]lthough not convinced that Petitioner's condition was caused by her employment, Dr. Gluscic did opine that Petitioner's work activities aggravated her preexisting condition." After considering the record as a whole, the Arbitrator found that at the very least, Petitioner's keyboarding aggravated a pre-existing condition. (Arbitrator's Decision, pgs. 6-7).

The Commission notes that both Dr. Gluscic [Petitioner's treating orthopedic surgeon] and Dr. Biafora [Respondent's Section 12 examiner] opined that Petitioner's work activities for Respondent did not cause her carpal tunnel syndrome. However, Dr. Gluscic believed that Petitioner's work activities aggravated her carpal tunnel syndrome symptoms. Based on Dr. Gluscic's causal connection opinion, Petitioner's testimony, the medical records, and the job video, the Arbitrator found that at the very least, Petitioner's keyboarding aggravated a pre-existing

condition. Our Supreme Court has long-established that the minimal threshold for a compensable injury is that the work-related accident need not be the sole or principal causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 205 (2003). In repetitive trauma cases, the claimant generally relies on medical testimony establishing a causal connection between the work performed and claimant's disability. *Nunn v. Indus. Comm'n*, 157 Ill. App. 3d 470, 477 (1987).

While all that may be needed for a claim to be compensable is that Petitioner demonstrate that the alleged accident was a cause in the resulting condition of ill-being, the Commission finds that Dr. Gluscic's baseless opinion is insufficient to meet this threshold. In weighing the evidence, Dr. Gluscic's records generically indicate that Petitioner's injury was a workers' compensation injury, and that Petitioner worked for Respondent as an executive secretary. During cross-examination at his deposition, Dr. Gluscic acknowledged that he did not review any detailed job description, or had observed Petitioner at work, or receive any ergonomic study of Petitioner's job duties. Dr. Gluscic did not note whether Petitioner performed any type of repetitive work, and he did not know how long Petitioner performed each of her job duties. What Dr. Gluscic knew was that Petitioner worked in the sheriff's office. On the contrary, Dr. Biafora was aware of Petitioner's job duties, including the fact that Petitioner allegedly used a computer for approximately 80-85-percent of her work shift, and used the mouse with her right hand. Petitioner also had to write at work. Dr. Biafora additionally reviewed and relied on the ergonomic report and the job video to opine that none of the activities as depicted in the video involved forceful gripping on a repetitive or sustained basis for prolonged periods of time, or the use of power tools or vibratory tools.

The Commission therefore finds Dr. Biafora's opinion on causal connection to be more comprehensive and persuasive than Dr. Gluscic's opinion. As such, the Commission reverses the Arbitrator's Decision and finds that Petitioner did not establish by a preponderance of the evidence that her alleged repetitive duties as an executive secretary caused her right carpal tunnel syndrome. Petitioner's claim for compensation is therefore denied.

The Commission will additionally address Respondent's *Ghere* objection, although the Commission has found in favor of Respondent. Nevertheless, Respondent had argued that Dr. Gluscic's opinion went beyond his medical records. "[T]here was nothing in the reports to put the employer on notice that the treating physician had an opinion regarding causal connection." (Respondent's Brief, pg. 12).

Section 12 of the Act states as follows:

> In all cases where the examination is made by a surgeon engaged by the employer, and the injured employee has no surgeon present at such examination, it shall be the duty of the surgeon making the examination at the instance of the employer to deliver to the injured employee, or his representative, a statement in writing of the condition and extent of the injury to the same extent that said surgeon reports to the employer and the same shall be an exact copy of that furnished to the employer, said copy to be furnished the employee, or his representative as soon as practicable but not later

> than 48 hours before the time the case is set for hearing. Such delivery shall be made in person either to the employee or his representative, or by registered mail to either, and the receipt of either shall be proof of such delivery. If such surgeon refuses to furnish the employee with such statement to the same extent as that furnished the employer said surgeon shall not be permitted to testify at the hearing next following said examination. 820 ILCS 305/12.

Section 12 applies to both examining and treating physicians.

It appears that Respondent does not dispute receiving Dr. Gluscic's medical records more than 48 hours before Dr. Gluscic's deposition. However, Respondent does dispute Dr. Gluscic's testimony regarding his opinion on causal connection. Respondent claims it had no notice that Dr. Gluscic would testify as to causal connection.

In *Ghere*, the employee died of a heart attack while working as a flagman for the employer. The employee's doctor testified that he treated the employee on several occasions, but never treated him for heart problems. The arbitrator sustained the employer's objection to the physician's testimony concerning causal connection because the opinions were not provided to the employer 48 hours before the hearing. On appeal, the Appellate Court agreed and found that the physician's causation opinion would have gone beyond the contents of his medical records because there was no mention of causation in the records or that the physician ever treated the employee for a heart condition. *Ghere v. Indus. Comm'n*, 278 Ill. App. 3d 840 (1996).

The Appellate Court further clarified in *Homebrite Ace Hardware v. Indus. Comm'n*, 351 Ill. App. 3d 333 (2004), that the holding in *Ghere* was not to be so strictly interpreted.

> The court did not set forth a bright-line rule or presumption that undisclosed opinion testimony constitutes surprise. Furthermore, Ghere is factually distinguishable because the physician in Ghere had never treated the employee's heart condition, whereas Dr. Heffner did treat claimant for his neck problems. Dr. Heffner's records contain details about his treatment of claimant's neck complaints and therefore the records put employer on notice that Dr. Heffner might testify as to a causal relationship between the neck condition and claimant's work accident. *Homebrite Ace Hardware*, 351 Ill. App. 3d at 339.

The Commission finds that the Respondent in the case at bar was on notice that Dr. Gluscic might testify as to causal connection as Dr. Gluscic principally treated Petitioner's right carpal tunnel syndrome, which is the subject of this claim. Dr. Gluscic's medical records not only documented Petitioner's course of treatment, but also indicated that Petitioner worked as an executive secretary for Respondent. Respondent's *Ghere* objection is overruled.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed on April 16, 2018, is hereby reversed. Petitioner's claim for compensation is denied.

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

The party commencing the 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: SEP 11 2019

DDM/pm
O: 8/28/19
052

D. Douglas McCarthy

Stephen Mathis

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CRIPPEN, MELISSA L
Employee/Petitioner

Case# **14WC040268**

OGLE COUNTY SHERIFF'S DEPARTMENT
Employer/Respondent

19IWCC0493

On 4/16/2018, 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 1.88% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2043 HAUSER LAW LLC
RICHARD J HAUSER
524 W STEPHENSON ST SUITE 300
FREEPORT, IL 61032

2337 INMAN & FITZGIBBONS LTD
LAUREN WANINSKI
33 N DEARBORN ST SUITE 1825
CHICAGO, IL 60602

STATE OF ILLINOIS)

)SS.

COUNTY OF **WINNEBAGO**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

MELISSA L. CRIPPEN
Employee/Petitioner

v.

OGLE COUNTY SHERIFF'S DEPARTMENT
Employer/Respondent

Case # **14** WC **40268**

Consolidated cases: **N/A**

19IWCC0493

An *Application for Adjustment 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 **ROCKFORD**, on **1/17/18**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches 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 **8/25/14**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**40,500.20**; the average weekly wage was $**778.85**.

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

Respondent is entitled to a credit of $**1349.02** under Section 8(j) of the Act.

ORDER

- The Arbitrator finds that Petitioner is entitled to $11,098.61 because the injuries sustained by Petitioner caused 12.5% loss of use of the right hand (23.5 weeks of compensation).
- Petitioner is entitled to TTD benefits for 3-5/7 weeks equal to $1,928.56.
- Respondent is to reimburse Petitioner $144.70 for out-of-pocket medical expenses
- Respondent is responsible for the Petitioner's medical expenses pursuant to the Illinois Worker's Compensation Fee Schedule for the services set forth in Petitioner's Exhibit 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.

Signature of Arbitrator

4/11/18
Date

APR 16 2018

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

MELISSA CRIPPEN
Employee/Petitioner,

V. Case # 14 WC 40268

OGLE COUNTY SHERIFF'S DEPT.
Employer/Respondent.

19IWCC0493

ADDENDUM TO THE DECISION OF THE ARBITRATOR
STATEMENT OF FACTS

Petitioner alleges she sustained a work-related repetitive-trauma injury to her right hand that manifested on August 25, 2014.

The following evidence was presented at the arbitration hearing held on January 17, 2018, in Rockford, Illinois pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2008).

Petitioner (DOB: 6-13-66) was hired by Respondent on September 14, 2010 as a part time employee. On December 1, 2010, Petitioner became a full-time employee, working a 40-hour work week, when she assumed the duties of executive secretary to newly elected Sheriff Michael Harn. (T. 7-8, 29). November 26, 2014 was the last day she worked for Respondent. (T. 30).

Petitioner performed job duties including payroll, reporting, letter writing, sheriff's sales, record keeping, handling employee benefits, attendance records, preparing workers compensation reports, completing hiring and termination forms, typing correspondence, maintaining personnel files and personnel records, screening phone calls for the sheriff, answering and making phone calls, handling routine questions and complaints by the citizens and greeting visitors. (T. 8, 34-36). Petitioner worked 40 hours per week, eight hours per day, Monday through Friday and took a 30-minute lunch break every day. (T. 8, 36-37).

Petitioner testified she spent 80% of her workday on the computer which involved keyboarding and mouse work. (T. 8-9).

Prior to working for Respondent, Petitioner was the secretary at a sign company she owned with her husband for four years. (T. 9).

Petitioner testified her right hand, thumb and small finger began to hurt more and more in August of 2014. She described the pain as an ache that would throb and fall asleep. (Id. at 10). The pain occurred while she was sleeping, then progressively occurred during the day as well. (Id.).

Prior to 2014, she did not experience right hand symptoms nor did she treat with a doctor for carpal tunnel syndrome. (Id. 25). She testified that she believed her work-related computer work and writing led to her symptoms. (Id.).

In March of 2014, Petitioner's supervisor, Sheriff Michael Harn lost a primary re-election bid to Brian VanVickle who was scheduled to assume office on December 1, 2014. (T. 14-16). Petitioner testified that prior to December 1, 2014, she learned she would be replaced as executive secretary to the Sheriff.

Sheriff VanVickle testified that during the fall of 2014 he had made the decision to employ Susan Montadon as his executive secretary, effective December 1, 2014.

On August 25, 2014 Petitioner presented to Freeport Health Network ("FHN") Internal Medicine where APN Tracy Clay noted a history of right-handed numbness involving all fingers, tingling, weakness and pain that had worsened over the past year. Petitioner reported her symptoms sometimes kept her up at night. Petitioner reportedly had tried NSAIDS, Tylenol and a wrist splint which, as of late, failed to relieve her symptoms. Petitioner reported her right complaints impacted her activities of daily living such as putting on makeup and blow-drying her hair. APN Clay noted Petitioner "keyboards for a living". A diagnosis of carpal tunnel syndrome was noted and an EMG was recommended followed by a surgical consult. (PX1, attached as Dep. Ex. 1).

On August 25, 2014, Petitioner completed an Employer's First Report of Injury and a Worker's Compensation Incident Report. (RX. 8 and 10) A Worker's Compensation Injury Report was completed by Petitioner on August 27, 2014. (RX. 9)

On September 29, 2014, Petitioner presented to FHN Orthopedics where Dr. John Gluscic noted her complaints of numbness, tingling and pain that started one year prior and had progressively worsened to the point that her [right hand] falls asleep all the time and wakes her up at night. (PX1, p. 9, 10 & Dep. Ex. 1). Dr. Gluscic noted that an EMG had been performed on September 11, 2014 at Rockford Neuroscience Center by Dr. Afzal, a neurologist who noted a diagnosis of right carpal tunnel syndrome. (PX1, p. 12 & Dep. Ex. 1). On exam, Dr. Gluscic noted a positive Phalen's at 10 seconds. Based on Petitioner's history, examination and diagnostic testing, Dr. Gluscic noted a diagnosis of right carpal tunnel syndrome for which he recommended surgical release. (PX1, p. 13, 16 & Dep. Ex. 1).

Dr. Gluscic testified that Petitioner's work-related activities did not cause, but did aggravate Petitioner's symptoms and caused her "to have more difficulty when she was doing her work-related activities, based on her history." (PX1, p.13).

Respondent commissioned an ergonomic study regarding Petitioner's job duties and completed a job video of the Petitioner. (RX. 6 & 7)

Respondent's job video depicts Petitioner in her office at the Ogle County Sheriff's Department. Her office setting shows a desk with a computer, mouse, calculator, printer, files, notepads, notebooks, filing cabinets. At the outset of the video Petitioner can be seen using her keyboard, inputting payroll data. She sometimes uses the mouse with her right hand and then returns to keyboarding on the computer. Petitioner can also be seen writing with her right hand in a notebook and using her right hand to use a calculator. For the majority of the approximately 20-minute long video, Petitioner is seen typing on her keyboard.

On October 27, 2014, Petitioner presented to Dr. Sam Biafora for a Section 12 IME at the request of Respondent. (RX. 1) Dr. Biafora noted a history of a 48-year-old, right-hand-dominant female who reported right, significantly greater than left, hand numbness and tingling over the 1 ½ years with significant increase in symptoms over the past few months. Petitioner further reported awakening at night with numbness, tingling and aching in her right hand and experiencing an increase in symptoms as her workday progresses. (Id.). Petitioner reported that 80-85% of her work functions involve the use of the computer, as well as a mouse, using her right hand. Dr. Biafora reviewed the August 25 & September 29, 2014 FHN records from APN Tracy Clay and Dr. John Gluscic, the September 11, 2014 electrodiagnostic study, the video job analysis of Petitioner

dated October 7, 2014, the ergonomic report dated October 17, 2014 and the August 25, 2014 Employer's First Report of Injury. (Id.).

On exam, Dr. Biafora noted a positive carpal Tinel's and median nerve compression test on the right. (Id.). Dr. Biafora diagnosed right carpal tunnel syndrome based on Petitioner's history, physical exam, and electrodiagnostic findings. (Id.).

Dr. Biafora opined that Petitioner's right carpal tunnel syndrome was not caused or aggravated by her essential job functions as an executive secretary. The doctor acknowledged that "although she reports symptoms related to carpal tunnel syndrome during her work activities, these activities would not aggravate her condition" as they do not involve forceful gripping on a repetitive or sustained basis for prolonged periods of time, nor do Petitioner's duties involve the use of power or vibratory tools. (Id.).

On December 9, 2014, Petitioner presented for a pre-operative physical exam at FHN at which time she reported experiencing symptoms for over one year related to her right carpal tunnel syndrome. (RX.1). Petitioner reported working in an administrative/secretarial job where she did a lot of keyboarding and mouse usage. She reported that over the course of time her symptoms developed. Petitioner complained of numbness, tingling and pain in her 3rd and 4th finger of her right hand. She was noted to have no other risk factors for development of carpal tunnel syndrome. The examining doctor noted the diagnosis of carpal tunnel syndrome was confirmed via EMG. (Id.).

On December 18, 2014, Dr. Gluscic performed Petitioner's right median nerve release surgery (Px. 1).

Petitioner testified that on December 1, 2014, she called Heather Butler at the 911 call center and left messages with Sheriff VanVickle and Deputy Doug Lockhart to inquire whether she should report to work. She testified she received a call back from Doug Lockhart the afternoon of December 1, 2014, during which Mr. Lockhart advised Petitioner not to report to work. Petitioner testified she requested and was granted medical leave on December 2 and December 3, 2014. (Id. 31). She testified she did not recall Respondent's policy that an employee who doesn't call or show up for work for three days is considered a voluntary resignation. (T. 31). Petitioner testified she attended a meeting on Dec 4, 2014, at which time she was terminated. (Id. 19).

Petitioner testified that November 26, 2014 was the last day she worked for Respondent. (T. 30).

Petitioner testified her group health insurance benefits though Respondent were terminated in December of 2014. (Id. 27). Petitioner obtained a COBRA extended policy for which she paid premiums. (Id. 27-28).

Petitioner testified that currently she does not have the pain in her right hand when she works on the computer although she continues to have a little weakness and her hand "will go to sleep some". (Id. 23).

Petitioner testified following her surgery she did not received TTD benefits nor did Respondent pay any of her medical bills.

Petitioner testified that prior to 2014, she did not experience any problems with her right hand or treat for carpal tunnel syndrome. (Id. 25). She further testified she does not suffer from hyperthyroidism or diabetes. (Id. 26).

Petitioner's personnel file did not contain anything related to a medical leave request for December 2014. (RX 11).

On cross exam, Petitioner was shown September 11, 2014 records from Rockford Neurosurgeon Center EMG referral form. Petitioner admitted she completed the form and answered 'No,' to the question 'Is the reason for this visit a work injury, workers compensation related?' (T. 45; PX 2).

Petitioner testified she found a new job working for the Morse Group at less pay on January 12, 2015.

Testimony of Brian VanVickle

Respondent presented Brian VanVickle who testified he is the elected sheriff of Ogle County. His term began December 1, 2014. The sheriff is the administrator of the office which includes patrol investigations, court security, corrections, buildings and maintenance for the entire county. Sheriff VanVickle won the primary election in March 2014 against the incumbent sheriff, Michael Harn. (T. 49-50). He ran unopposed in the November 2014 general election. (T. 49).

Sheriff VanVickle testified he did not work with Petitioner but knew she was the executive secretary prior to his taking office. (T. 54). Sheriff VanVickle testified he employs an executive secretary who works 8 hours per day, 40 hours per week, Monday – Friday and takes a lunch break for 30 minutes. Sheriff VanVickle testified his executive secretary spends approximately between 35-40% using the computer. Sheriff VanVickle testified that most information remains pen and paper with the exception of payroll which is done twice a month. The majority of the computer work is fixed. The rest of the work performed by the executive secretary is sheriff sales. (T. 59). Sheriff VanVickle testified he has observed the work station of the executive secretary. It has a desk, computer, fax machine, files, paper, pens. It is the same work station Petitioner utilized. Sheriff VanVickle's executive secretary started December 1, 2014. (T. 60).

Sheriff VanVickle testified the personnel files of Ogle County employees are locked in his office. Every Ogle County employee has a personnel file. (T. 61). Sheriff VanVickle testified Petitioner did not provide him with medical notes or off work notes from December 1-3, 2014. Sheriff VanVickle testified Petitioner's claim that she called and left a message for him was not true. (T. 64).

CONCLUSIONS OF LAW

Accident & Causal Connection

The right-handed, Petitioner (DOB: 6-13-66) was hired by Respondent on September 14, 2010 as a part time employee. On December 1, 2010, Petitioner became a full-time, 40-hour work per week employee, when she assumed the duties of executive secretary to the newly elected Sheriff Michael Harn and worked in this capacity until November 26, 2014.

Petitioner testified her right hand, thumb and small finger began to hurt more and more in August of 2014. The pain occurred while she was sleeping, then progressively occurred during the day as well. Prior to 2014, she did not experience right hand symptoms nor did she treat with a doctor for carpal tunnel syndrome. Petitioner testified that 80% of her work for Respondent involved using the computer and mouse. Petitioner's testimony is corroborated by the treating medical records and the history reported to Respondent's Section 12 examiner.

Respondent's job video depicts Petitioner at work on October 7, 2014. For the majority of the approximately 20-minute long video, Petitioner is seen typing on her keyboard.

The Arbitrator found Petitioner presented at the arbitration hearing as a confident, trustworthy witness.

The Arbitrator acknowledges the testimony of Sheriff VanVickle regarding his current executive secretary and her computer usage however, Petitioner never worked for Sheriff VanVickle nor has the current Sheriff had an opportunity to observe Petitioner at her former job.

Based upon the preponderance of evidence contained in the record, the Arbitrator finds that Petitioner has satisfied her burden with respect to accident. Petitioner credibly testified that she noticed an increase in right

hand symptoms during the daytime in August of 2014. Petitioner has established that her secretarial job duties involved the repetitive use of her right hand and her condition of ill-being manifested itself on August 25, 2014 when she presented to APN Tracy Clay with progressive complaints of right-handed numbness, tingling and weakness, at which time she was given a provisional diagnosis of right carpal tunnel syndrome that was later confirmed by diagnostic testing.

With respect to causation, there is no dispute that Petitioner suffered from carpal tunnel syndrome. Respondent's IME physician noted a diagnosis of right carpal tunnel syndrome on October 27, 2014, based on his physical exam of Petitioner and review of her treating medical records and the September 11, 2014 electrodiagnostic study.

At the IME, Dr. Biafora noted a history of a 48-year-old, right-hand-dominant female who reported right, significantly greater than left, hand numbness and tingling over the 1 ½ years with significant increase in symptoms over the past few months. Petitioner further reported awakening at night with numbness, tingling and aching in her right hand and experiencing an increase in symptoms as her workday progresses. (Id.). Petitioner reported that 80-85% of her work functions involve the use of the computer, as well as a mouse, using her right hand.

Dr. Biafora opined that Petitioner's right carpal tunnel syndrome was not caused or aggravated by her essential job functions as an executive secretary. The doctor acknowledged that "although she reports symptoms related to carpal tunnel syndrome during her work activities, these activities would not aggravate her condition" as they do not involve forceful gripping on a repetitive or sustained basis for prolonged periods of time, nor do Petitioner's duties involve the use of power or vibratory tools. (Id.).

With respect to his causation opinion, Dr. Biafora testified at his evidence deposition that computer keyboarding cannot aggravate the symptoms of carpal tunnel syndrome. (RX2, p. 18).

The Arbitrator places no weight on Dr. Biafora's causation opinion, noting it is contrary to precedents established by appellate court and the Commission.

The Arbitrator finds the greater weight of the evidence establishes that Petitioner's employment activities were a causative factor in her right hand carpal tunnel syndrome. Petitioner spent most of her workday, for nearly four years using her keyboard repetitively and with sufficient regularity to prove such a nexus. Although not convinced that Petitioner's condition was caused by her employment, Dr. Gluscic did opine that Petitioner's work activities aggravated her preexisting condition. The Arbitrator finds, after careful consideration of the record as a whole, that at the very least, Petitioner's keyboarding aggravated a pre-existing condition.

Notice

The Arbitrator finds the manifestation date of Petitioner's injury was on August 25, 2014 when she saw Nurse Practitioner Tracy Clay. (PX1, Dep. Ex. 1) There is no indication in the record that Petitioner had previously experienced right hand problems. On the same date, August 25, 2014, Illinois Form 45, the Employer's First Report of Injury was completed (RX8), a Worker's Compensation Incident Report to be completed by the supervisor was completed (RX10), and on August 27, 2014 a Worker's Compensation Report to be completed by injured employee was completed (RX 9). Nothing in the record suggests these reports were not completed on the date stated in the exhibits. The Petitioner, in her duties as executive secretary, had the responsibility to prepare worker's compensation reports. (RX3)

Further, the ergonomic report and videotape of Petitioner's work activities were completed on behalf of the Respondent on October 7, 2014 within the 45-day accident reporting time frame. (RX6 & 7)

The Arbitrator finds Petitioner reported the accident to the Respondent on a timely basis.

Medical services and bills

Dr. Biafora in his Section 12 medical exam report and in his deposition agreed with the diagnosis that Petitioner suffered from right hand carpal tunnel syndrome and that surgical intervention was a reasonable and appropriate treatment.

As it has been determined that the Petitioner's right hand carpal tunnel syndrome is causally connected to her employment for Respondent, the medical treatment which the Petitioner received at FHN, including carpal tunnel release performed by Dr. Gluscic, was reasonable and necessary. As such, the Respondent is responsible for payment of the Petitioner's bills pursuant to the Illinois Worker's Compensation Fee Schedule, of Rockford Neuroscience Center, FHN Memorial Hospital, and Freeport Health Network, as outlined in Petitioner's Exhibit 2.

The Respondent is entitled to a credit of $1,349.02 as stipulated to by the parties in Arbitrator's Exhibit 1. However, it is noted that Petitioner was providing the health insurance pursuant to COBRA.

Temporary Total Disability

The Petitioner first sought medical treatment for her right-hand symptoms on August 25, 2014. (PX1, dep. ex. 1) Petitioner thereafter sought treatment with orthopedic surgeon Dr. Gluscic on September 29, 2014. Surgery was recommended. (Id.) Thereafter, the Respondent had an ergonomic study completed of the Petitioner's work station (Respondent's Exhibit 6) and videotaped the Petitioner at work (Respondent's Exhibit 7). Using the ergonomic report and the video tape, Dr. Biafora issued a Section 12 report opining that the Petitioner's right hand carpal tunnel syndrome was not causally connected to her job. (Respondent's Exhibit 1)

The Petitioner testified that she learned she was going to be replaced as executive secretary for the new sheriff when the new sheriff, VanVickle, took office December 1, 2014. Sheriff VanVickle testified he hired a new executive secretary in the fall of 2014. Sheriff VanVickle testified that a new executive secretary in fact did start working for him December 1, 2014. This begs the question of what job the Petitioner would have returned to on December 1, 2014. Petitioner testified that she made several different phone calls December 1, 2014 to learn if she was to report to work and subsequently a deputy contacted her to not report to work and scheduled a meeting for December 4, 2014. From the personnel file of the employer (Respondent's Exhibit 11), a meeting did in fact occur December 4, 2014 and Petitioner was advised she no longer had a job with the Ogle County Sheriff's Department.

Subsequently, the Petitioner, on her own dime, had right carpal tunnel release performed December 18, 2014. Dr. Biafora, in his Section 12 exam report, indicated that a right carpal tunnel release was appropriate and that maximum medical improvement would be three months post-operatively. (Respondent's Exhibit 1)

The Petitioner testified she found new employment with the Morse Group January 12, 2015. As such, the Arbitrator finds Petitioner was temporarily totally disabled from December 18, 2014 through January 12, 2015, representing 3-5/7 weeks.

Nature and extent of Petitioner's injury

The Arbitrator notes that Section 8.1b(b) of the Illinois Workers' Compensation Act states as follows:

"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 Petitioner was employed as an executive secretary at the time of the accident. Petitioner started full time employment at The Morse Group on January 12, 2015. Petitioner works as Accounts Payable Data Entry Clerk using a desktop computer with keyboard and mouse. At the time of trial, Petitioner was working full duty in this capacity.

There is no objective basis to conclude that the work accident limited Petitioner's ability to continue in her pre-accident employment. The Arbitrator therefore accords no weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator finds that Petitioner was 48 years old at the time of the accident. The Arbitrator gives some weight to this factor given that Petitioner has many years with which she will live with the present condition of ill-being in her right hand.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator finds that Petitioner continued full duty work at a lower rate of pay with The Morse Group after being terminated from her employment at Ogle County Sheriff's Office. The Arbitrator gives some weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records.

The Arbitrator notes Petitioner's testimony that she returned to work and still experiences her hand falling asleep and weakness in her hand. Due to the limited treatment post-operatively that Petitioner received, there is not strong corroboration in the medical records. The Arbitrator gives lesser weight to this factor

Based upon the above factors and the records as a whole, the Arbitrator finds that the Petitioner suffered permanent partial disability of 12.5% loss of the right hand representing 23.5 weeks of compensation at Petitioner's PPD rate.

In Summary, the Arbitrator finds that the Petitioner is entitled to:

- Permanent Partial Disability of 12.5% of the right hand $11,098.61
- Temporary total disability for 3-5/7 weeks of $1,928.56
- Respondent is to reimburse Petitioner $144.70 for out-of-pocket medical expenses
- Respondent is responsible for the Petitioner's medical expenses pursuant to the Illinois Worker's Compensation Fee Schedule for the services set forth in Petitioner's Exhibit 2.

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 McHENRY)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

EDWARD SIMUNDIC, JR.,

Petitioner,

vs. NO: 17 WC 18642

CYGNET CONTROLS, INC.,

Respondent.

19IWCC0494

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, and 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 October 17, 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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $4,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: SEP 1 1 2019

D. Douglas McCarthy

DDM/tdm
O: 8/28/19
052

Stephen Mathis

SPECIAL CONCURRANCE

I concur with the majority in all aspects of its decision other than its order to compel Respondent to authorize medical treatment. This issue was previously addressed by the Court in *Hollywoood Casino-Aurora, Inc. v. Illinois Workers' Compensation Commission*, 2012 IL App (2d) 110426WC, which is dispositive. The Court noted "Assuming for the sake of analysis that this provision of the Act [Section 8(a)] is sufficiently broad so as to include a requirement that an employer authorize medical treatment for an injured employee in advance of the services being rendered, the fact still remains that there is no provision in the Act authorizing the Commission to assess penalties against an employer that delays in giving such authorization." *Id.* at ¶ 19. Ordering Respondent to authorize medical treatment is meaningless where no enforcement mechanism exists under the Act. In accordance with Section 8(a) of the Act and the Court's holding in *Hollywood Casino*, I would order Respondent to provide and pay for the awarded medical expenses and/or treatment.

L. Elizabeth Coppoletti

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

SIMUNDIC JR, EDWARD J Case# **17WC018642**
Employee/Petitioner

CYGNET CONTROLS INC **19IWCC0494**
Employer/Respondent

On 10/17/2018, 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 2.41% 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:

0314 KOSIN LAW OFFICE LTD
DAVID X KOSIN
134 N LASALLE ST SUITE 1340
CHICAGO, IL 60602

4234 RNBK PC
ANDREW FERNANDEZ
650 E DEVON AVE SUITE 110
ITASCA, IL 60143

STATE OF ILLINOIS)
)SS.
COUNTY OF MCHENRY)

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

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

Edward J. Simundic, Jr.
Employee/Petitioner

v.

Cygnet Controls, Inc.
Employer/Respondent

Case # **17** WC **18642**

Consolidated cases: **None**

19IWCC0494

An *Application for Adjustment 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 **Woodstock**, on **September 6, 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. [x] Is Petitioner's current condition of ill-being causally related to the injury?

G. [ ] What were Petitioner's earnings?

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

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

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

K. [x] Is Petitioner entitled to any prospective medical care?

L. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD

M. [ ] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [ ] Other ______

FINDINGS

On the date of accident, **August 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*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**51,252.76**; the average weekly wage was $**985.63**.

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

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

Respondent shall be given a credit of $**1,959.99** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**1,959.99**.

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

ORDER

Respondent shall directly pay to the providers all reasonable and necessary medical services incurred in the care and treatment of Petitioner's causally related injuries as provided in Sections 8(a) and 8.2 of the Act. SEE ARB EX 1. Respondent shall receive credit for amounts paid, if any.

Respondent shall authorize and pay for Petitioner's right knee treatment recommended by Dr. Durkin, including the right knee total replacement, pursuant to Sections 8 and 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.

Carolyn M. Doherty
Signature of Arbitrator

10/17/18
Date

OCT 1 7 2018

FINDINGS OF FACT

At trial, the parties stipulated that the 61 year old Petitioner sustained accidental injury to his right knee on 8/29/16 arising out of and in the course of his employment with Respondent. ARB EX 1. Petitioner testified that he had no prior problem, pain or treatment to his right knee and had no difficulty performing his job for Respondent prior to 8/29/16. Petitioner testified that he worked 20 years for Respondent which manufactured control panels. Petitioner's duties included building and wiring panels and installation of the panels at job sites. Petitioner was required to work on his knees and he testified that he was on his feet 80% of his job day.

On 8/29/16, Petitioner was working at a customer site installing a panel. Petitioner testified that while walking around the panel identifying components his right foot became caught under a pipe and he started to fall. Petitioner hyper-extended his right knee while trying to keep from falling. Petitioner testified that he continued to notice pain on the inside lower portion of his right knee while standing the rest of his work day. Petitioner iced his knee at home and reported the accident the next day to his foreman. Petitioner testified that the pain became sharper as time went on. His first medical attention was on 9/8/16 when he was sent to Physicians Immediate Care by Respondent.

Petitioner continued to work but his knee worsened. He returned to physicians on 9/13/16 and on 9/20/16 when he was sent to physical therapy. Petitioner testified that he went to physical therapy through November 7, 2016 but therapy did not alleviate his right knee pain. Rather, his knee pain worsened due to the exercises.

Petitioner testified that he returned to Physicians Immediate in mid October 2016 and underwent a right knee MRI on 10/26/16. Thereafter, Petitioner was referred to an orthopedic surgeon and he was seen by Dr. Durkin at Hinsdale Orthopedic.

On 11/15/16, Dr. Durkin examined Petitioner and reviewed the MRI. He interpreted the MRI to show some "degenerative joint disease involving the medial compartment, grade 4... chondromalacia of the femur and the tibia, grade 4 chondromalacia of the lateral facet, that's of the patella... and a grade 3 vertical tear of the posterior horn of the medial meniscus and some degeneration of the ACL ...but that's more a wear and tear type thing, and a Baker's cyst." PX 6. Dr. Durkin diagnosed a large medial meniscus tear and some post-traumatic arthritis. He opined that the meniscal tear was caused by the work injury in August 2016 and was an acute injury. He further opined that the meniscal tear the cartilage accelerated the cartilage wear/degeneration aggravating the osteoarthritis. PX 6, p. 17. Dr. Durkin recommended a knee brace, injections and restrictions. Dr. Durkin also explained to Petitioner that the course of the post-traumatic arthritis may lead to a total knee replacement. Petitioner testified that the Gel-One injection he received in December 2016 initially helped but the pain returned a few weeks later. On March 10, 2017, Dr. Durkin reviewed x-rays which showed a progression of the arthritis related to the lack of functioning meniscus. PX 6, p. 25. He determined that conservative care had been exhausted and prescribed a total knee replacement. He opined that a scope of the right knee would only be a temporary. He specifically opined that "this is not a degenerative meniscus tear. It's kind of a catastrophic full thickness radial meniscus tear that does cause kind of catastrophic arthritis." PX 6, p. 31. Dr. Durkin further clarified that the "patellofemoral arthritis was likely pre-existing but eh medial compartment osteoarthritis and pain are directly related to the medial meniscus tear." PX 6, p. 32.

Petitioner attended a Section 12 exam with Dr. Lieber in March 2017. Dr. Lieber recommended arthroscopic surgery to the medial meniscus. The total knee replacement recommended by Dr. Durkin was denied.

Dr. Durkin performed the medial meniscus repair in July 2017. During the surgery he found a "large posterior horn medial meniscus tear going all the way back to the capsule which was not repairable." PX 6, p. 33. He trimmed out loose pieces in an attempt to reduce pain. In its torn state the medial meniscus was providing no benefit to Petitioner and causing pain.

Petitioner testified that prior to the surgery he had sharp pain when walking and dull ache when he sat down. He further testified that the pain would occasionally wake him at night. After the surgery the sharp pain lessened but was not completely alleviated and then his pain began to increase again 3 weeks after the surgery. Petitioner underwent another course of physical therapy.

In August 2017, Petitioner returned to work light duty and has seen Dr. Durkin every 6 weeks since that time. He has received more injections which provide only temporary pain relief. In November 2017, Petitioner received a new brace which stabilizes the knee but does not alleviate the pain. Currently, Dr. Durkin continues to recommend the total knee replacement under a diagnosis of significant pain in his knee that limits his ability to function on a daily basis related to the medial compartment arthritis he's gotten from the meniscal tear. PX 6, p. 45-46. Dr. Durkin clarified that the "symptomatic part" of the arthritis was caused by the meniscal tear. PX 6, p. 64.

Petitioner testified that it is difficult to walk but that the pain subsides when he sits. He currently uses a cane for stability but it is not prescribed. His knee intermittently gives out due to sharp pain. Petitioner continues to work light duty and is able to sit at work. Petitioner testified that prior to the accident he was able to stand and walk all day at work without problems. Dr. Durkin again recommended the knee replacement two weeks prior to trial and Petitioner wants to have the surgery.

Dr. Lieber testified via evidence deposition dated August 7, 2018. RX 4. He examined Petitioner and reviewed the MRI. His diagnoses were degenerative joint disease, osteoarthritis of the right knee, and medial meniscal tear of the right knee. P. 11. He testified that these were 2 separate and distinct diagnoses. He further testified that only the medial meniscal tear was caused by the work accident and that the meniscal arthroscopic repair surgery was thus reasonable. However, he opined that the knee replacement was to treat the arthritis which he opined was in no way caused or aggravated by the work accident due to the preexisting nature of the arthritis. He agreed that a total knee replacement would solve both the meniscal tear and the arthritis but that arthroscopic repair of the meniscus alone would solve the symptoms related to the accident. P. 14-16. This opinion was based on his opinion that the acute meniscal tear did not cause further degeneration of the preexisting arthritis. P, 28-29. Lastly, he opined that the "significant arthritic change about Mr. Simundic's knee was in the patellofemoral joint. The medial meniscus has no relationship to the patellofemoral joint. So most likely Mr. Simundic is going to require a total knee replacement because of the severe degeneration in the patellofemoral joint. And this isn't even related or associated with the area where the medial meniscal tear occurred." P. 30.

Dr. Durkin testified that the pre-existing arthritis was asymptomatic and Petitioner had no issues with his right knee before the accident. On cross, Dr. Lieber agreed that he had not seen any medical record indicating knee problems prior to this accident. P. 36-47.

CONCLUSIONS OF LAW

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

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

Based on a preponderance of the credible evidence entered at trial, the Arbitrator finds that the petitioner's current condition of ill-being is causally related to the work injury of August 29, 2016. The Arbitrator notes that accident is not in dispute. The parties stipulate that Petitioner sustained a work related injury to his right knee on August 29, 2016 in the form of a meniscal tear and that Petitioner's arthroscopic repair surgery was both reasonable and necessary after the failure of conservative treatment. Petitioner credibly testified that his knee pain continues to date despite a brief improvement after the surgery in July 2017. The medical records also support a finding that Petitioner had pre-existing arthritis in his right knee – a finding to which Drs. Durkin and Lieber support. Petitioner credibly testified that his right knee did not cause him any problem prior to this accident and nothing in the record rebuts Petitioner's testimony. Dr. Durkin logically testified that the residual damage caused by the meniscal tear resulted in the aggravation and acceleration of the pre-existing arthritis causing a previously asymptomatic condition to become symptomatic. Placing greater weight on the opinion of Dr. Durkin as supported by Petitioner's credible, unrebutted testimony, the Arbitrator finds that the accident of August 29, 2016 and the resulting mensical tear caused the preexisting right knee arthritis to become symptomatic, where it currently remains.

The Arbitrator further notes that both physicians agree a total knee replacement is appropriate treatment for Petitioner's right knee condition. Based on the foregoing finding of causal connection for the right knee symptomatic arthritis in addition to the meniscal tear, the Arbitrator further finds that the recommended right knee total knee replacement is reasonable, necessary and causally related to the accident and injury of August 29, 2016. Accordingly, the Arbitrator finds that Respondent shall authorize and pay for the recommended total knee replacement and all attendant care pursuant to Sections 8 and 8.2 of the Act.

J. Were 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 notes that Respondent's dispute as to the medical bills was based on liability after Dr. Lieber's Section 12 examination of March 29, 2018. Based on the Arbitrator's findings on the issues of continued causal connection for Petitioner's meniscal tear and residual aggravation of the pre-existing arthritis, the Arbitrator further finds that Respondent shall pay all reasonable and necessary medical expenses incurred in the care and treatment of those causally related conditions pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid. The parties stipulated that if awarded, Respondent would pay the awarded bills directly to the providers and pursuant to the Fee Schedule. ARB EX 1.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TAMARA MULLENS DEAN,

Petitioner,

vs. NO: 15 WC 3080

CITY OF WHITE HALL,

Respondent.

19IWCC0495

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 4, 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 the Petitioner on account of said accidental injury.

The bond requirement in Section 19(f)(2) is applicable only when "the Commission shall have entered an award for the payment of money." *820 ILCS 305/19(f)(2)*. Based upon the denial of compensation 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:

LEC

O: 8/20/19

43

L. Elizabeth Coppoletti

Stephen Mathis

D. Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DEAN, TAMARA MULLENS Case# **15WC003080**
Employee/Petitioner

CITY OF WHITE HALL **19IWCC0495**
Employer/Respondent

On 9/4/2018, 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 2.21% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2028 RIDGE & DOWNES
JOHN E MITCHELL
415 N E JEFFERSON AVE
PEORIA, IL 61603

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

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

Tamara Mullens Dean
Employee/Petitioner
v.
City of White Hall
Employer/Respondent

Case # **15** WC **3080**

Consolidated cases: **N/A**

19IWCC0495

An *Application for Adjustment 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 **Springfield**, on **2/26/18**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **9/17/14**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**27,040.00**; the average weekly wage was $**520.00**.

On the date of accident, Petitioner was **55** years of age, ***married*** with **no** dependent children.

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

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**4,056.00** for other benefits, for a total credit of $**4,056.00**.

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

ORDER

Because Petitioner failed to prove that she sustained accidental injuries which arose out of and in the course of her employment with Respondent and failed to prove that her current conditions of ill-being are causally related to her employment benefits are denied.

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

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

Michael K. Nowak, Arbitrator

8/27/18
Date

ICArbDec p. 2

SEP 4 - 2018

FINDINGS OF FACT

Petitioner was hired by Respondent in 2004 as a dispatcher for the police department and fire department. Beginning in 2013, Petitioner began working as a billing clerk.

Petitioner testified her job duties include answering phones, running a cash register, and writing out receipts. She also testified the main part of her job duties consisted of entering collections and entering data from the meter reader's books.

Petitioner explained that during the first two weeks of the month, she mostly dealt with collections because the bills for water and gas were sent out at the end of the month. She also performed some cleaning and filing duties as well as periodically filling in for dispatchers.

Petitioner testified that the information contained in her written job description as set forth on Petitioner's Exhibit 14 primarily covers things she performed for the water company. Those duties included using a computer, cash register, and also writing receipts.

Petitioner testified she generally worked 10 hours per day and 4 days per week. She would begin her days by emptying a lock box and recording tickets. During the first two weeks of each month, she would then perform collection work.

During the second half of the month, Petitioner would enter data from the meter books. With respect to the data entry from the meter books, Petitioner testified she did a little bit each day or a few hours each day. She also had to tear apart bills which totalled about 1,100 collection tickets.

With respect to the meter books, Petitioner testified they were very big and cumbersome. She had to hold them open. She also explained she used a brick to hold the books open. She also used her left hand to hold down the book. The photos contained in Petitioner's Exhibit 5 show the meter books are slightly longer than Petitioner's hand. Petitioner testified she used a computer mouse with her right hand. When describing the books, Petitioner testified they were 2-3 inches thick. When asked if Petitioner had to work with some weight at the water department, she testified she had to work with the meter books. Petitioner testified the books weighed between 0.5 pounds and up to 3 pounds. On cross examination, Petitioner did not dispute the assertion from Respondent's counsel that the heaviest book weighed 2.145 pounds. Also on cross examination, Petitioner acknowledged that handling the log books were the biggest problem. She confirmed each log book was filled with a group of addresses for a single route to be utilized by the meter reader. Each page is for an individual customer. The meter reader takes a book and goes from house to house documenting gas and water readings. The reader then returns the book to the City's office and places it in a milk crate.

Petitioner's job duties involved her taking the book from the milk crate and placing it on her desk. She would then enter data from the book into the computer. Petitioner indicated that for each customer, she would have to type in between 8 and 10 digits. She also acknowledged using a brick to hold the books open until she got between 20 and 50 pages into the book. At that point, Petitioner would also rest her hand on the book and press down on it in order to keep the book from closing. Petitioner testified the meter reader went through each route one time per month.

Petitioner's medical conditions included bilateral carpal tunnel syndrome, right lateral epicondylitis, and left cubital tunnel syndrome and medial epicondylitis.

Petitioner testified the lifting of the books bothered her elbows. When asked about which job duties caused her upper extremity problems, Petitioner testified that pressing down on the meter book bothered her left elbow, and picking up the books bothered her right elbow. She also acknowledged using both hands to pick up the books. Petitioner indicated she was interrupted frequently throughout the day, and there was no down time in the office.

Ryan McMillen testified on behalf of Respondent. He indicated he worked for Respondent since 2001, and he also performed the duties of a billing clerk. Mr. McMillen testified he trained Petitioner for 10-12 months. The training started off with Petitioner observing Mr. McMillen performing the job duties. Petitioner would then help out and eventually the roles reversed so Petitioner would perform the job duties while Mr. McMillen observed. Mr. McMillen testified he used the number pad on the right side of the keyboard to enter the data from the meter books. He further explained he would enter 4 or 5 digits for the water reading, hit the tab button, and then enter 4 digits for the gas reading. He would then hit either the tab button or the enter button on the computer keyboard to get to the next customer. He would then turn the page in the meter book to get to the next customer and repeat the process. Mr. McMillen testified it did not require any pressure on the wrist or elbows to hold the books open. He agreed with Petitioner that there were frequent interruptions throughout the day because of phone calls, customers, and radio transmissions. Mr. McMillen testified there were no extended periods of time when the same duties would be performed. He also indicated the job duties of a billing clerk do not require the wrists to be placed in an awkward position for any period of time. He also testified there was no lifting required which would place stress on the wrists.

Petitioner testified in rebuttal that the training performed by Mr. McMillen only lasted about one month. Petitioner further testified Mr. McMillen remained in the same office as her for 10-12 months after she began the billing clerk duties, but he was not training her for that whole time. Petitioner also testified that Mr. McMillen is stronger than her and he was also faster at the job than she was. Petitioner acknowledged that while Mr. McMillen was in the office, he could have entered some data from log books on Petitioner's off days.

Petitioner's medical conditions involved her upper extremities. The medical evidence establishes that Petitioner was having problems with her thyroid dating back to at least May 23, 2008. She was diagnosed with hypothyroidism, and she underwent a thyroidectomy. (Rx.1)

On September 13, 2013, Dr. Venigalla saw Petitioner for a follow-up visit relating to her thyroid issues. Dr. Venigalla noted Petitioner was also having swelling and pain in her index fingers. On January 22, 2014, Dr. Venigalla noted elevated blood sugars and Petitioner's hypothyroidism. On June 13, 2014, Petitioner complained to Dr. Venigalla of intensive numbness in her feet. She was diagnosed with pre-diabetes. Petitioner also complained of numbness in her hand mainly when she wakes up. She did not notice the symptoms very much during the day time.

Based upon the complaints of numbness and tingling, Dr. Venigalla referred Petitioner to Dr. Fortin who is a neurologist.

On September 29, 2014, Dr. Fortin noted Petitioner was being seen for numbness and tingling in her hands and feet. The symptoms had been present intermittently for years but were worsening since March 2014. Dr. Fortin diagnosed Petitioner with idiopathic polyneuropathy. (Rx.1)

Petitioner first saw Dr. Darr Leutz September 17, 2014. The Arbitrator notes September 17, 2014 is the alleged accident date set forth on the Request for Hearing form, but the Application for Adjustment of Claim alleges an accident date of September 17, 2013.

The history form from Springfield Clinic dated September 17, 2014 indicates Petitioner was being seen for carpal tunnel testing results. Petitioner indicated her symptoms occur when working at a computer, when waking up in the morning, and driving a car. She also wrote her symptoms bother her when performing normal activities like cooking. (Px.2) Petitioner also wrote that after the testing the previous week, her elbows were very, very sore. (Px.2)

The treatment note from Dr. Leutz dated September 17, 2014 indicates Petitioner was being seen for bilateral carpal tunnel symptoms following an EMG study performed September 10, 2014. Petitioner rated her pain as a 9/10. She indicated she had pain for several months after starting a new job. (Px.2) Following an exam, Dr. Leutz diagnosed Petitioner with bilateral carpal tunnel syndrome. He recommended a decompression of the median nerve at the carpal tunnel. (Px.2)

On September 23, 2014, Petitioner told Dr. Fortin that after the EMG study performed September 10, 2014, her elbow felt like it was on fire. Dr. Fortin commented that in addition to Petitioner's elbow pain, she had fibromyalgia which may be a factor contributing to her elbow pain. Dr. Fortin also commented the elbow pain was not caused by the EMG study. (Px.2)

On October 1, 2014, Petitioner was evaluated by her family physician, Dr. Venigalla. The doctor noted Petitioner had a history of hypothyroidism, generalized anxiety, hypertension, degenerative disc disease, and hyperlipidemia. Petitioner told Dr. Venigalla her right-sided carpal tunnel syndrome was worse than the left. She also complained of ongoing numbness in her feet. (Px.2)

Petitioner indicated she received some Prednisone from the neurologist for her elbow pain, and her symptoms were much better. (Px.2) Dr. Leutz performed four surgeries on Petitioner's upper extremities. He performed a right carpal tunnel release February 20, 2015 and a left carpal tunnel release March 13, 2015. (Px.2) Dr. Leutz performed surgery on Petitioner's right elbow May 1, 2015. The procedure consisted of a right lateral epicondylar release. (Px.2) Dr. Leutz performed surgery on Petitioner's left elbow July 17, 2015. The procedures included a left cubital tunnel release with a submuscular transposition. He also performed releases of both the medial and lateral epicondyles. (Px.2)

At trial, Petitioner testified she did not have any permanent restrictions imposed on her activities.

Dr. Leutz wrote a letter to Petitioner's attorney dated February 10, 2016. The letter indicates Petitioner told Dr. Leutz that her job duties included work with log books, typing, ledgers, and documentation. Dr. Leutz rendered an opinion Petitioner's job duties were a direct contribution and aggravation and may have even caused Petitioner's symptoms to warrant the need for operative treatment on both the wrist and elbows. He stated his opinions were with a "certain degree" of medical and surgical certainty. (Px.2)

Dr. Leutz acknowledged Petitioner had active problems of fibromyalgia, hypothyroidism, pre-diabetes, and an elevated BMI. He further stated he did not believe those comorbidities alone were the cause of her condition. However, he then acknowledged Petitioner's diabetes and elevated BMI can contribute to her conditions. (Px.2)

At the request of Respondent, Petitioner was evaluated by Dr. Ryan Calfee on December 19, 2014 and May 4, 2016. Dr. Calfee testified by way of evidence deposition November 11, 2016. (Rx.2) Dr. Calfee is a board-certified orthopedic surgeon whose practice is focused on hand and elbow conditions. (Rx.2, pp.5-6)

Dr. Calfee noted Petitioner had thyroid issues, neuropathy, and was diagnosed with pre-diabetes. (Rx.2, p.9) Petitioner told Dr. Calfee that her job duties included the use of her left hand to hold books open. Her job duties also included entering data, collecting payments both manually and using the computer. She also indicated she uses a cash register. Dr. Calfee agreed with the diagnoses of bilateral carpal tunnel syndrome, left medial epicondylitis, and right lateral epicondylitis. (Rx.2, pp.15-16)

Dr. Calfee rendered an opinion that Petitioner's job duties as described by Petitioner and as set forth on the written job descriptions are not the type which would cause or aggravate a carpal tunnel condition. Dr. Calfee explained that the type of activities which increase the chance of developing or causing carpal tunnel syndrome are more of a high force repetitious-type of work. He gave examples of using a jackhammer or of doing something for prolonged periods of time with the wrist extremely flexed. (Rx.2, p.16)

With respect to Petitioner's elbow conditions, Dr. Calfee testified Petitioner's job duties are not of the type which would cause or aggravate the elbow conditions. He did not believe there is a causal relationship between Petitioner's job duties and either of her elbow conditions. (Rx.2, pp.26-27)

As of the time of Dr. Calfee's second exam of Petitioner May 4, 2016, he did not believe Petitioner needed any additional treatment for her upper extremities, and he did not believe Petitioner needed any work restrictions on her activities as a result of her upper extremity conditions. (Rx.2, p.28)

At trial, Petitioner testified she retired from working for the City of White Hall. She is currently living on her farm. Petitioner testified she has difficulty performing some activities. She noted she is unable to use a tiller because it vibrates. She also noted using the tiller aggravates her elbows. Petitioner further testified she is limited with how much she can use a riding lawn mower. She also indicated she now only fills a five gallon bucket halfway with water or feed.

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?

In a workers' compensation action, the claimant has the burden of proving, by a preponderance of the evidence, all of the elements of her claim. *O'Dette v. Industrial Comm'n*, 79 Ill.2d 249 (1980). An employee who alleges injury based on repetitive trauma must still meet the same standard of proof as other claimants alleging an accidental injury. *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill.2d 524

(1987). That is, there must be a showing that the injury is work-related and not the result of a normal degenerative aging process. *Id.*

Here, Petitioner is alleging repetitive trauma injuries to each wrist and each elbow. Petitioner did not specifically attribute any particular job duties to the cause of her carpal tunnel syndrome conditions. Presumably, Petitioner is attributing the right-sided carpal tunnel syndrome to data entry. There is no indication Petitioner performed any significant work with her left hand.

The Illinois Workers' Compensation Commission previously denied benefits, in part, to a claimant alleging repetitive trauma injuries when the claimant testified she does not do one activity over and over during her shift. (*Coultas v. EMI*, 01 WC 50174, 06IWCC0807). The Commission also denied benefits to a claimant who failed to prove by a preponderance of the credible evidence that the performance of her work involved constant or repetitive activity that gradually caused deterioration of or an injury to a body part. (*Jalil v. United Airlines*, 04 WC 005855, 09IWCC0014).

Here, Petitioner's job duties do not meet the standards set forth by the previous commission decisions.

Petitioner attributed her left elbow condition to holding open a book, and she attributed her right elbow condition to lifting books which generally weighed about 2 pounds or less. Additionally, Petitioner testified she lifted the books with two hands.

In light of the relatively few number of times Petitioner would lift the books on a daily, weekly, or monthly basis, the Arbitrator finds those activities to not be causative in Petitioner's conditions. Similarly, the Arbitrator finds the mere act of holding open a book to not be causative of Petitioner's left elbow conditions.

The Arbitrator finds the opinions rendered by Dr. Calfee to be persuasive. Additionally, the Arbitrator finds the opinions rendered by Dr. Leutz are not necessarily based upon an accurate understanding of Petitioner's job duties.

Based upon the foregoing, and the record taken as a whole, the Arbitrator finds Petitioner failed to prove she sustained accidental injuries which arose out of and in the course of her employment for Respondent. The Arbitrator further finds Petitioner failed to prove a causal relationship between her job duties and her conditions of ill-being.

All remaining issues are moot.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAIME SOLIS,

Petitioner,

19IWCC0496

vs. NO: 16 WC 00726

THE PATIO,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 12, 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: SEP 12 2019
O091019
MEP/ypv
049

Maria E. Portela

L. Elizabeth Coppoletti

Thomas J. Tyrrell

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

SOLIS, JAIME
Employee/Petitioner

Case# **16WC000726**

THE PATIO
Employer/Respondent

19IWCC0496

On 3/12/2018, 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:

2553 LAW OFFICE OF JAMES P McHARGUE
BRENTON M SCHMITZ
123 W MADISON ST SUITE 1000
CHICAGO, IL 60602

0445 RODDY LAW LTD
AUSTIN FRIEDRICH
303 W MADISON ST SUITE 1900
CHICAGO, IL 60606

19IWCC0496

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)

Jaime Solis
Employee/Petitioner

v.

The Patio
Employer/Respondent

Case # **16** WC **0726**

Consolidated cases: ______

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Steven Fruth** Arbitrator of the Commission, in the city of **Chicago, IL**, on **April 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. ☒ 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 29, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**25,400.96**; the average weekly wage was $**488.48**

On the date of accident, Petitioner was **41** years of age, ***married*** with **1** dependent children.

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

Respondent shall be given a credit of $**22,049.26** for TTD, $0.00 for TPD, $**0** for maintenance, and $**30,282.74** for other benefits (prior medical payments,) for a total credit of $**52,332.50**.

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

ORDER

The Arbitrator has found that Petitioner failed to prove that his claimed current condition of ill-being is causally related to his workplace accident on December 29, 2015. Therefore, the Arbitrator finds that Petitioner failed to prove that he is entitled to the prospective medical recommended by Drs. Primus and Markarian, named surgical repair of a right torn rotator cuff.

All benefits are denied.

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

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

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

19IWCC0496

Signature of Arbitrator

March 12, 2018
Date

MAR 1 2 2018

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 and services?; ***L:*** What temporary benefits are in dispute? TTD

Petitioner and witnesses Luis Ceja and Guillermo Ceja testified through a Spanish translator.

FINDINGS OF FACT

Petitioner Jaime Solis testified that on December 29, 2015, he was employed by Respondent The Patio as a cook. His responsibilities included cooking Greek food, barbecue ribs, barbecue and chicken, and "other stuff." Petitioner testified that he had been working at The Patio for almost one year. His manager was George Stefas; the kitchen manager was John Kostopoulos. On December 29, Petitioner arrived between 9:30AM and 10:00AM. There were 4 employees in the kitchen that day: Luis Ceja and Guillermo Ceja, as well as Petitioner and "German."

Petitioner testified that he called in sick 3 or 4 days prior to December 29 because he had the chills and did not feel well. Petitioner returned to work on December 27, 2015. He testified while clocking in at the customer counter he told Mr. Stefas he had missed work because he did not feel well and had the chills. Petitioner also reported the same to Sam (Isem Bislimi) after speaking with Mr. Stefas.

Petitioner testified that he had not sustained any injuries outside of work before December 27. On that day, Petitioner did not feel well and had chills about two hours into his shift. He asked to go home and was allowed to do so.

Petitioner testified that on December 29, 2015 he arrived at The Patio for work between 9:30AM and 10:00AM. He stated other workers present were Luis Ceja, Guillermo Ceja, and "German", a friend. Between 11:00AM and 11:30AM, there was no work, so Guillermo went to lunch. He testified while Guillermo was at lunch, work started up suddenly and Luis talked with profanity to make his hands "move quicker" because

they had orders pending and they needed to work rapidly. Petitioner told Luis to "relax" and that he is not the manager or owner.

Petitioner testified that Luis went to where Guillermo was in the back. Luis was gone for 10 to 15 minutes. Petitioner could not hear or see Luis or Guillermo then. Petitioner stated 20 to 25 minutes passed while only he, Luis, and German were in the kitchen.

Petitioner testified that he was cleaning the grill when he was pushed from behind by Guillermo. Petitioner fell onto his right shoulder and right hand. He hit his neck of the deep fryer. While he was on the ground, Petitioner stated Guillermo did not try to punch him. He did not lose consciousness.

Petitioner testified that Luis and Guillermo had been "aggressive" with other co-workers.

Petitioner testified that he had not hurt his right shoulder, right hand, or neck in any accident before December 29, 2015. He also denied prior medical treatment for his right shoulder, right hand, or neck before December 29. At trial, Petitioner testified that his neck feels OK, but it does pop occasionally. He does not sleep due to pain in his right shoulder. He has tingling and pulsations in his right hand. He wishes to have the surgery that Dr. Primus and Dr. Markarian have recommended.

Petitioner testified that manager George Stefas came into the kitchen and helped him up off the floor. Petitioner told George that his neck, shoulder, and head were hurting. Petitioner asked to talk to George about the incident, but George said he should go home and they will talk tomorrow.

While driving home Petitioner's vision became "cloudy" and he stopped at La Clinica, at 69th and Harlem. He testified that he knew of a clinic nearby that he had driven past many times, so he drove himself to La Clinica (PX #2). He was seen that same day by chiropractor Dr. Adrian Zaragoza and began physical therapy. Dr. Zaragoza noted Petitioner's report that he had been tackled to the ground by a coworker. Petitioner reported that he landed on his right side and hit his head. He also hit his right hand on a metal counter. Petitioner also gave a history of a 2012 Workers' Compensation claim for right hand tendonitis. Petitioner presented with complaints of right hand, right shoulder, and neck pain. He reported that he had no prior injuries to his right hand or right shoulder.

Petitioner testified that he told Dr. Zaragoza that he was pushed and not tackled.

Petitioner marked a diagram showing pain in his neck, right shoulder, and right hand (PX #2). He gave a history that he fell onto his right side, hitting his right knuckle on the metal edge of a counter, and his head on the ground. Petitioner denied loss of consciousness. On examination Dr. Zaragoza noted reduced range of motion in the cervical spine, right shoulder, and right wrist. Dr. Zaragoza also noted swelling in the right hand. Dr. Zaragoza noted x-rays demonstrated a fracture of the 4th metacarpal of the right hand (knuckle) from an x-ray read by the radiologist as showing a questionable lucency of the scaphoid.

Dr. Zaragoza diagnosed a concussion, right hand fracture, right shoulder sprain, and a cervical sprain/strain. Dr. Zaragoza took the Petitioner off work until January 12, 2015 and ordered physical therapy 3 times a week for 4 weeks. Petitioner began physical therapy a La Clinica on December 30, which continued through July 28, 2016. Petitioner was also seen by Drs. Kathryn Engel-Morales and Dulce Vazquez. Petitioner testified that Dr. Zaragoza referred him to Drs. Hussain and Primus. He testified that Dr. Primus recommended shoulder surgery as soon as possible.

Petitioner consulted Dr. Intesar Hussain of the Pain Center of Illinois January 4, 2016 (PX #3). Dr. Hussain noted Petitioner's report of working cleaning the grill at The Patio when a co-worker pushed him and he fell onto his right side and hand and hit the right side of his head. Dr. Hussain diagnosed neck pain secondary to facet joint involvement, right shoulder pain which could be bursitis or tendonitis, right wrist pain that could be bursitis or tendonitis, and right hand pain due to a 4th metacarpal fracture. Dr. Hussain recommended medication and continued physical therapy. He also took Petitioner off work. Dr. Hussain recommended an MRI of his right shoulder and a referral to Dr. Primus, an orthopedist.

The right shoulder MRI, on February 23, 2016, revealed a complete rupture of the supraspinatus with retraction.

Petitioner saw Dr. Dore DeBartolo, D.O., of Chicago Center for Sports & Orthopedic Surgery (Chicago Center) on January 26 and February 25, 2016 (PX #4). Petitioner presented with complaints of right shoulder and right hand pain due to a work-related injury on December 29, 2015. On January 26 Petitioner reported that he had been pushed while at work and fell onto his right shoulder and right hand. Petitioner did not report that he had struck his head. Dr. DeBartolo noted x-rays of the right shoulder demonstrated moderate arthritis of the AC joint, barrel narrowing with spurs. On examination, right shoulder motion was full but painful above 90°. Strength was normal. There was decreased range of motion in the 4th` and 5th fingers of right hand. Finger

strength was normal. Dr. DeBartolo diagnosed a displaced fracture of the right 4th metacarpal and a sprain of right acromioclavicular joint.

In follow-up with Dr. DeBartolo February 25, 2016 Petitioner reported that he had been having physical therapy on the right hand but that his symptoms were getting worse. Dr. DeBartolo reviewed the right shoulder MRI and added the diagnosis right rotator cuff tear.

Petitioner consulted Dr. Gregory Primus of Chicago Center March 7, 2016 (PX #4). Petitioner complained of right hand and shoulder pain since a work-related injury on December 29, 2015. He gave a history of being pushed backward onto his right shoulder. Dr. Primus recommended physical therapy for the metacarpal fracture and surgery for the right shoulder. Dr. Primus reiterated his recommendation for shoulder surgery throughout follow-up visit notes.

Petitioner testified that as of the date of the trial, he has not had surgery and he wishes to proceed with surgery.

Petitioner testified that he switched attorneys and the new attorney recommended Dr. Ravi Barnabas. Petitioner testified that he told Dr. Barnabas of the altercation on December 29, 2015 as he was pushed to the ground by a co-worker while working and that no one attempted to punch him. He testified that Dr. Barnabas had a translator present. Petitioner's wife who is fluent in English and Spanish also translated. Dr. Barnabas notes indicate Petitioner reported that he was going out when a co-worker came and punched him and he fell down hurting his right shoulder (PX #5). The doctor's records note Petitioner told him this co-worker had also threatened other people and that he reported the incident to the police.

Dr. Barnabas gave Petitioner the choice of either Dr. Harsoor or Dr. Chunduri for his neck, and Dr. Markarian or Dr. Giannoulias for the right shoulder.

Petitioner consulted pain management specialist Dr. Suneela Harsoor August 5, 2016 (PX #6). Petitioner complained of neck and right shoulder pain from an injury at work on December 29, 2015. Petitioner reported that he had been pushed by a coworker and fell to the floor onto his right side. He reported that he blacked out. He also gave his history of care at La Clinica and with Dr. Primus. Dr. Barnabas had referred petitioner to Dr. Harsoor for pain management. After a clinical exam and review of MRI reports Dr. Harsoor diagnosed rotator cuff injury, cervical disc herniation, and resolving hand fracture. She recommended physical therapy, medications, and possible injections if pain persisted.

Petitioner also consulted orthopedic surgeon Dr. Gregory Markarian on August 5 (PX #7). Petitioner gave a history of being attacked by a coworker at work. He was pushed and fell onto his right side. He reported immediate right shoulder pain. Petitioner described his care at La Clinica and with Dr. Primus. Dr. Markarian noted that Dr. Primus and Dr. "Nick" Verma both recommended shoulder surgery. Dr. Markarian diagnosed a work-related rotator cuff tear. On August 10, 2016 Dr. Markarian reviewed additional x-ray and MRI imaging. He confirmed a diagnosis of full thickness rotator cuff tear with retraction. He agreed that petitioner was a candidate for right shoulder biceps tenotomy and possible rotator cuff repair versus capsular reconstruction and AC resection.

Petitioner testified that Dr. Barnabas referred him to Dr. Ossama Abdellatif. Petitioner saw Dr. Abdellatif on September 22, 2016 (PX #8). Petitioner gave a history that he had been beat at work by coworkers. He reported that he had been knocked to the floor onto the right side of his body. Petitioner stated that police were called in and a report was made.

Petitioner complained to Dr. Abdellatif of cervical pain radiating into both arms, bilateral shoulder pain, right greater than left, and lower back pain radiating into the legs (PX #8). Dr. Abdellatif diagnosed cervical facet syndrome, cervical radiculopathy, lumbar facet syndrome, lumbar radiculopathy, myofacia pain, and right shoulder pain/tear. Dr. Abdellatif administered cervical trigger point injections, facet injections from C3-C7 bilaterally, and a cervical ESI at C7-T1 on September 28, 2016, and again on October 19, 2016. Dr. Abdellatif performed a third C7-T1 ESI on November 4, 2016, as well as radiofrequency ablation from C4-C7 bilaterally.

Respondent called Isem (Sam) Bislimi as a witness. Mr. Bislimi is the manager at The Patio and has been employed there for 30 years. He is responsible for "everything" in the kitchen. His supervisor is the general manager, George Stefas. Mr. Bislimi' s position includes managing employees.

Mr. Bislimi recalled a conversation with Petitioner on December 27, 2015 at the clock-in register area of the restaurant. Mr. Bislimi testified that Petitioner told him he had hurt his arm in a fall at home. He is not sure which arm Petitioner pointed to but later testified it was the left arm. Mr. Bislimi testified that there was a surveillance camera covering the check-in area. He reviewed footage of the surveillance of Petitioner's check-in on December 27. After review of the surveillance video he testified Petitioner pointed to his right arm. George Stefas then joined Mr. Bislimi and asked Petitioner if he could work. Mr. Bislimi also testified that he noticed Petitioner's arm was swollen.

Respondent played Respondent's Exhibit #1 (later admitted as Respondent's Exhibit #9), a video recording from the clock-in area on December 27. The video is from

above, giving a coronal view of the cash register and clock-in area. The video showed Petitioner with Mr. Bislimi at the register where employees clock in. The Arbitrator noted that Petitioner was cradling his right wrist and arm in his left hand.

Mr. Bislimi prepared a report of the incident in the kitchen on December 29, 2015 (RX #10). He was off work the day of the incident.

On cross-examination Mr. Bislimi acknowledged that Petitioner pointed to his left arm and not his left shoulder on December 27. Petitioner did not point to his neck on December 27 either. He also testified that Luis and Guillermo Ceja have two other relatives working at The Patio.

Respondent called John Kostopoulos as a witness. Mr. Kostopoulos is Respondent's kitchen manager. He makes the schedule and oversees the cooks and their food preparation. Mr. Kostopoulos testified to a conversation occurring on a Wednesday between 4:00PM and 5:00PM when Petitioner told him that he could not work because of a problem with his arm. Mr. Kostopoulos told Petitioner that if could not work he should go home. Petitioner said he had hurt his arm in a fall in the house.

On cross-examination, Mr. Kostopoulos acknowledged that Petitioner did not mention an accident or injury to his arm, and merely stated that the arm hurt. When asked where the arm purportedly hurt, he indicated the entire right arm.

Respondent called George Stefas as a witness. Mr. Stefas is the general manager of The Patio, and has been employed by The Patio for close to 7 years. He oversees the daily operations of the restaurant, as well as customer contact and managing employees. He testified that Petitioner called in sick on December 26, and worked on December 27. On December 27, Petitioner told Mr. Stefas that he had injured his right arm and hand at home December 26 during a Christmas party at his house. Petitioner only worked for an hour or so on December 27, and left early.

Mr. Stefas was present at the restaurant when the altercation of December 29, 2015 took place. He heard arguing and screaming from the kitchen between Petitioner and another cook. The arguing and screaming was mostly in Spanish. He did not see a physical altercation of any kind. When he went into the kitchen, he saw Petitioner laying on the floor, with Guillermo and Luis standing a few feet away. He did not see anyone kick or attempt to kick Petitioner when he was down. Mr. Stefas helped Petitioner up off the floor. Petitioner told George he had been pushed because of an argument.

Mr. Stefas prepared a written report of his conversations with Petitioner prior to December 29, RX #2 (later rejected as Respondent's Exhibit #10). The report was marked as Respondent's #2 but was not admitted based on petitioner's objection.

Mr. Stefas testified that he had no prior disciplinary issues with Guillermo or Luis Ceja. On cross-examination, he testified that he completed his report on February 10, 2016, at the request of Janet Koliopoulos, the owner of the restaurant (RX #10). Mr. Bislimi and Mr. Kostopoulos also signed the report. They gave him some of the information regarding the December 27 exchange. The report documented an altercation in the kitchen between Petitioner and one or two of the Ceja brothers.

Respondent called Luis Ceja as a witness. Luis has been employed as a cook for more than 10 years at The Patio. On December 29, 2015, he was working with Petitioner. He asked Petitioner to help him in the kitchen, but Petitioner would not help. Petitioner responded in Spanish, *chinga tu madre,* which translates as "son-of-a-bitch" in English. Petitioner stated this 2 or 3 more times. Luis did not respond to this and continued working. Petitioner then repeated the same profanity further times. Luis was alone in the kitchen with Petitioner when this was going on.

When Mr. Ceja's brother Guillermo returned from his break, Petitioner purportedly uttered this profanity again. Guillermo asked Petitioner to calm down about 3 times and tried to get Petitioner out of the kitchen. Petitioner then threatened Guillermo and Guillermo then pushed Petitioner. Luis did not actually see Petitioner pushed to the ground. He did not see Guillermo attempt to punch or kick Petitioner when he was down.

Luis spoke with Petitioner when he came to work on December 27. Petitioner said he couldn't work that day because he fell down stairs in his house after drinking. Petitioner worked 40 minutes to an hour that day.

On cross-examination, Luis stated that on December 29 when Guillermo returned from his break, he did not say anything to Petitioner. Luis then stated that Guillermo told Petitioner to calm down when he heard Petitioner use bad words with Luis. Guillermo then put his arm around Petitioner and tried to guide him out of the kitchen.

On cross-examination, Luis testified that approximately 20 minutes after Guillermo went on break, Luis asked Petitioner for help with the grill station. Specifically, Luis asked Petitioner to hand him something. Petitioner responded by calling him a "son-of-a-bitch" out of the blue. Luis asked Petitioner for help again, and Petitioner repeated

the profanity. Again, Luis asked Petitioner to calm down, and Petitioner repeated the profanity a third time.

On cross-examination, Luis testified that Guillermo put his arm around Petitioner and tried to guide him out of the kitchen when Petitioner fell.

Respondent called Guillermo Ceja to testify. He has been employed by The Patio for more than 15 years as a cook. Guillermo testified that before December 29, 2015 Petitioner came to work complaining about his right arm and neck. He could not remember the exact date but was certain it was before December 29. Petitioner said that he had been drinking and fell down stairs at his home. Guillermo testified that Petitioner pulled up his shirt to show "marks" from the fall. Petitioner did not work that day and was sent home.

Guillermo admitted that on December 29 he pushed Petitioner to the ground. He had been on break and returned to the kitchen when Petitioner was calling his brother Luis a son-of-a-bitch. Guillermo testified that he had not talked to Luis before he returned to the kitchen from his break. Guillermo testified that he tried to calm Petitioner down but Petitioner continued to call Luis a son-of-a-bitch. Guillermo tried to push Petitioner out of the kitchen and pushed Petitioner in the chest which caused Petitioner to fall to the floor. He did not try to kick or punch Petitioner while he was down.

Petitioner underwent a §12 IME of his right shoulder with orthopedic surgeon Dr. Nikhil Verma on May 25, 2016 (RX #1). Petitioner gave a history of a physical altercation with a coworker December 29, 2015, when he fell to the ground onto his right side. Petitioner denied that he had any shoulder injury prior to the December 29 altercation. Petitioner stated he was involved in a physical altercation with a coworker and fell to the ground and landed on his right side. Dr. Verma was informed by referring counsel for Respondent that Petitioner had reportedly injured his right arm on Christmas day and had been unable to work more than 40 minutes on December 27.

Dr. Verma reviewed Petitioner's medical records from La Clinica, including imaging of the right shoulder and hand. Dr. Verma noted that Petitioner had been diagnosed with an AC joint sprain. A February 13, 2016 MRI showed a full thickness tear of the supraspinatus. Petitioner complained of right shoulder pain and difficulty with arm elevation due to weakness. On exam Dr. Verma found normal cervical range of motion without specific pain, reduced shoulder range of motion, and reduced strength on shoulder abduction and external rotation.

Dr. Verma diagnosed a right shoulder rotator cuff tear. Dr. Verma was unable to opine whether the cuff tear was related to the workplace altercation given the apparent

history of two traumas within a short period of time. Dr. Verma did opine that medical care to that point was reasonable given the diagnosis. Dr. Verma further opined that arthroscopic surgical repair of the torn rotator cuff was reasonable but could not opine whether it was relatable to either trauma. Dr. Verma also noted that Petitioner did not display any evidence of malingering. Finally, Dr. Verma opined that Petitioner could work with light duty 5-pound lifting restrictions with no overhead activity or repetitive lifting.

Respondent submitted five Utilization Reviews, all of which were admitted in evidence.

Respondent's Exhibit #4 is a January 6, 2017 Utilization Review addressed to Dr. Barnabas, which certified rental of an ice machine from August 13 to August 19, 2016 in response to Dr. Barnabas' request for three weeks' use. There was no evidence of any response to or appeal of the UR.

Respondent's Exhibit #5 is a January 19, 2017 Utilization Review addressed to Dr. Markarian, which denied the medical necessity of Terocin patches. There was no evidence of any response to or appeal of the UR.

Respondent's Exhibit #6 is an August 23, 2016 Utilization Review addressed to Dr. Primus, which denied the medical necessity physical therapy as of July 13, 2016. There was no evidence of any response to or appeal of the UR.

Respondent's Exhibit #7 is an August 23, 2016 Utilization Review addressed to Dr. Primus, which denied the medical necessity of a compound topical cream. There was no evidence of any response to or appeal of the UR.

Respondent's Exhibit #8 is a September 26, 2016 Utilization Review addressed to Dr. Hussain, which denied the medical necessity of cervical medial branch blocks. There was no evidence of any response to or appeal of the UR.

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 an accident occurred that arose out of and in the course of Petitioner's employment by Respondent.

Petitioner claims that he was injured as a result of a physical altercation with his co-worker Guillermo Ceja on December 29, 2015. There is no dispute that a physical altercation between Petitioner and Guillermo Ceja took place December 29 in the kitchen of The Patio. Injuries sustained in the workplace which resulted from a physical altercation or fight may be compensable provided that the fight arose out of and in the course of the employment and provided that the claimant was not the aggressor in the fight.

An injury arises out of one's employment if it originates from a risk connected with, or is incidental to, the employment and involves a causal connection between the employment and the injury. Generally, injuries sustained on an employer's premises during after work hours are generally deemed to arise in the course of the employment. The employee must prove that they were subjected to a risk that was incidental to their work. Further, the employee must prove that they were performing some task in the furtherance of the employer's business or some activity incidental to the business at the time at issue. The mere fact that the employee is at the place of employment when injured is not sufficient to support a claim.

A fight resulting from a quarrel in the workplace, such as some disagreement as to how the work is to be done and the manner of doing it, is compensable. However, a fight which was purely personal in nature or when the claimant is the aggressor is not compensable. While the Arbitrator notes that the dynamics of the altercation between Petitioner and his co-worker are suggestive of personal animosity, there was no direct evidence that the dispute was indeed personal.

The evidence supports a finding that the altercation between Petitioner and his co-worker Guillermo Ceja was in some manner related to the means and method of Petitioner's performance of his work duties. As such, the evidence supports a finding that Petitioner's claimed injuries arose out of and in the course of his employment.

Further, the Arbitrator finds that there is no evidence that Petitioner was the physical aggressor in the altercation with Guillermo. The question of who struck the first blow, while important, is not decisive. There was evidence that Petitioner was a verbal aggressor by the purported use of profanity. The evidence did not support a finding that Petitioner's verbiage amounted to "fighting words." In addition, there was no evidence that Petitioner even struck a blow.

Fights among co-workers arising out of disputes concerning the employer's work are risks incidental to the employment, and resulting injuries are compensable. It is speculative whether there was pre-existing animus between Petitioner and either of the

Ceja brothers. But, the evidence established that the incident shoving of Petitioner by Guillermo Ceja was related in some fashion to work activities.

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

The Arbitrator finds that Petitioner failed to prove that his current claimed condition of ill-being is causally related to the workplace incident on December 29, 2015. The Arbitrator's finding is primarily based on Petitioner's lack of credibility.

Petitioner clearly testified that he had not injured his right shoulder or arm before his fight with Guillermo Ceja at work December 29, 2015. Luis Ceja, Guillermo Ceja, George Stefas, and Isem Bislimi all testified that Petitioner reported that he had injured his shoulder in a fall at home before the December 29 fight. While the number of witnesses testifying to a particular fact may not be convincing if a lesser number of witnesses is more convincing when testifying to that fact. However, here the number of witnesses regarding Petitioner's claim that he injured his right shoulder at work December 29 is, in fact, more persuasive, even given the obvious self-interest of all the witnesses. The Arbitrator finds the cumulative evidence that Petitioner injured his shoulder prior to December 29 credible and persuasive.

In addition, Petitioner's evidence showed that he was, at the very least, in inaccurate and unreliable medical historian. Petitioner's evidence showed multiple versions as to how the altercation and claimed injury occurred. Dr. Zaragoza's record from December 29, 2015 notes Petitioner reported he was tackled to the ground and that his co-worker attempted to punch him. Dr. Barnabas noted Petitioner reported he was punched while going out of work. Dr. Harsoor noted that Petitioner said he blacked out. On the same day Petitioner saw Dr. Harsoor, he saw Dr. Markarian but did not report a loss of consciousness. Dr. Abdellatif documented Petitioner's report that he had been beat up by several co-workers and that the police were involved. All of these versions are contrary to Petitioner's testimony at trial.

The Arbitrator's finding is also supported by the video of Petitioner's check-in for work on December 27, 2015. The video shows Petitioner cradling and favoring his right arm, raising the inference that the arm was painful at that time. This is objective evidence undermining Petitioner's credibility in his denial of prior injury or problems with his right arm and shoulder.

J: Were 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 has previously found that Petitioner failed to prove that his current claimed condition of ill-being is causally related to the workplace incident on Decemeber 29, 2015. Therefore, this issue is moot.

The Arbitrator does note that Petitioner was diagnosed with a full thickness tear of right rotator cuff and a fracture in the right hand. Respondent's §12 examining orthopedist, Dr. Nikhil Verma, confirmed the torn rotator cuff diagnosis and agreed with the recommendation for surgery. The Arbitrator notes that the medical care and treatement for that diagnosis was reasonable and necessary. The Arbitrator also notes that the recommendation for surgical repair of the torn rotator cuff was reasonable. But for Petitioner's failure to prove causal connection Petitioner would be entitled to payment for his medical care up to the date of the arbitration hearing.

Respondent submitted Utilization Reviews which found requests for rental of an ice machine prescribed by Dr. Barnabas, Terocin patches, additional physical therapy, compound topical cream prescribed by Dr. Primus, and cervical medial branch block and trigger point injections not medical necessary or reasonable. There was no evidence that timely appeals for these denials were asserted. But for Petitioner's failure to prove causal connection Petitioner would adopt the findings of the Utilization Reviews.

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

The Arbitrator has previously found that Petitioner failed to prove that his current claimed condition of ill-being is causally related to the workplace incident on Decemeber 29, 2015. Therefore, this issue is moot.

The Arbitrator does note that Petitioner was diagnosed with a right rotator cuff tear. The Arbitrator also notes that the medical care and treatement for that diagnosis was reasonable and necessary. The Arbitrator also notes that the recommendation for surgical repair of the torn rotator cuff was also reasonable. But for Petitioner's failure to prove causal connection Petitioner would be entitled to payment for his medical care up to the date of the arbitration hearing.

L: What temporary benefits are in dispute? TTD

The Arbitrator has previously found that Petitioner failed to prove that his current claimed condition of ill-being is causally related to the workplace incident on December 29, 2015. Therefore, this issue is moot.

Pettioner was off work from the date of the incident, December 29, 2015, up to the date of the hearing, April 25, 2017. But for Petitioner's failure to prove causal connection Petitioner would be entitled to TTD commencing December 29, 2015 through April 25, 2017.

Steven J. Fruth, Arbitrator

March 12, 2018
Date

STATE OF ILLINOIS	)		
	) SS.		
COUNTY OF COOK	)		

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WILLIAM J. BILBREY,

Petitioner,

vs. NO: 14 WC 36014

ILLINOIS DEPARTMENT OF TRANSPORTATION,

Respondent.

19IWCC0497

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, causal connection, notice and permanent disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 16, 2017 is hereby affirmed and adopted.

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

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

No 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.

DATED: SEP 13 2019
LEC/bsd
0072319
43

L. Elizabeth Coppoletti

Thomas J. Tyrrell

Maria Portela

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BILBREY, WILLIAM J
Employee/Petitioner

Case# **14WC036014**

14WC036015

IDOT
Employer/Respondent

19IWCC0497

On 11/16/2017, 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 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:

1759 MARTAY LAW OFFICES
WILLIAM H MARTAY
134 N LASALLE ST 9TH FL
CHICAGO, IL 60602

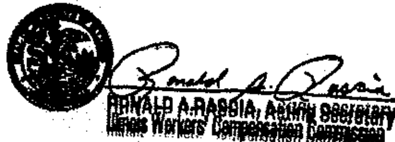
5830 ASSISTANT ATTORNEY GENERAL
MATTHEW J KELLER
ONE W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1430 CMS BUREAU OF RISK MANAGEMENT
WORKERS' COMPENSATION MANGER
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

NOV 16 2017



19IWCC0497

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

WILLIAM J. BILBREY
Employee/Petitioner

v.

I.D.O.T.
Employer/Respondent

Case # **14** WC **36014**

Consolidated cases: **14 WC 36015**

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

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☒ What was the date of the accident?

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

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

G. ☐ What were Petitioner's earnings?

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

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

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

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

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

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

N. ☐ Is Respondent due any credit?

O. ☐ Other _____

FINDINGS

On **March 10, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**71,840.08**; the average weekly wage was $**1,381.54**.

On the date of accident, Petitioner was **62** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**0.00** 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*:

> The Arbitrator finds the Petitioner did not suffer an accident that arose out of and in the course of his employment with the Respondent AND his present condition of ill-being is not causally related to the alleged accident. Therefore, this claim for benefits under the Act (14 WC 36014) 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

NOVEMBER 16, 2017
Date

NOV 16 2017

WILLIAM J. BILBREY v. ILLINOIS DEPARTMENT OF TRANSPORTATION

14 WC 36014

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter was tried before Arbitrator Steffenson on April 10, 2017.[1] The issues in dispute were accident, notice, causal connection, medical bills, and the nature and extent of the injury. (*Arbitrator's Exhibit* 1A). The parties requested a written decision, including findings of fact and conclusions of law, pursuant to Section 19(b) of the Act and agreed to receipt of this Arbitration Decision via e-mail. (*Arbitrator's Exhibit* (hereinafter, *AX*) 1A).

FINDINGS OF FACT

The Petitioner testified that he had been hired by the Respondent in 2007. (*Transcript* at 12). His position was classified as a highway maintainer. (*Transcript* (hereinafter, *T.*) at 15). The Petitioner testified his duties pertained to highway repair, cutting the grass, pothole patching, and picking up trash. (*T.* at 15). He stated that his job required him to do lifting, bending, standing, walking on uneven slopes, and such. (*Id.*) He indicated he was assigned to work on the Edens Expressway. (*Id.*)

In October of 2013, the Petitioner's position had become one of acting lead worker and that he was now responsible for a crew of people. (*T.* at 16). He asserted that as an acting lead worker, he was assigned a vehicle for his sole use that he drove from five to seven days a week. (*T.* at 17). The vehicle had a front seat that was in disrepair that the Petitioner described as "the whole left side of the seat was broken out, ... So when you sat in the truck, you sat back and to the side. Every time you hit a bump, you went to the bottom of the seat, [and it] pounded on my back." (*T.* at 18). The Petitioner indicated he was the only one to drive this vehicle from October 2013 until March 10, 2014. (*T.* at 21). He testified riding in this vehicle for those five months, without the seat being repaired, caused "[his] sciatic nerve was getting to the point where [he] couldn't hardly walk." (*T.* at 21).

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[1] In the interest of judicial economy, this claim was consolidated with 14 WC 36015 and both matters were tried at the same time on April 10, 2017. The Arbitrator has prepared a separate Arbitration Decision for 14 WC 36015.

Petitioner presented two photos of the seat that he took on October 25, 2013. (*Petitioner's Exhibit* 2). These photos show the front seat having, what appears to be, intact foam on the inside with a vinyl cover; however, the vinyl was ripped with a large piece of vinyl missing. (*Petitioner's Exhibit* (hereinafter, *PX*) 2).

The Petitioner provided a memorandum dated "3-10-14" to his supervisor, Mr. Robert Duda. (*PX* 1). The memorandum reads in pertinent part:

> "For the last 5 months I have been driving T37749-334 that has had a bad front seat. ... It took a long time to get the process going to get the seat somewhat fixed. ... Now I have leg pain down my leg and my back is hurting so I am going to see a doctor before it gets worse. After I talk to the doctor I will let you know if this may be a workers comp claim." (*PX* 1).

He confirmed his signature at the bottom of the memorandum and confirmed the date of the document was March 10, 2014. (*T.* at 21). The Petitioner also maintained the accident date was March 10, 2014. (*AX* 1A and *T.* at 30-31). However, he also testified he first started noticing his injury and symptoms around two weeks after he began driving the vehicle, in October of 2013. (*T.* at 39-40). The Respondent presented a notice of injury form that had been executed by the Petitioner. (*Respondent's Exhibit* 1). On that form, dated, March 13, 2014, the Petitioner reported to the Respondent that the injury started on November 15, 2013. (*Respondent's Exhibit* (hereinafter, *RX*) 1).

During his testimony, the Petitioner reported he gave multiple oral and written notices of his injuries to his supervisor in November and December of 2013, and January, February and March of 2014. (*T.* at 96). However, the only written notices contained in the record are the March 10, 2014 memo (*PX* 1) and the March 13, 2014 notice of injury (*RX* 1). The Petitioner's supervisor, Mr. Robert Duda, testified the first time the Respondent received written notice of the injury was on March 10, 2014 when it received the Petitioner's memorandum (*PX* 1) and, prior to that date, the Respondent had not been made aware of any injury resulting from the Petitioner's use of this vehicle. (*T.* at 75).

The Petitioner testified he was assigned a crew cab truck in the third week of October of 2013. (*T.* at 39, 45).[2] He described the vehicle as "[v]ery old, very beat up, [and] tore up." (*T.* at 16). The Petitioner stated he exclusively drove the vehicle "5 days a week to 7 days a week" and "some days 8 (hours a day), some days 12(hours a day), [and] some days 18 hours (a day)." (*T.* at 17). He also testified that "I drove it from home to the job, did the job all day, and then

[2] The Petitioner further identified this particular vehicle as "T37749-334" in his written memorandum. (*PX* 1).

drove it home at the end of the day." (*T.* at 97). The Petitioner indicated the vehicle was, after he filed multiple complaints, repaired in March of 2014. (*T.* at 19-20 and *PX* 1).

Robert Duda, an Operations Supervisor II at the Respondent's Edens Maintenance Yard, testified he is responsible for the personnel and equipment at that facility. (*T.* at 71). He supervised Petitioner for over five years. (*T.* at 72). Mr. Duda testified the Respondent keeps daily usage records of its vehicles in the computerized MMI system. (*T.* at 79). Mr. Duda further testified the truck in question (T37749) was not exclusively assigned to Petitioner and that multiple people had the ability to use the truck. (*Id.*) Instead, he indicated truck T37749 was a pool vehicle. (*T.* at 79, 88, 89, & 94). Mr. Duda further testified the Petitioner drove his own personal vehicle to and from work. (*T.* at 99). The Petitioner, while acknowledging the vehicle was a pool vehicle, asserted the vehicle's classification changed once "snow and ice started, which was October." (*T.* at 97). Mr. Duda testified that, sometime in October of 2013, the Petitioner's only complaint was that the seat was torn. (T. at 85). In response to those complaints, Mr. Duda sent the truck to be repaired and received a November 4, 2013 bill from J.E.R.R.S. (RX 9 at 6).

The Respondent's computerized vehicle logs from October 29, 2013 to April 18, 2014 cover multiple employees, multiple vehicles, and show who used which vehicle on any given day, and for how long. (*RX* 8). Also, Mr. Duda prepared a log summary sheet for vehicle T37749. (*RX* 8 at 1). Mr. Duda testified an employee who was assigned to one vehicle exclusively would have to obtain insurance and then keep a mileage log for that vehicle. (*T.* at 79-80). He noted that, during the period in question, the Respondent never received any insurance paperwork from Petitioner. (*T.* at 80). Mr. Duda identified a mileage log from December of 2012 and indicated the Petitioner took vehicle T37749 home once. (*T.* at 82-83; *RX* 11 at 1).

Christopher Walters, a co-worker of the Petitioner, testified he recalled the Petitioner had driven vehicle T37749 and identified a seat in the vehicle itself (*T.* at 59-60 and *PX* 2). Charlie Otto, another of the Petitioner's co-workers, also identified the vehicle and seat and agreed the vehicle was a "pool vehicle". (*T.* at 65-66 and *PX* 2). Both Mr. Walters and Mr. Otto also indicated accurate vehicle use would be documented in the vehicle logs kept by the Respondent "(t)o keep track of when we drive it." (*T.* at 61, 67).

Two days after his memorandum to his supervisor, the Petitioner sought medical care from Dr. Ghanshyam M. Shah at Northwest Suburban Physicians. The record of the visit with Dr. Shah is dated March 12, 2014 and notes that the reason for the appointment is for sciatic nerve problems. (*PX* 4). Dr. Shah's report fails to mention any accident history, including the Petitioner riding in a vehicle as the cause of his sciatic nerve problems. (*PX* 4). A subsequent

March 25, 2014, follow up appointment also failed to cite any accident due to riding in a vehicle at work. (*Id.*). Dr. Shah prescribed physical therapy for the Petitioner. (*T.* at 23 and *PX* 4).

Subsequently, the Petitioner returned to Dr. Shah on July 21, 2014.[3] (*PX* 4). At this appointment, Dr. Shah wrote that the sciatica was improving and the Petitioner had finished his physical therapy regime. On August 25, 2014, Petitioner again saw Dr. Shah, who ordered an MRI study of the Petitioner's lumbar spine. This study revealed: "[m]oderate degenerative disk disease primarily at L4-5 and L5-S1 levels with disk bulging and superimposed bony spondylotic changes." (*PX* 4 and *RX* 4 at 2). The MRI report also noted each disc level was afflicted with disc dehydration. (*PX* 4 and *RX* 4 at 1). The Petitioner then returned to Dr. Shah on September 22, 2014, and Dr. Shah noted: "[Petitioner] has been diagnosed with degenerative discs and herniation. ... He describes pain that starts in the back and radiates down the right leg." (*PX* 4). He urged the Petitioner to follow up in three months.[4] (*Id.*).

At the Respondent's request, pursuant to Section 12 of the Act, the Petitioner was examined by Dr. Frank Phillips of Midwest Orthopaedics at Rush on September 11, 2014. (*RX* 5). Dr. Phillips, after taking the Petitioner's history, reviewing his diagnostic studies, and performing a physical examination, opined the Petitioner had underlying lumbar degenerative changes with varying degrees of arthrosis and stenosis. (*RX* 5 at 2). He also indicated the Petitioner had no true radicular or neurogenic symptoms. Dr. Phillips went on to note:

> "Based on the information provided, it does not appear his condition is related to any specific work incident. He denied any (specific) injury. ... I believe that [Petitioner] has chronic degeneration of his lumbar spine with back pain that has become symptomatic. There is no evidence to suggest any specific work-related incident is responsible for his symptoms." (*RX* 5 at 2).

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[3] The Petitioner offered into evidence physical therapy bills from Arlington Heights Medical, but no supporting therapy records, for therapy sessions running from March 4, 2016 until May 2, 2016. (*PX* 3). These treatment dates are some two years after the Petitioner's initial appointment with Dr. Shah. The Petitioner submitted this billing to Teamsters Local Union No. 727 for payment processing, but the Union excluded those bills from its coverage. (*PX* 7).

[4] A review of Dr. Shah's records failed to locate any causal connection opinion by Dr. Shah regarding the Petitioner's documented sciatica and the defective driver's seat of vehicle T37749. (*PX* 4).

On December 9, 2014, Petitioner sought further medical care from Dr. Richard Broderick at Surgical Neurology Associates. (*PX* 5). Dr. Broderick obtained the Petitioner's accident history that included the involvement of "a very poorly maintained driver's seat" in his work truck. (*PX* 5). He also reviewed the Petitioner's medical history, that included a prior lumbar surgery, and recent diagnostic films, before conducting a physical examination. (*Id.*). Dr. Broderick reported the Petitioner's MRI films revealed:

> "Lumbar radiculopathy secondary to multilevel lumbar spondylosis. This is clearly related to both his preexisting surgical treatment with chymopapain treatment at the L4-L5 and L5-S1 levels as well as the degenerative spinal condition that has been exacerbated by his work truck that was in disrepair that he showed me a picture of." (*Id.*).

On December 27, 2016, the Petitioner served a subpoena on the Respondent's "Work Comp Claims" seeking vehicle usage logs from October of 2013 to March 20, 2014 for a vehicle numbered "T44766" that was identified on the subpoena as a 2007 Ford F250 van. (*PX* 8). During this hearing, the Petitioner's attorney asserted he had not received a timely response to the subpoena request. (*T.* at 113). The subpoena was accompanied by a January 23, 2017 letter from the Respondent noting it had "checked our records for vehicle equipment number T44766 and have nothing on file for this vehicle equipment." (*PX* 8 at 2).

As noted above, the Petitioner himself testified as to the vehicle in question and prepared a March 10, 2014 memorandum that listed vehicle "T37749" as having the offending driver's seat. (*T.* at 45 and *PX* 1). Additionally, the Petitioner identified the vehicle as "a crew cab. I believe it was an International crew cab." (*T.* at 16).

CONCLUSIONS OF LAW

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

Issues C&D: *Accident and date of accident*

To obtain compensation under the Act, the Petitioner bears the burden of showing, by a preponderance of the evidence, that he has suffered an injury that arose out of and in the course of his employment. *Baggett v. Industrial Comm'n*, 201 Ill.2d 187 (2002). One of the elements that a workers' compensation claimant must prove is that he or she sustained an injury "arising out of" employment. *Builders Square, Inc. v. Industrial Comm'n*, 339 Ill. App. 3d

1006, 1010 (2003). For an injury to arise out of the employment, the Petitioner must present evidence which supports a reasonable inference that the injury stemmed from a risk related to the employment. (*Id.* at 1010). "Whether a work-related accident occurred and whether it caused a worker's condition of ill-being are questions of fact for the Commission." *Pryor v. Industrial Comm'n*, 201 Ill. App. 3d 1 (1990). Furthermore, "(i)n resolving questions of fact, it is within the province of the Commission 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." *Hosteny v. IWCC*, 397 Ill. App. 3d 665, 674 (2009).

This Arbitrator finds the Petitioner's testimony as to his alleged March 10, 2014 accident is not credible. First, the Petitioner's claim that he drove this vehicle exclusively for eight (8) to eighteen (18) hours a day is refuted by the testimony of Mr. Robert Duda, Mr. Charlie Walters, Mr. Christopher Otto, and the vehicle logs that are maintained in the computer system. (*RX* 8). The vehicle logs note the Petitioner did not drive this vehicle T37749 every day. Instead, the Petitioner used several other vehicles during the time frame from October 1, 2013 through May 1, 2014, including T46742, T48283, and T47409. (*RX* 8 at 2 and 9). Furthermore, several other people drove T37749 during this time frame. (*RX* 8 at 3, 4 and 7). The vehicle logs demonstrate T37749 is properly classified as a pool vehicle instead of a vehicle assigned to the Petitioner for his own use "5 days a week to 7 days a week ..." (*T.* at 17).

Second, the vehicle's seat was repaired on November 4, 2013, when Mr. Robert Duda testified that Petitioner complained about the state of the seat. (*RX* 9 at 6). However, the Petitioner asserted the driver's seat in question was not fixed until March of 2014 and he conveyed this incorrect information to his treating physicians. (*T.* at 19-20 and *PX* 5). These factors adversely impact the credibility of the Petitioner's testimony before the Arbitrator. Conversely, the Arbitrator finds the testimony of Mr. Robert Duda, Mr. Charlie Walters, and Mr. Christopher Otto to be credible as they each individually identified the Respondent's vehicle use procedures and documents contained within the record.

Having determined the Petitioner to not be a credible witness for this claim, it must be found the Petitioner failed to prove he sustained an accident that arose out of and in the course of his employment with the Respondent.

Issue E: *Notice*

The Arbitrator, having found the Petitioner did not suffer an accident that arose out of and in the course of his employment with the Respondent, finds the issue of *notice* to be moot.

Issue F: *Causal connection*

In addition to the Arbitrator's finding above regarding **Issues C & D**, the Arbitrator also must determine if the Petitioner's present condition of ill-being is causally connected to any workplace injury. An accident arises out of one's employment if its origin is 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, 58 (1989). "Typically, an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties." (*Id.*). "A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties." (*Id.*).

Initially, a review of the medical records from Dr. Shah fails to appreciate any causal connection opinion regarding the Petitioner's symptoms and his work for the Respondent. (*PX* 4). Although Dr. Broderick subsequently opined the Petitioner's spinal problems were exacerbated by Petitioner's vehicle at work, it also is important to determine if that opinion is based upon credible information provided to Dr. Broderick. It is evident Dr. Broderick's understanding of the Petitioner's work for the Respondent and alleged accident solely came from the Petitioner during his singular visit on December 9, 2014. (*PX* 5). As was determined above, the Petitioner himself lacks credibility regarding the facts of this claim.

Dr. Broderick reported the Petitioner's symptoms began in "January 2013" while the records of Dr. Shah indicate the Petitioner sought medical care for his alleged sciatica complaints on March 12, 2014. (Compare *PX* 5 with *PX* 4). Furthermore, the Petitioner himself prepared his March 10, 2014, Memorandum informing the Respondent his difficulties had begun over "... the last 5 months ...", which would place the beginning of his symptoms at approximately November of 2013. (Compare *PX* 1 with *PX* 4). These discrepancies call into question the validity of Dr. Broderick's report and opinion.

Next, Dr. Broderick wrote: "[Petitioner] states that the day after he reported his back injury to his boss, despite the fact that he claims that he had asked to have the truck seat repaired multiple times, he states that the truck was taken out of service the day after he sought medical treatment." (*PX* 5). Based upon the admitted evidence and the Petitioner's testimony, the "day after he sought medical treatment" must be his March 12, 2014 visit with Dr. Shah. (See *PX* 1, *PX* 4, *PX* 5 and *T.* at 21). However, the Respondent's vehicle records instead demonstrate the seat was repaired on November 4, 2013. (*RX* 9 at 6).

These inconsistencies undercut Dr. Broderick's credibility regarding any causal connection between the Petitioner's then-present condition of ill-being and his work for the Respondent. Dr. Broderick's opinions cannot be accepted if he does not have a firm understanding of the beginning of the Petitioner's alleged symptoms and the time frame of any repairs to vehicle T37749.

As such, the Arbitrator must find the Petitioner also failed to prove any causal connection between his current condition of ill-being and his alleged accident.

Issue J: *Medical bills*

The Arbitrator, having found both that the Petitioner did not suffer an accident that arose out of his employment with the Respondent and failed to prove any causal connection, finds the issue of *medical bills* to be moot.

Issue L: *Nature and extent*

The Arbitrator, having found both that the Petitioner did not suffer an accident that arose out of his employment with the Respondent and failed to prove any causal connection, finds the issue of the *nature and extent* of the injury to be moot.

Signature of Arbitrator

November 16, 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 Choose reason	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WILLIAM J. BILBREY,

Petitioner,

vs. NO: 14 WC 36015

ILLINOIS DEPARTMENT OF TRANSPORTATION,

Respondent.

19IWCC0498

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 and permanent disability and being advised of the facts and law provides further analysis as stated below, and otherwise, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission concurs with the Arbitrator's Decision finding Petitioner's present condition of ill-being with regard to his left knee not causally related to the accident. The Commission specifically notes Petitioner testified he consulted Dr. Breslow one time, approximately two and one-half years prior to the arbitration hearing with no plans for additional medical treatment. T. 33. Petitioner further testified he returned to work full-duty with no lost time. T. 33-34. When asked as to his current care or treatment for the left knee, the Petitioner testified: "Exercise, medication when needed." *Id.* Petitioner did not identify what medication he used nor the frequency or dosage. Petitioner testified to pain and stiffness in his left knee (T. 35), but there is no current medical evidence which would support a finding that this pain and stiffness is due to the accident of September 24, 2014.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on November 16, 2017, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's claim for benefits under the Act is denied.

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

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.

DATED: SEP 1 3 2019
LEC/bsd
O072319
43

L. Elizabeth Coppoletti

Thomas J. Tyrrell

Maria E. Portela

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BILBREY, WILLIAM J
Employee/Petitioner

Case# **14WC036015**
14WC036014

IDOT
Employer/Respondent

19IWCC0498

On 11/16/2017, 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 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:

1759 MARTAY LAW OFFICES
WILLIAM H MARTAY
134 N LASALLE ST 9TH FL
CHICAGO, IL 60602

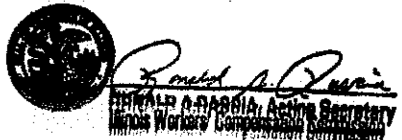
5930 ASSISTANT ATTORNEY GENERAL
MATTHEW J KELLER
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1430 CMS BUREAU OF RISK MANAGEMENT
WORKERS' COMPENSATION MANGER
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

NOV 16 2017



19IWCC0498

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

WILLIAM J. BILBREY
Employee/Petitioner

v.

I.D.O.T
Employer/Respondent

Case # **14** WC **36015**

Consolidated cases: **14 WC 36014**

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

DISPUTED ISSUES

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

FINDINGS

On **SEPTEMBER 24, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**74,062.04**; the average weekly wage was $**1,424.27**.

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 $**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 $**1,376.77** under Section 8(j) of the Act.

ORDER

As detailed in the attached memorandum discussing the *Findings of Fact and Conclusions of Law*:

> The Arbitrator finds the Petitioner's present condition of ill-being is not causally related to the alleged accident. Therefore, this claim for benefits under the Act (14 WC 36015) 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

NOVEMBER 16, 2017
Date

NOV 16 2017

WILLIAM J. BILBREY v. ILLINOIS DEPARTMENT OF TRANSPORTATION

14 WC 36015

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter was tried before Arbitrator Steffenson on April 10, 2017.[1] The issues in dispute were causal connection and the nature and extent of the injury. (*Arbitrator's Exhibit* 1B). The parties requested a written decision, including findings of fact and conclusions of law, pursuant to Section 19(b) of the Act and agreed to receipt of this Arbitration Decision via e-mail. (*Arbitrator's Exhibit* (hereinafter, *AX*) 1B).

FINDINGS OF FACT

The Petitioner testified that he had been hired by the Respondent in 2007. (*Transcript* at 12). His position was classified as a highway maintainer. (*Transcript* (hereinafter, *T.*) at 15). The Petitioner testified his duties pertained to highway repair, cutting the grass, pothole patching, and picking up trash. (*T.* at 15). He stated that his job required him to do lifting, bending, standing, walking on uneven slopes, and such. (*Id.*) He indicated he was assigned to work on the Edens Expressway. (*Id.*)

The Petitioner alleged he suffered an injury to his left knee on September 24, 2014. (*AX* 1B and *T.* at 31-32). He specifically indicated on that date:

> "I was out driving the tractor, cutting grass, had to get out of the tractor on a slope to move a tire that was in front of the tractor, and I slipped and fell down the hill and landed on my left knee." (*T.* at 32).

The Petitioner further admitted his prepared an accident report and informed his supervisor, Mr. Robert Duda, of this episode. (*T.* at 34-35).

---

[1] In the interest of judicial economy, this claim was consolidated with 14 WC 36014 and both matters were tried at the same time on April 10, 2017. The Arbitrator has prepared a separate Arbitration Decision for 14 WC 36014.

Subsequently, the Petitioner described this occurrence in greater detail during cross examination:

> "Q. You testified earlier that it was due to getting out of a tractor to pick up a tire, is that correct?
>
> A. Yes.
>
> Q. What kind of tire?
>
> A. Truck tire.
>
> Q. How much do you think that truck tire weighed?
>
> A. Maybe 80 pounds, I guess, 80 to a hundred pounds.
>
> Q. Did you lift it up? Did you pull it?
>
> A. I lifted it up from one side, I didn't lift the whole tire up, and rolled it out of the way, put it up on the shoulder so it could be picked up later. It was after I fell.
>
> Q. When did you fall?
>
> A. When I got out of the tractor. The incline was very steep, and it was wet because it was early in the morning. And I slipped and went down, and I landed on my left knee.
>
> Q. You said it was early morning?
>
> A. Yes.
>
> Q. Do you know about what time?
>
> A. Probably 8:00 o'clock." (T at 41-42).

The Petitioner then admitted his accident report listed "paper picking" and not "grass cutting" or "moving a tire" as his work activity at the time of his alleged fall. (*T.* 43-44 and *Respondent's Exhibit* 12). Furthermore, the Petitioner acknowledged the accident report he prepared listed the date and time of his accident as September 24, 2014 at 1:40 P.M. (*T.* at 44 and *Respondent's Exhibit* (hereinafter, *RX*) 12).

The Petitioner sought medical care from Skokie Hospital, operated by NorthShore University HealthSystem, on September 24, 2014. (*Petitioner's Exhibit* 9). He was diagnosed with "(k)nee strain" and discharged with a conservative course of care at home. (*Petitioner's Exhibit* (hereinafter, *PX*) 9). On October 22, 2014, he sought further medical care from Dr. Marc Breslow. (*PX* 10). Dr. Breslow found the Petitioner suffered an "(e)xacerbation of previously asymptomatic osteoarthritis of the left knee." (*PX* 10). Dr. Breslow administered a lidocaine

shot and told Petitioner to follow up if symptoms persisted. (*Id.*). However, the Petitioner did not return to Dr. Breslow for further medical care. (*Id.*).

CONCLUSIONS OF LAW

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

Issue F: *Causal connection*

To obtain compensation under the Act, the Petitioner bears the burden of showing, by a preponderance of the evidence, that he has suffered an injury that arose out of and in the course of his employment. *Baggett v. Industrial Comm'n*, 201 Ill.2d 187 (2002). One of the elements that the Petitioner must prove is that he sustained an injury "arising out of" employment. *Builders Square, Inc. v. Industrial Comm'n*, 339 Ill. App. 3d 1006, 1010 (2003). For an injury to arise out of the employment, the Petitioner must present evidence which supports a reasonable inference that the injury stemmed from a risk related to the employment. *Id.* at 1010. "Whether a work-related accident occurred and whether it caused a worker's condition of ill-being are questions of fact for the Commission." *Pryor v. Industrial Comm'n*, 201 Ill. App. 3d 1 (1990). Furthermore, "(i)n resolving questions of fact, it is within the province of the Commission 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." *Hosteny v. IWCC*, 397 Ill. App. 3d 665, 674 (2009).

Previously, the Arbitrator found the Petitioner to not be a credible witness for his prior claim, 14 WC 36014, that was consolidated with and tried at the same time as this claim. (See *Arbitration Decision 14 WC 36014*). As such, the Arbitrator must carefully examine the Petitioner's credibility regarding his concurrent testimony concerning this claim, 14 WC 36015. In the case at hand, the Petitioner testified he injured his left knee while cutting grass and moving a truck tire out of his way when he slipped and fell on a grassy hill. (*T.* at 32). However, his accident report concerning the events of September 24, 2014 identified his work that day as "paper picking on Clavey R(oad) ramp." (*RX* 12). Furthermore, the accident history he provided to Dr. Breslow made no mention of either *grass cutting*, *tire moving*, or *paper picking*, and instead merely cited wet grass as the cause of his slip and fall. (*PX* 10).

Once again, the Petitioner's testimony at trial is not supported by the accident report he authored and available medical records and must be discounted. Accordingly, the Arbitrator must find the Petitioner failed to prove his current condition of ill-being is causally connected to his injury.

Issue L: *Nature and extent*

The Arbitrator, having found the Petitioner failed to prove any causal connection, finds the issue of the *nature and extent* of the injury to be moot.

Signature of Arbitrator

November 16, 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	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Belinda Towers,

Petitioner,

vs. No. 15 WC 24854

Healthcare Consortium of Illinois,

Respondent.

19IWCC0499

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 employment relationship, accident, causal connection, medical expenses, temporary disability and permanent disability, and being advised of the facts and law, affirms and adopts with correction the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission corrects the Arbitrator's Decision to reflect, consistently with the Arbitrator's analysis, the denial of the claim solely for failure to prove the accident arose out of Petitioner's employment with Respondent. The Arbitrator acknowledged that an employee's fall in a parking lot accessible to the employees and the general public is considered to have occurred in the course of the employment.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 20, 2018, is hereby corrected, affirmed and adopted.

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

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

DATED: SEP 13 2019
o-07/17/2019
SM/sk
44

Stephen Mathis

Douglas McCarthy

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TOWERS, BELINDA
Employee/Petitioner

Case# **15WC024854**

HEALTHCARE CONSORTIUM OF IL
Employer/Respondent

19IWCC0499

On 12/20/2018, 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 2.48% 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:

1920 BRISKMAN BRISKMAN & GREENBERG
RICHARD VICTOR
351 W HUBBARD ST SUITE 810
CHICAGO, IL 60654

4412 ACCIDENT FUND HOLDINGS
GRACE DiGERLANDO
200 W MADISON ST SUITE 3850
CHICAGO, IL 60606

19IWCC0499

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

Belinda Towers
Employee/Petitioner

v.

Healthcare Consortium of IL
Employer/Respondent

Case # **15** WC **24854**

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 **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **November 8, 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. [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. [x] Is Respondent due any credit?
O. [ ] Other ______

FINDINGS

On **March 9, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 $**41,999.88**; the average weekly wage was $**807.69**.

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

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

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

Respondent shall be given a credit of $**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 $**10,156.91** under Section 8(j) of the Act.

ORDER

Because an accident did not occur that arose out of and in the course of Petitioner's employ with Respondent, all benefits are denied.

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

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

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

Signature of Arbitrator

12-20-18
Date

DEC 20 2018

BELINDA TOWERS v. HEALTHCARE CONSORTIUM OF ILLINOIS
CASE NUMBER: 15 WC 24854

FINDINGS OF FACT:

On November 8, 2018, this matter was tried before Arbitrator Carlson at the IWCC in Chicago. The petitioner was the first and only witness to testify on her own behalf. At the time of trial, settlement contracts for consolidated cases of 15 WC 24853 and 15 WC 24855 were approved for the sum of $750.00 and case number 15 WC 24854 was severed from the same, so that trial could commence.

The petitioner testified that she had bee an employee of the Healthcare Consortium of Illinois, hereinafter "the respondent," for a total of 10 years. She testified that she was employed by the respondent as a supervisor and that the respondent was located at 1350 E. Sibley Boulevard in Dolton, IL. The petitioner testified that the building that the respondent was located in was shared with US Bank.

The petitioner testified that she drove to work and parked at work daily. She testified that in approximately July of 2004 or 2005, "Tristina," the HR Director, gave a speech to the "new hire group," including the petitioner, and advised them to park in the last two rows of the parking lot as the first two rows of the lot were for people coming in and out of the bank. The petitioner testified that the lot probably had spaces for 80 to 100 cars. She testified that there was a total of four center rows for parking with an additional two rows of parking. The petitioner testified that there was no street parking available for anybody in the building.

The petitioner testified that she entered the same entrance when going to work everyday and that she parked approximately 100 feet from the building. She testified that after working for the respondent for four or five years, the respondent's employees were provided with stickers to put on their cars so they would not be towed from the lot. The petitioner testified that the Dolton police were ticketing cars in the lot.

The petitioner testified that on March 9, 2015, she slipped and fell on ice and snow in the parking lot, injuring her right arm, neck, back, ankles and hands. She testified to the treatment she received post March 9, 2015 and reported that she underwent a right shoulder surgery in July of 2017. The petitioner testified that she carried group health insurance through the respondent and that her group insurance paid some of her bills.

The petitioner testified that she never returned to work for the respondent company post March 9, 2015 and that she did not collect any benefits for her time off after that date. She testified that she was receiving Social Security Disability benefits and that she had been receiving the same for approximately four months. The petitioner testified that, currently, she had problems with everyday activities such as carrying, lifting, etc. She testified to continued pain in her neck and back.

The petitioner testified that if she were to park in the first two rows of the parking lot, she would be asked to move her car. She testified that there were approximately 4 inches of snow on the ground at the time of her injury and she was not sure if the lot had been plowed. The petitioner testified that she fell a couple of feet in front of her care at approximately 7:45 am on March 9, 2015. She testified that there was no sign in the parking lot indicating that it was for employees only. The petitioner also testified to the presence of the Dolton police department in the parking lot.

On cross examination, the petitioner testified that she did not know who owned the parking lot where she slipped and fell. She also testified that she did not know who was responsible for maintaining the parking lot or who was responsible for snow removal. The petitioner testified that there were other tenants in the building where the bank and the respondent were located, including a dental office. She testified that the tenants of the building all parked in the same lot. She testified that she did not recall when she was provided with a parking sticker to put on her car. The petitioner again testified that there was no street parking available, so that anyone going into the building had to park in the bank parking lot. She testified that she had not sough treatment for her right shoulder since her last evaluation with Dr. Mehl in December of 2017.

Ms. Shirley Jones was the first and only witness to testify on behalf of the respondent company. She testified that she had been employed by the respondent for approximately 12.5 years and that she was employed as the payroll and human resources coordinator. Ms. Jones testified that the respondent had employees in three separate office locations, one being in Dolton, IL.

Ms. Jones testified that she was familiar with the petitioner as they were both hired by the respondent at approximately the same time in 2006. She testified that she was aware that the petitioner slipped and fell in the parking lot on March 9, 2015. Ms. Jones testified that the parking lot where the petitioner slipped and fell was owned, operated and maintained by US National Bank and that the respondent leased space in the bank's building. She testified that as part of that lease agreement, the respondent's employees were allowed to park in the lot owned by the bank.

Ms. Jones testified that other companies, including, but not limited to, a law firm and a dental office, rented office space in the building owned by the bank and that those companies and their customers also parked in the parking lot where the petitioner slipped and fell on March 9, 2015. She testified that the first row of parking in the lot was for handicap parking and the second row of parking was for bank employees and customers. Ms. Jones testified that there were an additional 6 rows of parking that were open parking spaces where anyone could park, including the general public, the dental office employees, the law firm employees, the customers of all business located within the bank's building and the respondent employees alike. She testified that there were no designated parking spots, but that they were asked not to park in the first two rows of the lot.

Ms. Jones testified that when she began working for the respondent, parking stickers were provided to the respondent's employees so that they would not be towed from the bank parking lot. However, she testified that in October of 2009, US National Bank purchased the building and lot and that parking stickers were no longer required. In further explanation, Ms. Jones testified that nobody hired on or after October of 2009 was given a parking sticker to park in the lot.

MEDICAL HISTORY

On March 9, 2015, the petitioner was seen at the Franciscan Health/St. James ER. Reportedly, she fell backwards on ice that morning when "walking into her facility." She reported hitting her head, but denied loss of consciousness. The petitioner complained of head, neck, and bilateral arm pain with a hematoma to the right elbow. Allegedly, she used her right arm to brace herself when she fell. X-rays taken of the elbow exhibited no fractures, but there was soft tissue edema focally on the dorsal side of the proximal forearm. X-rays of the cervical spine did not reveal and acute cervical spine abnormality. CT of the head exhibited no acute intracranial findings, but right temporal

craniectomy defect and right parasellar metallic clip, "unchanged." Following her examination, the petitioner was assessed with blunt head trauma and a right forearm contusion. Tramadol was prescribed. (PX 6)

Thereafter, the petitioner saw her primary care physician and underwent a course of physical therapy at St. James from April 6, 2015 to September 25, 2015 (PX 4 & 6). Petitioner sought treatment at Illinois Orthopedic Network (ION) on August 13, 2015. Petitioner had a CT scan of the right shoulder on September 8, 2015. She was referred to Chicago Center for Sports Medicine where she sought treatment with Dr. DeBartolo and Dr. Primus as of October 7, 2015. The petitioner underwent a series of cortisone injections for her right shoulder on October 7, 2015, October 23, 2015, and November 6, 2015. She was referred for physical therapy through ION at South Suburban Physical Therapy from September 1, 2015 through October 2, 2015. The petitioner attended additional physical therapy at the Chicago Center for Sports Medicine. On December 12, 2016 and again on March 16, 2017, Dr. Primus diagnosed Petitioner with osteoarthritis of the glenohumeral joint, consistent with rotator cuff tendinitis, possible tear, impingement and biceps tenosynovitis and surgery was recommended. The physicians at ION and the Chicago Center for Sports medicine placed either light duty or total work restrictions on petitioner. (PX 1, 2, 3, 4, 6).

On June 9, 2017, the petitioner sought treatment with Dr. David Mehl. Dr. Mehl diagnosed the petitioner with severe right shoulder degenerative joint disease and recommended a shoulder replacement. On July 13, 2017, Dr. Mehl performed a right shoulder hemiarthroplasty. The petitioner underwent post-operative physical therapy and was discharged at maximum medical improvement on December 6, 2017. (PX 6&17)

IN SUPPORT OF THE ARBITRATOR'S DECISION PERTAINING TO (C) WHETHER AN ACCIDENT OCCURRED THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT WITH THE RESPONDENT, THE ARBITRATOR FINDS THE FOLLOWING:

The Arbitrator finds that the petitioner failed to prove by a preponderance of the credible evidence that she sustained accidental injuries while working for the respondent company on August 10, 2017. An injury is compensable under the Illinois Workers' Compensation Act only if it arises out of and in the course of employment. Pangos v. Industrial Commission, 171 Ill.App.3d 112, 524 N.E.2d 1018 (1988). The burden is on 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 Commission, 115 Ill.2d 524, 505 N.E.2d 1026 (1987). The burden is also on the employee to prove that his injuries are causally related to the employment. Newgard v. Industrial Commission, 58 Ill.2d 164, 317 N.E.2d 524 (1974). The mere existence of testimony does not require its acceptance. Bernard v. Industrial Commission, 25 Ill.2d 254, 184 N.E.2d 864 (1962).

In the case at hand, the Arbitrator finds that the parking lot in question where the petitioner fell was neither owned, maintained or controlled by the respondent. Additionally, the Arbitrator finds that the owner of the parking lot, the bank, directed its tenants not to park in the first two rows of the lot. The Arbitrator also notes that other than the first two rows of the parking lot, where bank employees and patrons parked, the remaining rows of the lot were accessible to all tenants of the bank building (i.e. the respondent, a dental office, a law firm, etc.), the tenants' customers, and the general public. Per the petitioner's testimony, there was no street parking available, so anyone entering the building had to park in the parking lot where she slipped and fell. Given the aforementioned testimony, the Arbitrator finds the petitioner's additional testimony that she never saw anyone other than respondent's employees park in the third row of the lot to be incredulous and in direct contradiction to the credibly testimony of Ms. Jones. Ms. Jones testified that employees of the respondent were allowed to park anywhere in the lot except the first two rows per the Bank's direction and that the general public also parked in the rows other than the first two rows. There were no assigned parking spots, no parking stickers in use at the time of the petitioner's slip and fall and no "employee only" parking signs in the parking lot in question.

The Arbitrator notes that injuries from a fall on ice in a company parking lot accessible to employees and the general public occurred in the course of the employment, but did not arise out of the employment in *Wal-Mart Stores, Inc. v. Industrial Commission,* 326 Ill.App.3d 438, 761 N.E.2d 768, 260 Ill.Dec. 585 (4th Dist. 2001). In *Wal-Mart,* one lot was used by both employees and patrons. Employees were requested, but not required, to park in one portion of the lot to provide patrons with better access to the store entrance. Patrons could park in the area where employees were asked to park. The parking lot where the petitioner fell was covered with ice as a result of a recent ice storm. The court held that the parking lot was available for use by both patrons and employees and that the petitioner's fall resulted from a hazard to which the claimant and the general public were equally exposed and did not arise out of her employment. The claimant's employment "did not place her in any special position *vis-à-vis* the general public" in the area of the parking lot where the fall purportedly occurred. 761 N.E.2d at 774.

The court has reiterated that in determining compensability when "a parking lot is used primarily by employees or by the general public, the proper inquiry is whether the employer maintains and provides the lot for its employees' use." *Mores-Harvey v. Industrial Commission,* 345 Ill.App.3d 1034, 804 N.E.2d

1086, 1092, 281 Ill.Dec. 791 (3d Dist. 2004). In the case at hand, the respondent neither owned nor maintained the parking lot in question. Additionally, the Arbitrator finds that the petitioner was allowed to park anywhere in the lot in question along with the general public, other than the first two rows utilized by the Bank. Based upon current case law and the testimony of the petitioner and Ms. Jones, the Arbitrator finds that the petitioner failed to prove by a preponderance of the credible evidence that she sustained an accident that arouse out of the course and scope of her employment with the respondent.

In accord with the Arbitrator finds the testimony of the respondent's witness, Ms. Jones, to be consistent and credible. Under the aforementioned circumstances, the Arbitrator can only find that the petitioner failed to meet her burden of proof. Thus, the Arbitrator finds that the petitioner did not suffer from an accident, which arose out of the course and scope of her employment with the respondent, on March 9, 2015.

IN SUPPORT OF THE ARBITRATOR'S DECISION PERTAINING TO (F) IS THE PETITIONER'S CURRENT CONDITION OF ILL BEING CAUSALLY RELATED TO THE INJURY AND (J) WERE THE MEDICAL SERVICES PROVIDED REASONABLE AND NECESSARY AND HAS THE RESPONDENT PAID ALL APPROPRIATE CHARGES, THE ARBITRATOR FINDS THE FOLLOWING:

As the Arbitrator finds that the petitioner did not suffer from an accident that arose out of the course and scope of her employment on March 9,2 015, the issue of causal connection and medical services is moot. For the foregoing reasons, the Arbitrator finds that there is no casual connection between the petitioner's condition of ill-being and the alleged accident of March 9, 2015 and, furthermore, that no past due medical care is awarded.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (K) WHAT TEMPORARY TOTAL DISABILITY BENEFITS ARE OWING, (L) WHAT IS THE NATURE AND EXTENT OF THE INJURY, AND (N) IS RESPONDENT DUE ANY CREDIT, THE ARBITRATOR FINDS THE FOLLOWING:

As the Arbitrator finds that the petitioner did not sustain an accident that arose out of the course and scope of her employment on March 9, 2015, and, furthermore, finds that the petitioner's current condition of ill being is not causally related to her alleged injury, the issue of temporary total disability benefits is moot and the Arbitrator finds that the petitioner is not entitled to the same. Per stipulation of the parties, the respondent is entitled to a credit of $10,156.91 under Section 8(j) of the Act should benefits be awarded.

STATE OF ILLINOIS)		
) SS.	☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
COUNTY OF MADISON)	☐ 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

KRISTIANA BRIDGES,

Petitioner,

vs. NO: 16 WC 22275

CASEY'S GENERAL STORE,

19IWCC0500

Respondent.

DECISION AND OPINION ON REVIEW

Petitioner timely filed a Petition for Review of the Decision of the Arbitrator finding Petitioner failed to prove she sustained an accidental injury arising out of and in the course of her employment. Notice having been given to all parties, the Commission, after considering the issues of accident, causation, medical expenses, temporary disability, and permanent disability, and being advised of the facts and law, reverses the Decision of the Arbitrator. The Commission finds Petitioner sustained an accidental injury arising out of and in the course of her employment on June 22, 2016 and her condition of ill-being is causally related to that work injury.

FINDINGS OF FACT:

Petitioner is a kitchen manager for Respondent, Casey's General Store. T. 9. Petitioner's job duties include preparing food such as pizza, pizza rolls, chicken strips, and hamburgers, as well as completing food orders. T. 15. Petitioner works the midnight shift; Respondent schedules only two employees for the midnight shift: Petitioner and one subordinate worker. T. 25.

Petitioner alleges she sustained a left knee injury arising out of her employment on June 22, 2016: "My customer came in asking for one of the AriZona energy teas. I went into the cooler to get it and it was not on the shelf, it was actually on the floor underneath the rack so I had to squat down and turn to grab it...My knee popped." T. 9-10. Petitioner retrieved the customer's requested drink because her co-worker "was working the register. I was working the

kitchen so she was the one standing there with the customer." T. 25. Petitioner explained her job duties include providing unshelved items: "If it's not stocked on the shelf it is our responsibility to get what the customer needs." T. 16. Petitioner further stated having to go into the cooler to obtain product for customers is a regular occurrence, although squatting is not a typical activity for her at work. T. 16-17.

When Petitioner's shift ended at 5:00 a.m., she went home and took Tylenol. T. 11. Her pain did not improve, so she went to the emergency room at St. Anthony's. T. 11. The St. Anthony's Health Center records reveal Petitioner reported sustaining a knee injury three to five hours prior: "Felt a 'pop' and pain postero-lateral knee when squatting down to pick something up at work early this AM." PX1. Examination findings included tenderness well localized laterally along plantaris and/or long head of biceps, no effusion, no joint line tenderness, and no varus/valgus stress laxity or pain. The emergency department physician diagnosed a left hamstring strain and advised Petitioner to ice the leg, take non-steroidal anti-inflammatories, and follow up with her primary care physician. PX1, T. 11.

Later that morning, Petitioner presented to her family doctor, Dr. Jim Hong. Dr. Hong's report reflects Petitioner gave a history of left knee pain when she tried to bend down that morning; she described feeling something pop and complained of pain and difficulty walking since the incident. Examination revealed mild tenderness with movement but provocative testing was negative. Dr. Hong's assessment was acute left knee pain; he ordered an x-ray, authorized Petitioner off work, and prescribed Ibuprofen and Norco. PX2. Petitioner testified she was off work for one week. T. 11-12.

On July 18, 2016, Petitioner was evaluated by Jonathon Brooks, DC, of Multicare Specialists. DC Brooks memorialized Petitioner sustained a left knee injury while "performing normal duties as a kitchen manager at Casey's...On 6/22/16 at 4 a.m. she bent down while she was in the walk in cooler and heard a 'pop' in her left knee." PX3. Petitioner rated her pain at 6/10, worse with bending the knee, and complained of her knee locking with ambulation. Petitioner informed the doctor she had a prior knee injury in 2010, this occurring while she was playing volleyball; a left knee arthroscopy was performed and Petitioner had "not had any problems with it since." PX3. DC Brooks noted Petitioner indicated she "waited so long to seek treatment because workers' comp is fighting with her." PX3. On examination, DC Brooks observed swelling, tenderness to palpation of the lateral and posterior knee, extreme pain with flexion, and a positive McMurray's test. DC Brooks' impression was a meniscal tear; he ordered an MRI as well as physical therapy and authorized Petitioner off work. PX3. Petitioner commenced a course of both physical therapy and chiropractic treatment. PX3.

On July 19, 2016, the left knee MRI was performed. The radiologist's impression was mild degenerative signal changes and mild cartilaginous changes without meniscal or ligamentous tear, as well as small Baker's cyst which may be partially ruptured. PX5, RX1. On review of the MRI results, DC Brooks referred Petitioner for evaluation by Dr. George Paletta of the Orthopedic Center of St. Louis; in the interim, Petitioner was to continue therapy and remain off work. PX3.

The consultation with Dr. Paletta took place on July 27, 2016. Dr. Paletta's records

reflect Petitioner complained of left knee pain following a work injury on June 22, 2016:

> She was squatting down to grab an item off the bottom shelf. As she squatted down she had immediate pain and felt a pop in the left knee. She was not lifting anything at that time. Rather she was squatting down to try and get this item but had not picked it up yet. PX4, RX2.

Her symptoms were described as pain in the posterior and lateral knee, some pain when negotiating stairs, occasional locking sensation, stiffness, and swelling. Dr. Paletta memorialized Petitioner reported having left knee surgery in 2010; she explained she underwent an arthroscopy for a suspected meniscal lesion however no evidence of a meniscus tear was found intra-operatively and the physician ultimately only performed debridement of some "scar tissue." She "recovered fully from that and really had no problems with the knee up until the time of this injury on 6-22-16." PX4, RX2. Examination findings included mild tenderness posterolaterally at the popliteal fossa, diffuse lateral sided tenderness as opposed to focal joint line tenderness, full range of motion, and no soft tissue swelling or effusion. Dr. Paletta noted he could not palpate an obvious Baker's cyst posteriorly. X-rays revealed normal bony anatomy with no evidence of premature degenerative changes. Dr. Paletta documented he reviewed the MRI study and the images were consistent with a Baker's cyst showing evidence of partial rupture. Dr. Paletta concluded, "Based on the mechanism of injury and her current subjective complaints as well as physical exam findings and MRI findings it appears that she likely had a Baker['s] cyst which partially ruptured as a result of the squatting activity." PX4, RX2. The doctor observed the condition is typically self-limited but can take upwards of three months to resolve fully; he recommended continuing with therapy as well as a Medrol Dosepak followed by non-steroidal anti-inflammatories. Dr. Paletta released Petitioner to return to modified duty as of July 27, 2016 with restrictions of no squatting or kneeling, and resumption of full duty effective August 22, 2016. Dr. Paletta then reiterated Petitioner's mechanism of injury "can certainly be an activity which can result in rupture of the cyst." PX4, RX2. The record reflects Petitioner returned to modified duty on July 27, 2016.

Over the next two months, Petitioner attended physical therapy and chiropractic sessions at Multicare Specialists. Her final appointment with DC Brooks was on September 29, 2016. Petitioner indicated she felt "100% improvement," was not having any issues, and was very pleased with her progress. Examination findings included no swelling or palpable tenderness, full and pain-free range of motion in all planes, no sign of joint laxity, and negative provocative testing. DC Brooks concluded Petitioner reached maximum medical improvement and released her to return on an as needed basis. PX3.

Petitioner resumed working full duty for Respondent. T. 21. She has not suffered any other injuries to her left knee since the work incident. T. 12. Petitioner testified she was not having any problems with her left knee prior to that day, nor was she on any restrictions. T. 10. Petitioner described her current knee symptoms: "When it's cold I get like a little kink in it, little pain, can't squat for a long period of time." T. 13.

Dana Holleman testified on Respondent's behalf. Holleman is currently an area supervisor for Respondent, however in June 2016, she was the Collinsville store manager and

was Petitioner's supervisor. T. 30-31. She testified Petitioner's title was food service leader and explained what Petitioner's job duties were: "They manage the kitchen, they do grocery orders for the kitchen, they train new employees on procedures and policies in the kitchen plus work in the kitchen for the most part on a daily basis." T. 32.

Holleman has not worked the food service manager position but has worked in the kitchen. T. 32. Holleman stated she was familiar with Petitioner's activities and testified Petitioner bent down or squatted "[o]n average I would say maybe five to ten times, between five to ten times per day." T. 33.

Holleman confirmed Petitioner worked the midnight shift, 10:00 p.m. to 5:00 a.m., on June 22, 2016. T. 37. Holleman was not at the store for that shift. T. 37. Petitioner and one other employee were scheduled to cover that shift; Holleman agreed the other employee was subordinate to Petitioner and Petitioner was essentially in charge of the store. T. 38. Holleman further agreed the other employee would have been at the cash register while Petitioner worked in the kitchen. T. 38. The following colloquy occurred:

Q. When a customer comes in to order something that's not on the shelf a cashier has to stay at the register while someone else gets the item, correct?

A. It's preferred.

Q. And if there's only two people in the store Kristiana would have been the only other person who could have gotten it?

A. Yes. T. 38-39.

Holleman testified she had conversations with Petitioner about her physical being: "She did at one point mention to me that she had some knee issues. She did not elaborate, she just said like when it was raining or if the weather changed it affected her knee." T. 34. Holleman clarified the comments were "[j]ust in passing, just, you know, that it was bothering her for that day or - - I mean, it wasn't every single day but occasionally." T. 35. Holleman confirmed Petitioner was able to do her job and testified she did not recall Petitioner ever missing work, going home early, or calling off work secondary to left knee pain. T. 35, 39.

CONCLUSIONS OF LAW:

I. Accident/Causation

To recover benefits under the Act, a claimant bears the burden of proving by a preponderance of the evidence that she sustained an accidental injury arising out of and in the course of her employment. *820 ILCS 305/1(d)*. Both elements must be present to justify compensation. *First Cash Financial Services v. Industrial Commission*, 367 Ill. App. 3d 102, 105, 853 N.E.2d 799 (2006). The parties do not dispute the incident in question occurred while Petitioner was in the course of her employment; rather, the dispute is whether the injury arose out of her employment.

The requirement that the injury arise out of the employment concerns the origin or cause of the claimant's injury. *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 203, 797 N.E.2d 665 (2003). The occurrence of an accident at the claimant's workplace does not automatically establish the injury "arose out of" the claimant's employment. *Parro v. Industrial Commission*, 167 Ill. 2d 385, 393, 657 N.E.2d 882 (1995). Rather, "[t]he 'arising out of' component is primarily concerned with causal connection" and is satisfied when the claimant has "shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro, Inc.*, 207 Ill. 2d at 203.

The Commission's first task in determining whether the injury arose out the claimant's employment is to categorize the risk to which the claimant was exposed in light of the Commission's factual findings regarding the mechanism of the injury. *First Cash Financial Services*, 367 Ill. App. 3d at 105; see also *Baldwin v. Illinois Workers' Compensation Commission*, 409 Ill. App. 3d 472, 478, 949 N.E.2d 1151 (2011) (To determine whether a claimant's injury arose out of her/his employment, "we must first determine the type of risk to which [s/he] was exposed."). There are three categories of risk to which an employee may be exposed: (1) risks that are distinctly associated with one's employment, (2) risks that are personal to the employee, such as idiopathic falls, and (3) neutral risks that have no particular employment or personal characteristics, such as those to which the general public is commonly exposed. *Springfield Urban League v. Illinois Workers' Compensation Commission*, 2013 IL App (4th) 120219WC, ¶ 27, 990 N.E.2d 284; see also *Brady v. Louis Ruffolo & Sons Construction Co.*, 143 Ill. 2d 542, 552, 578 N.E.2d 921 (1991) (noting that "neutral" in workers' compensation terms means "neither personal to the claimant nor distinctly associated with the employment" (internal quotation marks omitted)).

"Injuries resulting from a risk distinctly associated with employment, *i.e.*, an employment-related risk, are compensable under the Act." *Steak 'n Shake v. Illinois Workers' Compensation Commission*, 2016 IL App (3d) 150500WC, ¶ 35, 67 N.E.3d 571. "Risks are distinctly associated with employment when, at the time of injury, 'the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties.'" *Id.* "A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his duties." *Orsini v. Industrial*

Commission, 117 Ill. 2d 38, 45, 509 N.E.2d 1005 (1987).

Alternatively, neutral risks "generally do not arise out of the employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public." *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Commission*, 407 Ill. App. 3d 1010, 1014, 944 N.E.2d 800 (2011). "Such an increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public." *Id.* In the present matter, the Arbitrator found Petitioner's injury involved a neutral risk ("Bridges' simple act of squatting down to pick up a single item (bottle of tea)") and she was not exposed to the risk to a greater degree than the general public: "Petitioner did not provide any testimony from a qualitative or quantitative standpoint upon which the Arbitrator can reasonably rely to show that Bridges' work activities go above and beyond the neutral risk of squatting down." The Commission believes a different analysis is required under the law.

There has undeniably been confusion as to the starting point of the risk analysis when injury occurs while the individual is performing an "everyday activity" or common bodily movement. In such circumstances, there is debate as to whether the analysis is unchanged such that the first step remains determining whether the claimant was subjected to an employment risk, or, alternatively, whether these claims are automatically subject to a neutral risk analysis and the evidentiary burden associated therewith (the *Adcock* approach). The Appellate Court addressed this conundrum in *McAllister v. Illinois Workers' Compensation Commission*, 2019 IL App (1st) 162747WC, and the majority found the *Adcock* approach inconsistent with precedent and counter to the intentions of the Act:

> Under the *Adcock* majority's rule, a claimant who is injured while performing "everyday activities" or common bodily movements can only obtain compensation under the Act by comparing his or her activities or movements to those of the general public. Per *Adcock*, this is true even in situations where the activity or movement is directly related to the specific duties of employment. Accordingly, pursuant to *Adcock* (and the special concurrence), bodily movements, including turning, bending, kneeling, pushing, pulling, reaching, stretching, *etc.*, must always be viewed as common to the general public and cannot be considered distinct or peculiar to the nature of an individual's employment. *Infra* ¶ 88 ("the risks presented by such everyday activities [(such as bending or kneeling)] are not peculiar to any particular line of employment").
>
> Here, the special concurrence proposes adherence to the neutral-risk definition and analysis adopted by the majority in *Adcock. Infra* ¶ 80. However, we note that *Adcock's* analysis is at odds with other decisions of this court—decided both before *Adcock* (*Young*, 2014 IL App (4th) 130392WC; *Autumn Accolade v. Illinois Workers' Compensation Comm'n*, 2013 IL App (3d) 120588WC, 990 N.E.2d 901, 371 Ill. Dec. 713; *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)) and after that decision was issued (*Steak 'n Shake*, 2016 IL App (3d) 150500WC, 409

Ill. Dec. 359, 67 N.E.3d 571; *Mytnik v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 152116WC, 409 Ill. Dec. 491, 67 N.E.3d 946; *Noonan*, 2016 IL App (1st) 152300WC, 408 Ill. Dec. 308, 65 N.E.3d 530). In particular, the risk analysis utilized in those cases does not automatically exclude from the definition of an employment-related risk activities that might involve common bodily movements or which *Adcock* terms "everyday activities." Accordingly, we reject *Adcock* and its legal analysis. In doing so, we hold that the definition of a neutral risk as set forth in *Adcock* is inconsistent with the purpose of the Act, overly broad, and unsupported by supreme court precedent. *McAllister*, ¶ 37-38 (Emphasis added).

The *McAllister* Court observed its conclusion is supported by the original application of the neutral risk analysis:

[W]hile there may be a lack of complete uniformity among appellate decisions, we maintain that *Young*, the cases upon which *Young* relied (including *Autumn Accolade*), and its progeny are consistent with the manner in which the neutral-risk analysis has historically been applied. This court has stated that "[n]eutral risks include stray bullets, dog bites, lunatic attacks, lightning strikes, bombing, and hurricanes." (Citation omitted). Supreme court case authority bears this out, demonstrating that it has performed a neutral-risk analysis, thereby considering whether a claimant was exposed to a common risk to a greater degree than the general public, in those circumstances which show no apparent connection to the employee's job duties. *McAllister*, ¶ 62.

The Court explained it is "clearer and more straightforward to focus the employment risk inquiry on whether the injury-producing act was required by the claimant's specific job duties and not whether it could further be considered an 'activity of everyday living.' Activities necessary to the fulfillment of a claimant's job duties present risks that are distinct or peculiar to the employment and, as a result, are not common to the general public." *McAlllister*, ¶ 48. Whether the physical act is commonplace is immaterial; the determinative factor is whether the claimant's job duties necessitated that she perform the task:

A risk that is required by the claimant's employment and necessary to the fulfillment of the claimant's job duties removes it from the realm of what is common to the general public (a neutral risk) even if the activities attendant to the risk have neutral characteristics, *i.e.*, involve common bodily movements. Although case law has defined neutral risks as those that have no particular employment or personal characteristics, it has not similarly defined employment risks as having no particular neutral characteristics. *Id*, ¶ 69 (Emphasis added).

Ultimately, the *McAllister* Court concluded the first step in analyzing risk is to determine whether the claimant's injuries resulted from an employment-related risk:

Here, we simply hold that an "arising out of" determination requires an analysis of the claimant's employment and the work duties he or she was required or

expected to perform. Only after it is determined that a risk is not employment-related should the Commission consider and apply a neutral-risk analysis. *McAllister*, ¶ 73.

In the present matter, Petitioner was kitchen manager on the midnight shift. T. 25. Only two employees are scheduled for the midnight shift and Respondent's witness, Holleman, testified Petitioner was the senior employee and essentially in charge of the store. T. 25, 38. Petitioner's job duties include preparing food orders and grocery orders and training new employees on procedures and policies in the kitchen. T. 15, 32. Petitioner testified providing merchandise is another of her job duties: "If it's not stocked on the shelf it is our responsibility to get what the customer needs." T. 16. Holleman corroborated this:

Q. When a customer comes in to order something that's not on the shelf a cashier has to stay at the register while someone else gets the item, correct?

A. It's preferred.

Q. And if there's only two people in the store Kristiana would have been the only other person who could have gotten it?

A. Yes. T. 38-39.

Petitioner's injury occurred when she was responding to a customer's request for a specific beverage which was out of stock on the shelf. Therefore, the "injury-producing act" *i.e.*, squatting, turning and reaching underneath the lowest shelf of the shelving unit to pick up the requested AriZona tea, was required by Petitioner's specific job duties.

Unlike the claimant in *McAllister*, who "did not establish that he was instructed to perform, or that he had a duty to perform, that particular activity," nor did he establish "the activity was incidental to his employment, in that it was not necessary to the fulfillment of his specific job duties" (*McAllister*, ¶ 31), Petitioner's injury occurred while she was retrieving an un-shelved product for a customer, *i.e.*, performing an act she was instructed to perform by her employer, and performing this task required her to squat and turn while reaching under the bottom shelf. The Commission finds Petitioner's injury resulted from an employment-related risk. As such, Petitioner sustained an accidental injury arising out of her employment.

This finding, though, does not end our inquiry:

> [E]ven if a claimant can establish an accident originating from an employment-related risk, he or she must still establish a causal connection between that accident and the resulting condition of ill-being. Certainly, where the evidence presented at arbitration supports a finding that the risk of injury was due to a degenerated physical condition, or was otherwise solely personal to the employee, recovery can and should be denied. *McAllister*, ¶ 67.

Here, the treating records uniformly document Petitioner felt a pop in her left knee while

squatting/bending at work followed by an immediate onset of pain. Petitioner testified she had no problems with her left knee before the June 22, 2016 injury; she acknowledged having a prior injury in 2010 but asserted she recovered fully from the subsequent arthroscopic debridement and was problem-free thereafter. While Holleman stated Petitioner made occasional comments "in passing" about weather-related knee complaints, we emphasize Petitioner required no knee treatment in the intervening six years, and she was able to fulfill all her job duties and never missed work nor left early secondary to knee pain.

As to medical causation opinion evidence, Dr. Paletta concluded, "Based on the mechanism of injury and her current subjective complaints as well as physical exam findings and MRI findings it appears that she likely had a Baker['s] cyst which partially ruptured as a result of the squatting activity." PX4, RX2. No contrary causation opinion was offered.

The Commission finds Dr. Paletta's opinion is highly persuasive, and we find Petitioner to be credible and her testimony further corroborated by the medical histories. The Commission finds Petitioner's left knee condition of ill-being is causally related to the June 22, 2016 accidental injury.

II. Temporary Disability

On the Request for Hearing, Petitioner alleged two periods of temporary total disability: (1) June 23, 2016 through June 30, 2016, and (2) July 19, 2016 through July 26, 2016. ArbX1. The Commission observes this corresponds to the periods Petitioner was authorized off work by Drs. Hong and Brooks (PX2, PX3), and as such we find Petitioner proved entitlement to temporary total disability benefits.

The parties stipulated Petitioner's average weekly wage is $332.57. ArbX1. This yields a TTD rate of $221.71, however the Commission notes this rate falls below the minimum as calculated pursuant to Section 8(b)1. *820 ILCS 305/8(b)1.* The statutory minimum benefit rate for a married claimant with three dependents for Petitioner's date of accident is $330.00. Therefore, the Commission finds Petitioner entitled to TTD benefits of $330.00 per week for a period of 2 2/7 weeks.

III. Medical

Petitioner's Exhibit 6 contains medical bills incurred for treatment of Petitioner's left knee. The Commission finds these charges are related to Petitioner's work injury and are reasonable and necessary as provided in Section 8(a).

IV. Permanent Disability

As Petitioner's accident occurred after September 1, 2011, §8.1b applies. Section 8.1b(b) requires permanent partial disability be determined following consideration of five factors: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No

single enumerated factor shall be the sole determinant of disability. *820 ILCS 305/8.1b(b).*

Section 8.1b(b)(i) – §8.1b(a) impairment report

Neither party submitted a §8.1b(a) impairment report. As an impairment report is not a prerequisite to an award of permanent partial disability benefits (*Corn Belt Energy Corp. v. Illinois Workers' Compensation Commission*, 2016 IL App (3d) 150311WC, ¶47, 56 N.E.3d 1101), the Commission will assess Petitioner's permanent disability based upon the remaining enumerated factors.

Section 8.1b(b)(ii) – occupation of the injured employee

Petitioner returned to her pre-injury job as a kitchen manager. The Commission finds Petitioner's successful return to unrestricted work is significant and indicative of reduced permanent disability.

Section 8.1b(b)(iii) – age of the employee at the time of the injury

Petitioner was 36 years old on the date of her accidental injury. Petitioner is a relatively young woman and will therefore be better able to manage her minor residual complaints. The Commission finds this factor weighs in favor of reduced permanent disability.

Section 8.1b(b)(iv) - future earning capacity

No evidence was offered to suggest the injury had an adverse impact on Petitioner's future earning capacity. The Commission finds this indicative of reduced permanent disability.

Section 8.1b(b)(v) – evidence of disability corroborated by treating medical records

After diagnostic imaging revealed a partially ruptured Baker's cyst, Petitioner underwent approximately two months of physical therapy and chiropractic intervention. At the final medical visit, DC Brooks documented Petitioner felt "100% improvement," was able to work without issues, and had no abnormal physical examination findings. Petitioner was placed at maximum medical improvement, instructed to continue her home exercise program, and released from care. PX3. The Commission notes DC Brooks' records are consistent with Petitioner's description of benign residual complaints consisting of weather-related pain and difficulty squatting for extended periods. T. 13. The Commission finds these facts evidence a positive outcome after a brief course of conservative care and are highly indicative of reduced permanent disability.

Based on the above, the Commission finds Petitioner sustained permanent partial disability to the extent of 5% loss of use of the left leg under Section 8(e)12. The Commission notes the statutory minimum permanent partial disability rate under Section 8(b)2.1 is implicated. Petitioner's PPD award is to be paid at $330.00 per week. *820 ILCS 305/8(b)2.1.*

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner sustained an accidental injury arising out of and in the course of her employment on June 22, 2016, and her

left knee condition of ill-being is causally related to that work injury.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $330.00 per week for a period of 2 2/7 weeks, representing June 23, 2016 through June 30, 2016 and July 19, 2016 through July 26, 2016, 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 the reasonable, necessary and causally related medical expenses incurred in the care and treatment of Petitioner's left knee injury as detailed in Petitioner's Exhibit 6, pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $330.00 per week for a period of 10.75 weeks, as provided in §8(e)12 of the Act, for the reason that the injuries sustained caused the 5% loss of use of the left leg.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $22,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: SEP 13 2019

LEC/mck

D: 7/3/19

43

L. Elizabeth Coppoletti

Stephen Mathis

D. Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BRIDGES, KRISTIANA
Employee/Petitioner

Case# **16WC022275**

19IWCC0500

CASEY'S GENERAL STORE
Employer/Respondent

On 6/11/2018, 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 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:

4463 GALANTI LAW OFFICE
DAVID M GALANTI
PO BOX 99
E ALTON, IL 62024

0734 HEYL ROYSTER VOELKER & ALLEN
TONEY J TOMASO
301 N NEIL ST SUITE 505
CHAMPAIGN, IL 61824-1190

5483-99 TT/dkl

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

KRISTIANA BREDGES
Employee/Petitioner
v.
CASEY'S GENERAL STORE
Employer/Respondent

Case # **16 WC 22275**

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 **Edward Lee**, Arbitrator of the Commission, in the city of **Collinsville, Illinois**, on **March 27, 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 **N/A**

FINDINGS

On **June 22, 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 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 $**9,976.97**; the average weekly wage was $**332.57**.

On the date of accident, Petitioner was **36** years of age, ***married*** with **3** children under 18.

Petitioner ***has*** received all reasonable and necessary medical services, and said medical services are the sole responsibility of Petitioner and not that of the Respondent.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services; those charges will be the sole responsibility of Petitioner.

ORDER

The Arbitrator finds Petitioner failed to meet her burden of proof and establish through the evidence she suffered an accident which arose out of and in the course of her employment with Respondent; therefore, the Arbitrator denies all benefits.

Petitioner failed to establish her current condition of ill-being is causally related to the June 22, 2016, accident; therefore, the Arbitrator denies all benefits.

Based upon the findings above, deny compensability based upon the defenses of accident and medical causal connection, and consistent with those findings, any and all medical benefits claimed by Petitioner are hereby denied by the Arbitrator (see Petitioner's Exhibit No. 6; Medical Bills Checklist), and therefore said medical bills (PX 6) will be the sole responsibility of Petitioner.

The Arbitrator finds Petitioner is not entitled to any temporary total disability benefits based upon, and consistent with, the findings above.

The Arbitrator finds Petitioner is not entitled to any permanent partial disability benefits based upon, and consistent with, the findings above.

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

19IWCC0500

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

Signature of Arbitrator

6/6/18
Date

JUN 1 1 2018

STATEMENT OF FACTS

Petitioner, Kristiana Bridges (hereinafter "Bridges") worked at Casey's General Store as of June 22, 2016, operating as the Kitchen Manager. (Tr., pg. 9).

Bridges worked what she described as the midnight shift which began at 10:00 p.m. and ended at 5:00 a.m. (Tr., pg. 25). When Bridges worked this shift, she would be with one additional worker who would typically be working the cash register while Bridges worked in the kitchen. (Tr., pg. 25). Bridges confirmed, prior to the June 22, 2016, date of loss, and specifically during the time sequence between the spring and summer of 2016, Bridges was asked about her job duties working in the kitchen. She noted one of her duties was to make pizzas wherein she would be standing up at a waist-level table in order to make said pizzas. (Tr., pgs. 13-14). She was also required to help with orders for customers making different type of food orders (whether it was in-person or by phone) and she would be required to make other food items above and beyond pizzas, such as pizza rolls, chicken strips and hamburgers. (Tr., pg. 15). All of this was done at a prep table which was at her waist level. (Tr., pg. 15).

On June 22, 2016, a customer came into the Casey's General Store, requesting a specific drink (Arizona Energy Tea). Bridges went into the cooler in order to retrieve the drink, but it was not on the shelf. It was actually on the "floor underneath the rack." (Tr., pg. 10). Petitioner explained she had to "squat down and turn to grab it." (Tr., pg. 10). While performing this activity (squatting down), Bridges felt her left knee pop. (Tr., pg. 10). Prior to June 22, 2016, Bridges noted she had no prior problems with her left knee. (Tr., pg. 10). Further, there were no restrictions on Bridges' left knee prior to June 22, 2016. (Tr., pg. 10).

Bridges was asked how frequently she would go into the cooler (where the drinks were kept for customers) and squat down in order to grab something for a customer. (Tr., pg. 16). Bridges admitted, "The squatting down is not regular but as far as going into the cooler to grab something that a customer should need that's not on the shelf, that is regular." (Tr., pg. 17). In follow-up, Bridges was asked, "Squatting down, that's not a typical activity for you during the day at work, correct?" Bridges' response was, "No." Squatting was not a typical activity. (Tr., pg. 17).

After the incident of June 22, 2016, Bridges noted she did not report this incident right away (right after it occurred). (Tr., pg. 10). Bridges recalled going home, taking some over-the-counter medication (Tylenol), getting her children ready for school, and during that course of time the pain began to increase in intensity. (Tr., pgs. 10-11). As a result, Bridges recalled going to the emergency room at St. Anthony's Hospital in Alton, Illinois. (Tr., pg. 11). At the emergency room on June 22, 2016, Petitioner complained of a "new problem" which was left knee pain, which started "3 to 5 hours ago." Bridges noted she felt a "pop and then pain in the posterolateral knee when squatting down to pick something up at work early this AM." Dr. Mark Mason diagnosed a left hamstring strain at this initial emergency room encounter. The recommended course of treatment was a release from the emergency room, use of ice, and over-the-counter/anti-inflammatory medication (Ibuprofen). (PX 1).

Bridges next followed up with her family physician, Dr. Jim Hong. (Tr., pg. 11). Dr. Hong took her off work for one week beginning June 23, 2016, through June 30, 2016. (Tr., pgs. 11-12). Bridges did appear at Dr. Hong's office (Southern Illinois Family Medicine) on June 22, 2016, complaining of left knee pain. Dr. Hong notes Bridges was complaining of acute left knee pain when she "tried to bend down this morning" and "felt something pop." Bridges complains of continued left knee pain since this time wherein she has been limping and having difficulty walking due to the pain. Dr. Hong diagnosed acute left knee pain, ordered x-rays, and took Bridges off work for

one week. Dr. Hong prescribed Ibuprofen and Norco for the left knee pain. Dr. Hong instructed Bridges to follow up in one month, or earlier if necessary. (PX 2).

After Bridges' initial consult with Dr. Hong, following the June 22, 2016 accident, she next sought out medical attention at MultiCare Specialists with Dr. Mark Eavenson and Chiropractor Jonathon Brooks. (Tr., pg. 12). Bridges confirmed her initial consultation came with Chiropractor Brooks on July 18, 2016. (PX 3). The history provided to Chiropractor Brooks by Bridges included sustaining an injury to her left knee while "performing normal duties as a Kitchen Manager at Casey's General Store in Collinsville, Illinois." Bridges recalled, on June 22, 2016, at approximately 4:00 a.m., ". . . she bent down while she was in the walk-in cooler and heard a "pop" in her left knee." She provided a history of reporting this injury to her manager, going to the emergency room, and then later in the day to her primary care physician, Dr. Hong. Bridges recalled being prescribed narcotic pain medication which has "helped a little bit." At this time, bending her left knee would hurt and her left knee locks when she walks. Bridges also noted a prior history of having her left knee "scoped" by Dr. Gallagher in Oklahoma, dating back to 2010. She recalls injuring her left knee when playing volleyball. Lastly, Bridges notes she has not had any problems with the left knee since that time. (PX 4). Bridges confirmed after her 2010 surgery with Dr. Gallagher in Oklahoma (on the left knee) and after her treatment with Dr. Gallagher concluded (which included surgery), she was not having any further problems with the left knee. (Tr., pgs. 18-19).

Chiropractor Brooks diagnosed a left meniscal tear and recommended an MRI of the left knee in order to confirm the diagnosis or rule it out. He also recommended initiation of physical therapy for the left knee, as well as a home exercise program, and an off-work slip beginning on July 19, 2016, which continued for an additional week, up and through July 26, 2016. (PX 4). After this time, or beginning July 27, 2016, Bridges was able to return to work with light-duty restrictions per Dr. Eavenson and Chiropractor Brooks. (PX 4).

Bridges confirmed she underwent an MRI of the left knee on July 19, 2016. (Tr., pg. 12). The MRI was ordered by Chiropractor Brooks and the findings, or impression, noted by interpreting radiologist, Dr. Greg Cizek, was "mild degenerative signal changes and mild cartilaginous changes without meniscal or ligamentous tear; small Baker's cyst but may be partially ruptured. Clinical correlation may be of value." (RX 1).

Bridges confirmed she continued to treat at MultiCare Specialists with Chiropractor Brooks and Dr. Mark Eavenson. (Tr., pg. 12). The care and treatment at this facility included physical therapy and chiropractic management, as well as electrical stimulation. She was discharged from care on September 29, 2016, by her therapist, Mr. Corey Voss. (PX 3). The treatment records from MultiCare Specialists do confirm a final date of treatment (physical therapy) on September 29, 2016. (PX 3). Bridges confirmed after her treatment with MultiCare Specialists she was allowed to go back to work at full-duty, being released from all medical care, on September 29, 2016. (Tr., pg. 21). Bridges confirmed she did return to full-duty workplace activities at Casey's in Collinsville, Illinois, on or about September 29, 2016. (Tr., pg. 21).

Bridges recalls Dr. Eavenson had referred her for an orthopedic consult with Dr. George Paletta and underwent one visit with Dr. Paletta. (Tr., pgs. 12-13). Dr. Paletta consulted with Bridges on July 27, 2016. At this time, Bridges noted she works at a Casey's General Store as a Kitchen Manager in Collinsville, Illinois, and had been working there for approximately nine months before her left knee issues came about. The history noted by Dr. Paletta in his report was an injury from June 22, 2016, when Bridges was "squatting down at work." She was performing this activity (squatting), in order to grab an item off of a bottom shelf and felt immediate pain and a pop in the left knee. It was confirmed by Dr. Paletta, through the history provided by Bridges, she was not lifting anything more at the time. Dr. Paletta was aware she underwent emergent care at St. Anthony's Hospital in Alton,

Illinois, and was subsequently examined by her primary care physician, Dr. Jim Hong and given pain medication. Because of Bridges' continued complaints of pain, she eventually sought out additional care and treatment with Dr. Eavenson with MultiCare Specialists. Dr. Paletta was aware she had initiated physical therapy and thus far (six visits) there was minimal improvement with the therapy. Dr. Paletta reviewed the MRI films. Dr. Paletta also noted Bridges' prior history of left knee problems which included surgery back in 2010 with Dr. Gallagher in the State of Oklahoma based upon a meniscus tear. Dr. Paletta did confirm he personally reviewed the MRI scans, which he does note shows a consistent finding of a Baker's cyst with evidence of a partial rupture. The medial and lateral menisci were intact and appeared normal, and the cruciate and collateral ligaments were also normal. Dr. Paletta diagnosed a partially ruptured Baker's cyst in the setting of the medial compartment, with no evidence of meniscus or ligament injury. Dr. Paletta opined these MRI findings were likely caused by Bridges' squatting activity. Thus, Dr. Paletta established a causal relationship between Petitioner's diagnosis and her June 22, 2016 date of loss. Finally, Dr. Paletta noted Petitioner could continue working but requires restrictions of no squatting and no kneeling. She was told to work as tolerated, along with the indication hers was not a surgical case as it relates to the left knee. Dr. Paletta wanted Bridges to continue therapy at MultiCare Specialists and indicated that she did not require any additional orthopedic follow-up at this point. (PX 4).

Bridges discussed her last physical therapy visit with Mr. Corey Voss at MultiCare Specialists. Bridges confirmed this took place on September 29, 2016. (Tr., pg. 22; PX 3 – pg. 3 of 104). Therapist Voss noted in his September 29, 2016, report that Bridges reported to him she was experiencing no pain in her left knee on this date. Bridges confirmed this was correct. (Tr., pg. 23). It was also reported by Therapist Voss that Bridges felt 100% improved and Bridges confirmed this is what she told her therapist on September 29, 2016. (Tr., pg. 23). Lastly, the report from Therapist Voss confirmed Bridges was having no problems on that date as it relates to the left knee, and Bridges did confirm that indeed she was having no problems with her left knee on that date. (Tr., pg. 23; PX 3 – pg. 3 of 104). Bridges confirmed since this time, September 29, 2016, she has not returned for any additional medical care or treatment regarding the left knee. (Tr., pgs. 23-24). Further, Bridges confirmed she has had additional care and treatment with her primary care physician, Dr. Jim Hong, in January and February of 2017. Bridges admits during those visits with Dr. Hong she did not complain of any problems or issues regarding her left knee wherein her visits with Dr. Hong in January/February of 2017 did not include any complaints regarding the left knee. (Tr., pg. 24; PX 2).

Bridges confirmed during the course of her treatment with Dr. Eavenson at MultiCare Specialist, she received a bill in the amount of $14,865.00. (PX 6). This was based upon 34 office visits for therapy and various other modalities (including chiropractic management and electrical stimulation) for the left knee. These 34 office visits took place during the time sequence between July 18, 2016 (initial consultation) and September 29, 2016 (release from care). Therefore, over an approximate 10-week time frame, Petitioner was treated at this facility, on average, 3 – 4 times each week. (PX 6).

Bridges noted, as of today's date (March 27, 2018), when it is cold outside she gets a "little kink" in the left knee with a little pain wherein she notes she cannot squat for a long period of time. (Tr., pg. 13).

Ms. Dana Holleman testified on behalf of Respondent. She is currently an Area Supervisor for Respondent. At the time in question, June 2016, she was the Store Manager at the Collinsville Casey's General Store location where Bridges was working at the time of her accident. (Tr., pgs. 30-31). Ms. Holleman served as Bridges' manager and therefore supervised her as of June 2016. (Tr., pg. 31). Ms. Holleman recalled Bridges was employed as a Food Service Leader who would be responsible for managing the kitchen, she would conduct grocery orders for the kitchen, train new employees on procedures and policies within the kitchen, plus work in the kitchen on a daily

basis. (Tr., pg. 32). Ms. Holleman was familiar with these duties and activities because she supervised/managed Bridges while she performed them, and further, Ms. Holleman had been employed as a Food Service Manager herself, working in the same position but just at a different store. (Tr., pg. 32).

Ms. Holleman recalls, besides being familiar with the activities and duties performed by Bridges, having an opportunity to watch and observe her perform her duties and activities. (Tr., pgs. 32-33). Ms. Holleman was asked to comment on how regularly or frequently Bridges would be required to bend down and squat down in order to satisfy her job activities and duties. Ms. Holleman commented on average it would be 5 – 10 times per day (based upon a seven-hour work shift). (Tr., pg. 33).

Prior to the accident date in question, or June 22, 2016, Ms. Holleman confirmed the Petitioner had mentioned to her on prior occasions that she was experiencing some left knee complaints and problems. Specifically, Ms. Holleman recalls Bridges complaining regarding the left knee when it was raining or if there were weather changes because it affected her left knee. (Tr., pg. 34). This was something that would Bridges would occasionally complain to her about; however, to be clear, Ms. Holleman noted this was not as a result of workplace duties or activities (left knee pain) and it did not cause her to go home early because of that pain. Ms. Holleman recalls Bridges was still able to do her job even though she was complaining of left knee pain and problems. (Tr., pg. 35).

FINDINGS ON DISPUTED ISSUES:

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

Both parties agree the fact pattern of this claim deals with one specific question – that being whether Bridges' injury arose out of her employment, because it is undisputed that the accidental injury occurred in the course of her employment. The Arbitrator finds Bridges' accidental injury (involving the left knee) did not involve an employment risk or a personal risk. Rather, the Arbitrator finds this was a neutral risk and has analyzed the Respondent's accident defense based upon same, taking into account the facts as laid out above. Bridges' simple act of squatting down to pick up a single item (bottle of tea) was the neutral risk involved in this case. An outline and analysis of the applicable case law is necessary in order to clearly delineate the issues before us.

In order to be compensable under the Act, a worker's injury must be one "arising out of and in the course of the employment." *Citing* 820 ILCS 305-2. Respondent in the present claim has disputed whether Petitioner's injury "arose out of" her employment with Casey's General Store. A worker's injury arises out of her employment if the origin of the injury "is in some risk connected with or incident to the employment, so that there is a causal connection between the employment and the accidental injury." *Rund v. The Illinois Workers' Compensation Commission*, 2018 Ill.App.4th, 170054 WC; *Saunders v. Industrial Commission*, 189 Ill.2d 623 (2000). The standard which is well established also notes, "A risk is incidental to the employment when it belongs or is connected with what the employee has to do in fulfilling" their duties. *Orsini v. Industrial Commission*, 117 Ill.2d 38 (1987). The mere fact that the injured worker's accident and subsequent injury happened at Respondent's place of employment "does not automatically establish that the injury arose out of claimant's employment." *See Saunders*, cited above.

The Appellate Court has recognized three general types of risks to which an employee may be exposed. They are as follows: (1) risks that are distinctly associated with the employment; (2) risks that are personal to the employee; and (3) neutral risks that do not have any particular employment or personal characteristics. *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Commission*, 407 Ill.App.3d 1010 (2011).

The Appellate Court, as a general proposition, has consistently held that if an activity is "an activity of everyday life" then an injury resulting from that activity should be analyzed under a neutral risk doctrine. *Adcock v. Illinois Workers' Compensation Commission*, 2015 Ill.App.2d, 130884 WC. Falling down stairs has been held to be a neutral risk (*see Village of Villa Park v. Illinois Workers' Compensation Commission*, 2013 Ill.App.2d, 130038 WC. The Arbitrator finds squatting down to pick something up would fall into the category of "neutral risk."

Further, the general rule, as has been accepted by the Appellate Court, is that injuries resulting from a neutral risk "generally do not arise out of the employment." Therefore, the claims are not deemed compensable under the Act because the employees were found to not be exposed to a risk greater than that to the degree the general public would be exposed in a normal day. *See Metropolitan Water Reclamation District of Greater Chicago*, cited above.

The increased risk in question "may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public." *Noonan v. Illinois Workers' Compensation Commission*, 2016 Ill.App.1st, 152300 WC.

Applying the standards as noted above regarding the neutral risk analysis to the facts of this case, we need to focus upon what Petitioner was doing when she allegedly hurt herself. In this case, the facts are clear and unrebutted. She was squatting to pick up a bottle of tea to then give to a customer. Petitioner explained while squatting and turning to grab the tea, she felt a pop in her knee. Bridges went on to explain that this is not a frequent activity. As a matter of fact, doing this specific activity is infrequent (Although she admits on occasion she would be required to help customers because when she worked, during the midnight shift, it was just her and another employee who would be required to cover the cashier station. This resulted in Ms. Bridges needing to help customers who had special requests). Further, Ms. Bridges' supervisor, Ms. Holleman, noted squatting would be an infrequent activity performed, during a seven-hour work shift, maybe 5 – 10 times during any given day. The conclusion which can reasonably and logically be reached is that Petitioner squatting down to pick up the tea on June 22, 2016, is not an activity Bridges would normally perform. Further, this is an activity of everyday life (squatting down to pick something off the floor) to which the general public is exposed each and every day. Petitioner did not provide any testimony from a qualitative or quantitative standpoint upon which the Arbitrator can reasonably rely to show that Bridges' work activities go above and beyond the neutral risk of squatting down. As such, Petitioner has failed to meet her burden of proof and establish her June 22, 2016 accident rose out of her employment with Respondent. As a result, this claim must fail based upon Respondent's accident defense and no benefits will be awarded as it relates to same.

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

The Arbitrator references and incorporates herein the findings made in Section "C" as noted above.

Respondent has disputed medical causation between Petitioner's left knee condition and the June 22, 2016 accident in question. Petitioner provided medical evidence which was submitted and accepted into evidence, specifically Dr. George Paletta's orthopedic consult report from July 27, 2016, in which Dr. Paletta opined Petitioner's current condition of ill-being was causally related to the June 22, 2016 accident wherein conservative treatment would be required and no surgery was indicated. Therefore, the Arbitrator concludes Petitioner did provide sufficient evidence to establish causal connection; however, the Arbitrator finds, consistent with the findings noted above, because Petitioner failed to prove an accident arose out of her employment with Respondent, there is no need to get to the issue as to medical causation because this was deemed a non-compensable claim and no benefits will be awarded.

J. Were 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 references and incorporates herein the findings made in Sections "C" and "F" as noted above.

Respondent has disputed accident and medical causation between Petitioner's left knee condition and the June 22, 2016 accident in question. Petitioner provided medical evidence (PX 6; Medical Bills Checklist) which was submitted and accepted into evidence. The Arbitrator finds, consistent with the findings noted above, Petitioner failed to prove an accident arose out of her employment with Respondent and there is no need to get to the issue as to medical billing because this was deemed a non-compensable claim and no benefits will be awarded.

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

The Arbitrator references and incorporates herein the findings made in Sections "C", "F", and "J" as noted above.

Respondent has disputed accident and medical causation between Petitioner's left knee condition and the June 22, 2016 accident in question. Petitioner claimed to be entitled to two (2) weeks of temporary total disability benefits. The Arbitrator finds, consistent with the findings noted above, because Petitioner failed to prove an accident arose out of her employment with Respondent, there is no need to get to the issue as to temporary total disability because this was deemed a non-compensable claim and no benefits will be awarded.

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

The Arbitrator references and incorporates herein the findings made in Sections "C", "F", "J", and "K" as noted above.

Respondent has disputed accident and medical causation between Petitioner's left knee condition and the June 22, 2016 accident in question. Petitioner claimed to be entitled to permanent partial disability

benefits (a percentage loss of use of a leg). The Arbitrator finds, consistent with the findings noted above, because Petitioner failed to prove an accident arose out of her employment with Respondent, there is no need to get to the issue as to permanent partial disability because this was deemed a non-compensable claim and no benefits will be awarded.

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STATE OF ILLINOIS	)		
	) SS.		
COUNTY OF WILLIAMSON	)		

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jennifer Cain,
Petitioner,

vs. No: 12 WC 39682

19IWCC0501

State of Illinois,
Choate Mental Health Center,
Respondent.

DECISION AND OPINION ON REVIEW

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

All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 5, 2018, 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: SEP 13 2019

Marc Parker

mp/wj
08/01-19
68

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CAIN, JENNIFER
Employee/Petitioner

Case# **12WC039682**

14WC032892

SOI/CHOATE MENTAL HEALTH CENTER
Employer/Respondent

19IWCC0501

On 11/5/2018, 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 2.43% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1315 DWORKIN AND MACIARIELLO
GERALD CONNOR
135 N LASALLE ST SUITE 650
CHICAGO, IL 60602

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

0558 ASSISTANT ATTORNEY GENERAL
SHANNON D RIECKENBERG
93 MORBER RD
AVA, IL 62907

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

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

NOV 5 - 2018

STATE OF ILLINOIS)
)SS.
COUNTY OF **WILLIAMSON**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

JENNIFER CAIN
Employee/Petitioner

Case # **12** WC **39682**

v.

Consolidated cases: **14 WC 32892**

STATE OF ILLINOIS / CHOATE MENTAL HEALTH CENTER
Employer/Respondent

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Cellini**, Arbitrator of the Commission, in the city of **Herrin**, on **December 12, 2017**. By stipulation, the parties agree:

On the date of accident, **September 6, 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 $**54,648.36**, and the average weekly wage was $**1,050.93**.

At the time of injury, Petitioner was **53** years of age, ***single*** with **0** dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

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

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of **$630.56 per week** for **25 weeks**, because the injuries sustained caused the **5% loss of the person as a whole**, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from **March 8, 2016** through **December 12, 2017**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

October 29, 2018
Date

NOV 5 - 2018

STATEMENT OF FACTS and CONCLUSIONS OF LAW

An employee for the Respondent since 2002, the Petitioner testified she was employed as a mental health technician III with Choate Mental Health Center on 9/6/12. Her job duties included working with mental health patients on a daily basis, including doing "face checks", making the schedule for the other workers on the same shift, and ensuring everyone was doing their jobs. Petitioner indicated she remains a Respondent employee.

Petitioner testified that on 9/6/12 she was sexually assaulted in the chart room. She was doing a face check at 12:45, i.e. making sure all patients were present and accounted for. Petitioner stated she entered a patient's room, announced she was doing a face check, shut the door, and went down the hallway to the next room. After making it halfway up the hallway, she heard someone running up behind her, and it was one of the patients she just checked. She told the patient she was unable to talk at that time but would come talk to him when she was finished. Petitioner said the patient began simulating sex with a handrail. Petitioner was continuing up the hallway to complete the face check when the patient grabbed her and turned her around. She again indicated she couldn't stop and talk at that time, at which point the patient then continued to simulate sex with the handrails. She next went to the chart room to tell the nurse the patient needed one-on-one supervision. She closed the door behind her, indicating the patient was there and grabbed her, put her on his lap and started simulating sex with

her in the seated position. Petitioner indicated she was able to get away, but her radio fell off. The nurse picked up her radio and called for help. Petitioner testified the patient then grabbed her again and that she blacked out. She testified that when she regained consciousness, she was on the floor and the patient was on top of her, groping her and again simulating sex.

Petitioner testified the patient that assaulted her was 6'2" to 6'6" and weighed over 200 pounds, while she is 4'11". Petitioner explained that she felt violated after the incident, and experienced pain in her head, neck, back, butt and hip. The floor she had landed on was like marble and very hard. She testified she sought treatment, which included a steroid injection, physical therapy, and diagnostic testing, with Advanced Orthopedic Specialists after the incident. Petitioner said she had a lot of anxiety and night terrors or dreams after the incident, and indicated she was referred to a psychiatrist for her mental injury.

Prior to the incident, on 7/24/12, Petitioner had presented to Dr. Godbey on referral from a Dr. Koonce for additional evaluation as to her complaints of muscle spasms and cramping. She indicated a sensation in her thighs was causing issues with her sleep patterns. She reported a "rippling" sensation in her thighs, cramping throughout her body brought on by laying on her stomach or back, and "creepy crawly" sensation in her legs if she sat for long periods of time. She indicated she first began experiencing these sensations in 2007 and had felt the cramping in her legs her whole life. (Px7).

On 7/30/12, an EMG/NCS study at Saint Francis Medical Center was noted to be a normal study. (Px7). On 8/10/12, Petitioner returned to Dr. Godbey for complaints of muscle aches. She reported she was continuing to experience cramps and fasciculations throughout her body, but the cramping had improved. She also reported issues with aching in her muscles after working a double shift at work. Dr. Godbey thought Petitioner might have a neuromuscular disease. (Px7).

Following the 9/6/12 accident, Petitioner presented to MedStop One on 9/10/12. She indicated she had been sexually assaulted a few days prior while at work and was complaining of left leg and breast pain. Petitioner was tender at the gluteus medius and vastus lateralis, but no bruising was noted. Petitioner returned on 9/24/12, stating she did not feel she could mentally or physically return to work following the assault there. She indicated she could stand for 15 to 20 minutes before her left lateral thigh would start to burn. She was referred to a psychologist. On 10/1/12, Petitioner returned to MedStop One as she was feeling some anxiety over the sexual assault at work. She was advised to remain off work at that time. (Px8).

On 10/19/12, Petitioner sought treatment with Dr. Godbey and indicated she was assaulted at work by a patient that pushed her to the ground and punched her multiple times. She reported pain in the left thigh. Petitioner was advised to use Tylenol and follow up with her occupational medicine physician. (Px7).

Petitioner returned to MedStop on 10/23/12 and requested an orthopedic consult as well as referral to her neurologist, Dr. Godbey. She complained of left buttock pain with radiation in to the lateral knee, and trochanteric tenderness with walking, stooping, standing, or sitting since the sexual assault at work. A 10/31/12 x-ray of her left hip reflected no acute findings and minor degenerative changes. She underwent an MRI of the pelvis on that same date which showed no acute osseous abnormality, minimal degenerative changes of the sacroiliac joints without evidence of active sacroiliitis or ankyloses, small ovarian cysts, trace greater trochanteric bursitis bilaterally, and mild common hamstring tendinosis bilaterally without evidence of a tear. A left femur MRI reportedly showed nonspecific subcutaneous edema anteriorly within the thighs bilaterally, no acute osseous abnormality, and lateral subluxation of the patella. (Px8).

On 11/9/12, Petitioner presented to Dr. Lents of Advanced Orthopedic Specialists for left hip pain. She reported a 9/7/12 assault at work which resulted in an injury to her left hip. Her symptoms included pain on the lateral side which increased after sitting, along with stiffness. Dr. Lents noted the MRIs of the left femur and pelvis were normal. Petitioner was diagnosed with trochanteric bursitis of the left hip and was given an injection of Depo-Medrol and lidocaine. She was advised to begin physical therapy for range of motion and strengthening. (Px6).

On 11/6/12, Petitioner returned to MedStop One with complaints of tenderness at the trochanteric area. While the report notes she was there to follow up on the results of her MRI, there was no indication of the MRI results in the report. (Px8). On 12/7/12, Petitioner returned to Dr. Lents with complaints of continued left hip pain, and continued therapy was recommended. She also went to MedStop One that same day and advised that Dr. Lents was treating her for hip issues with a cortisone injection and physical therapy. (Px6 & 8).

On 1/4/13, Dr. Lents indicated Petitioner was improved and her pain was lessening. The diagnosis was a left hip sprain, and she was advised to continue in physical therapy and to return to work. (Px6). Petitioner testified that she returned to full duty work on 1/4/13. However, at MedStop One on 1/8/13, Petitioner indicated physical therapy was helping and she hoped to return to work the next week. (Px8).

On 1/28/13, Petitioner returned to Dr. Lents with continued reports of pain in her left leg, thigh, and up her back. Dr. Lents noted it was difficult to pinpoint what was causing her pain and recommended Petitioner be followed by a physiatrist. (Px6).

On 2/4/13, Petitioner underwent an ultrasound of the pelvis which showed a 1.3 cm anterior uterine body, tiny cervical cyst, and normal ovaries. On 2/8/13, she returned to MedStop One for issues with her menstrual cycle. (Px8). On 6/24/13, Petitioner was notified she had been authorized to meet with a physiatrist, and she indicated she had met with Dr. Bieser and an MRI was being performed. (Px6).

On 7/2/13, Petitioner presented to Dr. Burns, D.O., of Advanced Orthopedic Specialists for diffuse left leg and thigh pain. Dr. Burns recounted Petitioner's assault and summarized that the patient was not able to do a lot of injury to Petitioner. Petitioner reported pain with sitting, standing, and walking which including a tightening and burning feeling. Petitioner told Dr. Burns that redirecting patients bothers her, but she believed being assigned elsewhere would make things worse for her. The doctor noted Petitioner's MRI showed degenerative disc disease, but nothing that would cause her current physical symptoms. He noted that she had recently seen Dr. Biesner at Advanced Orthopedic Specialists, and that he had recommended a bursal injection like the one she had received in November, but that Petitioner indicated this had only made her worse and caused a sleep disturbance. It was noted that physical therapy had helped her, but she had not continued with it. As to her sleep patterns, Petitioner reported bad dreams and a little bit of fear in the workplace, along with waking a few times per night and sleep latency of up to three hours when she first goes to bed. Dr. Burns thought Petitioner had "a touch" of post-traumatic stress disorder but did not think extensive treatment was warranted. (Px6).

On 7/15/13, Petitioner returned to Dr. Burns for follow up. He noted her prior physical therapy notes indicated "somewhat guarded progress." Petitioner was diagnosed with hip strain, lumbar strain, tight iliotibial band, and clinical evidence of bursitis but negative response to 2 bursal injections. Petitioner was restricted from performing overtime work. (Px6).

On 8/12/13, Dr. Burns indicated Petitioner was improving through physical therapy, and her work restrictions were continued. On 10/14/13, Dr. Burns indicated Petitioner's diagnosis was changed to include multiple contusions and lumbar and iliotibial strain. Petitioner was responding well to the complexity of her injury and

the overlay from her workplace. On 1/2/14, Petitioner was doing quite well as her formal therapy program had been shifted to a home program. She had developed lateral hip pain which she could not associate with any particular injury. Petitioner was continuing to work but with ongoing restriction against overtime hours. (Px6).

On 2/10/14, Petitioner returned to Dr. Burns for follow up and indicated she was responding well to the exercise program and her medications. Petitioner's diagnosis was changed to chronic pain syndrome, and Dr. Burns felt Petitioner was close to maximum medical improvement (MMI). (Px6).

On 6/2/14, Petitioner was noted to be performing her daily home exercise program. Dr. Burns' diagnosis was assault with multiple contusions and diffuse strain, and that all felt stable. He recommended a permanent restriction against a lot of overtime hours, as she had poorly tolerated this since the accident, and placed her at MMI. He did not envision the need for extensive treatment in the future, other than a review of her exercise regimen a couple of times a year, as he had no expectation of any significant reoccurrence or re-exacerbation without further trauma. (Px6).

On 8/21/14, Petitioner testified she was working her regular evening shift doing a face check. She indicated a girl was standing in the hallway as she came from the "Dogwood" wing onto "Magnolia." Petitioner stated a patient came towards her with her arms open, and she told the patient she was not going to hug her at that time, but she would come back when her work was completed. Petitioner testified that the patient then grabbed her and put her in a choke hold. She was able to get out of it twice, because the patient was so tall, before the patient then threw her against the handrail, causing her to hit her head and black out again. Petitioner said the patient then went after another staff member in the hallway. Petitioner described this patient as being a 6'4" female weighing over 300 pounds. Petitioner testified that she injured her neck, back, and left forearm, and she again sought treatment with Advanced Orthopedic Specialists.

Petitioner testified that she had a hard time seeing a doctor because her claim was being denied, and her doctor wouldn't see her for any injuries that happened at work. Petitioner said she had not taken psychiatric medication prior to the date of accident.

On 9/4/14, Petitioner presented to Dr. Smith with left arm, lower back, bilateral hip and left thigh complaints following the 8/21/14 assault. Dr. Smith diagnosed lumbosacral and left elbow sprains. Petitioner was directed to begin physical therapy and advised to take over the counter ibuprofen. She also was provided with activity modifications of lifting up to 10 pounds up to 5 times per hour, limited/no bending, limited/no lifting below waist or shoulder level, and limited/no strenuous or repetitive gripping or grasping of the left arm. (Px5).

On 9/11/14, Petitioner returned to Dr. Smith, but only the only report from this visit in evidence is a Work Status Worksheet. Petitioner's activity restrictions were changed to include lifting up to 10 pounds up to 5 times per hour and no strenuous or repetitive gripping or grasping of the left arm. (Px5).

Petitioner returned to Dr. Burns on 10/20/14 with complaints of recurrent low and mid back, neck, and buttock pain. The doctor recommended a short course of physical therapy to help with range of motion, stretching, development of a home program, modalities, and to allow for exercise. He opined that the Petitioner needed to demonstrate the ability to return to work. (Px7).

On 12/18/14, Petitioner attended a Section 12 examination with Dr. Sudekum at the request of Respondent. Dr. Sudekum diagnosed significant bilateral thumb basal joint arthritis, left greater than right, and opined that this condition had developed over several years, as supported by Petitioner's history of pain in the CMC joint region, x-rays, and physical exam findings. As such, Dr. Sudekum opined this condition was not related to Petitioner's

work injury. The doctor's conclusion was based, in part, on the fact that there was no indication in the medical records that Petitioner sustained any direct injury to her left forearm and instead had reported radial neuropathy symptoms for the past 28 years. He felt Petitioner would benefit from conservative treatment including therapy, splinting, nonsteroidal anti-inflammatory medications, and possible steroid injection, but was not a surgical candidate. (Rx6).

A second Section 12 examination was performed on 12/22/14 with Dr. Doll. Petitioner reported being attacked on 8/21/14 by a large, 6'1" female patient who weighed about 350 pounds. Dr. Doll diagnosed Petitioner with a mild neck strain, left proximal forearm contusion/strain and left lumbosacral/hip contusion/strain related to her 2014 work injury. He opined that the diagnoses of chronic left hip/leg pain, history of left lateral elbow surgery and cervical spondylosis were unrelated to Petitioner's 8/21/14 work injury. Of note, is that Petitioner indicated to Dr. Doll she had no prior complaints in the areas of the body listed above. Upon further review of the medical records, it was discovered Petitioner had a pre-existing underlying chronic condition involving her left hip and leg, and she had undergone diagnostic studies of her neck and back. Considering this and the patient's own complaints, Dr. Doll found Petitioner to have exaggerated pain responses and inconsistencies which were not supported by objective findings. Dr. Doll opined that the Petitioner had reached MMI without restrictions as it related to her 8/21/14 work injury. (Rx4).

On 2/11/15, the parties took the deposition of Dr. Doll. The doctor maintained his diagnoses as listed in his report, but also emphasized that Petitioner's weight could have been playing a role in her continued pain. Dr. Doll also noted a 9/4/14 progress note wherein Dr. Smith listed numerous symptoms for Petitioner but also indicated she had full range of motion in her back, hips, and left arm, which made Petitioner's responses questionable to Dr. Doll. He continued to opine that Petitioner was at MMI and did not need work restrictions. (Rx5).

On 2/23/15, Petitioner presented to Tiffany Armes, PMHNP-BC, for evaluation and treatment regarding anxiety associated with assaults occurring in the workplace. Petitioner reported the assault in 2012 occurred when a patient jumped over the nurses' station, came into the chart room, and started humping her. Petitioner reported the assault in 2014 occurred when a 6', 300 pound African American man head locked her and threw her into the wall. Petitioner stated she initially experienced nightmares but that they had become less frequent. She described feelings of anxiety around crowds and around African American males, which had led to avoidance of activities. Petitioner also indicated she was physically abused by a previous husband, leading to trust issues. (Px9).

Petitioner returned to Ms. Armes on 3/16/15, rating her anxiety level as three out of ten. She had not had any panic attacks. On 4/20/15, Petitioner reported one panic attack while car shopping and one nightmare she was unable to remember. She described her mood as fine. Petitioner indicated she would likely not be able to return to work because of her age and all of the attacks. On 5/18/15, Petitioner returned to Ms. Armes, noting she was experiencing stress as her disability had been "revoked", and she was also concerned over health problems involving fasciculations and ulcers which were not work related. She reported an increase in sleep and only sporadic nightmares. Petitioner described her anxiety as manageable and that she had just situational stress. (Px9).

On 7/13/15, Petitioner returned to Dr. Armes. Petitioner reported she had been doing fairly well and had only experienced anxiety around men who stare or look "creepy." Dr. Armes recommended Petitioner not return to work as a mental health technician but indicated that her office provided only clinical services and does not provide in-depth disability evaluations. (Px9).

On 3/8/16, Petitioner attended a psychiatric evaluation with psychiatrist Dr. Garland at the Respondent's request. Petitioner recounted the events of the 9/6/12 work injury to Dr. Garland. Petitioner reported she had nightmares after the incident, isolated herself, and could no longer go dancing anymore because of the pain she experienced. Petitioner also recounted the events of the 8/21/14 work injury, stating she was assaulted by a man. Petitioner indicated she experienced back, hip and leg pain. She also reported frustration with the doctors who would not see her because her injury involved a workers' compensation injury. She indicated she was in a stressful situation with her deceased husband's family members. Petitioner reported problems with sleeping since 2012. She described feelings of being scared of everything. Petitioner initially indicated she had been suicidal on one occasion, but later stated she was suicidal every day for 2 months after the 2012 altercation. Dr. Garland and the Petitioner discussed what brings about her anxiety and how it had affected her daily living. Ultimately, Dr. Garland diagnosed Petitioner with post-traumatic stress disorder in remission, which he opined was unrelated to the work injury of 8/21/14. The doctor believed Petitioner's current complaints were instead related to her 9/6/12 work injury, along with the ongoing litigation process and her financial stress. Dr. Garland believed Petitioner's prognosis was poor because Petitioner was of the belief that she was severely mentally ill and unable to work. Dr. Garland opined that the Petitioner was able to perform normal life capabilities and work, but recommended she not work as a mental health technician due to the physical nature of the job and the potential for future altercations. Dr. Garland believed the Petitioner had reached MMI. (Rx7).

On 8/25/16, Dr. Garland authored an addendum after reviewing additional medical records. Review of the records did not change her causation opinion or prognosis. She did opine that Petitioner could continue to take paroxetine, as it appeared to have improved her symptoms, but as the Petitioner reported limited benefit with psychotherapy, Dr. Garland indicated this could be discontinued. (Rx8).

On 10/26/16, the parties took the deposition of Dr. Garland. She explained that her diagnosis for Petitioner of post-traumatic stress disorder in remission meant that the symptoms were improved and were not causing any problems in her everyday life. The doctor based her diagnosis on the fact that Petitioner was able to return to work after her accident in 2012. She was also able to easily talk about the patient assaults, her sleep pattern appeared to be fine, and she had engaged in activities, with the only limitation being due to physical pain. She reported intermittent nightmares, but it didn't seem to be at the point that it affected her sleep. While noting she only reviewed some limited psychiatric records, Dr. Garland opined that psychiatric treatment to date appeared reasonable, and she reiterated the future recommendations she had noted in her addendum report. Dr. Garland opined that Petitioner could return to work outside of a mental health facility, and even could return to work at Choate Mental Health Center, but that practically speaking she would not recommend that she return to work there. Her prognosis was poor because of her own belief that she was severely mentally ill and disabled. Dr. Garland thought a return to work in general would help the Petitioner by giving meaning and structure to her life again. (Px1; Rx8).

Petitioner acknowledged that she met with Dr. Garland, was examined for her psychiatric injury and that she was aware Dr. Garland testified and opined she should not go back to work in the field of mental health technician. Petitioner testified she has not returned to her job as a mental health technician since 8/21/14 and did not feel she could return to that position at this time.

When asked if she was experiencing psychiatric symptoms as she sat in the hearing room, Petitioner testified she was not because none of her triggers were present. Petitioner described her triggers as including experiencing someone who is agitated, or a black male of the body type of the male patient that assaulted her. Petitioner said these things give her anxiety. Petitioner indicated she did not experience these issues prior to work accident.

Petitioner testified she is not currently working. She is 58 years old. Petitioner stated she has a GED and also completed some college classes. Petitioner described her job experience as including being a teachers' aide for developmentally disabled and mentally ill behavior disorder adolescents. Petitioner confirmed she has been working with the mentally handicapped prior to her employment with Choate Mental Health Center for 20 years.

On cross examination, Petitioner again indicated that to her knowledge she remains a Respondent employee. She last worked in August of 2014 and had not returned to work since, including any sort of modified duty. Petitioner has not secured other employment or completed any employment searches since August of 2014. She testified she remains under the care of psychiatric nurse practitioner Armes. She takes an anxiety medication on an as needed basis but could not recall the name of it, as it recently changed. Petitioner stated she takes the medication if she goes anywhere besides church where there is a large crowd. Petitioner explained this does not mean she takes it very often as she does not go many places, but would, for example, take it if going to St. Louis. Petitioner testified she was seeing Ms. Armes every 3 months but recently had her change it to every 6 months because she is paying for it herself. Petitioner said the last time she met with the doctor was the week prior to the hearing date.

WITH RESPECT TO THE ISSUE OF THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

At Arbitration, the parties that compensable accidents occurred on 9/6/12 and 8/21/14 while Petitioner was employed by the State of Illinois. The parties also agreed that Respondent has paid or will pay all reasonable and causally related medical bills. The parties further agreed that any temporary total disability (TTD) benefits due Petitioner had been paid and that there is no further dispute as to said benefits. Thus, the only issue at hearing was the nature and extent of any permanent disability sustained by Petitioner as a result of these accidents.

As a result of the patient assault Petitioner encountered at Choate Mental Health Center in 2012, it was recommended in 2016 by Section 12 examiner Dr. Garland that Petitioner not return to her position as a mental health technician. Consideration was given to the second assault of 8/21/14, but Dr. Garland felt Petitioner's PTSD in remission had actually stemmed from the 2012 incident. Designating the diagnosis of PTSD in remission indicated, per Dr. Garland, that Petitioner could return to the work force, though he did not believe she should do so at the Choate Mental Health Center. There are no medical restrictions barring her from returning to the workforce outside of current employment. The only physical restriction in place for Petitioner is that which excludes her from participating in overtime. This restriction was not an issue for the facility to accommodate. Accordingly, this Arbitrator finds that Petitioner is not medically permanently and totally disabled.

Alternatively, Petitioner could seek permanent total disability benefits pursuant to the "odd-lot" theory or could argue she is entitled to a wage differential award as her injury may prevent her from continuing in her previous line of employment. 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, 397 N.E.2d 804, 34 Ill. Dec. 132 (1979). If the employee'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 employee to establish by a preponderance of the evidence that he falls into the "odd lot" category, that is, 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. *Westin Hotel v. Workers' Compensation Comm'n*, 372 Ill. App. 3d 527, 544, 865 N.E.2d 342, 310 Ill. Dec. 18 (2007). An employee

satisfies his burden of proving that he falls into the "odd-lot" category by showing either (1) a diligent but unsuccessful attempt to find work or (2) 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. *Westin Hotel*, 372 Ill. App. 3d at 544. Petitioner has failed to show either of these factors are applicable. Petitioner presented no evidence to support the contention she cannot be regularly employed in the labor market in order to qualify for permanent benefits under the "odd-lot" theory. Petitioner testified she remains an employee of the Respondent and has not attempted to secure alternative employment. Petitioner did not present any evidence sufficient to support the contention that her age, skills, training, and work history would hinder her from being regularly employed in the general labor market. The Petitioner has failed to prove that she is permanently and totally disabled pursuant to the Act.

The Arbitrator must next determine if Section 8(d)1 is applicable to this case. The Arbitrator finds that the Petitioner also has failed to fulfill her burden or proof that she is entitled to a wage differential. To qualify for a wage differential award, Petitioner must show both that the disability has caused (a) a partial incapacity that prevents him or her from pursuing his or her usual and customary line of employment, and (b) impairment of earnings. *Sobolyev v. Yellow Transp.*, 08 IL.W.C. 43283 (Ill.Indus.Com'n), 15 I.W.C.C. 0623, 2015 WL 5351031 citing *Albrecht v. Industrial Comm'n*, 271 Ill.App.3d 756, 648 N.E.2d 923, 925, 208 Ill.Dec 1 (1995).

Petitioner testified she continues as an employee of Choate Mental Health Center which has been her usual and customary line of employment since 2002. At the same time, Dr. Garland has indicated that the Petitioner cannot return to her usual and customary employment as a mental health technician III. However, the Petitioner did not provide any evidence to support the second prong of the test, i.e. that she has suffered an impairment of earnings. It is entirely possible that she has, but evidence was simply not presented in support of this theory. Petitioner provided no evidence as to the income she would be able to earn in any other position of employment outside of Choate Mental Health Center. She has not performed a job search. She did not obtain a labor market survey or obtain vocational assistance. It appears to the Arbitrator that from her testimony she has not ruled out returning to work for the Respondent in some fashion. To award a wage differential by guessing as to what type of employment position Petitioner could obtain and without any income information upon which to base the award would be speculative in nature and would make such an award inappropriate based on the evidence presented.

As a result of failing to prove she is entitled to a permanent and total disability awards outlined above, the analysis turns to consideration of a permanent partial disability award. Pursuant to §8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

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

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

(i) the reported level of impairment pursuant to subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of the injury;
(iv) the employee's future earning capacity; and

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

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no weight is placed on this factor as neither party provided an AMA rating for consideration.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a mental health technician III. It appears that she remains employed in this position with Respondent, but has not returned to work since August 2014, and cannot return to work performing her regular job according to both psychiatric nurse practitioner Armes and Dr. Garland. Thus, it appears that the Petitioner has suffered a loss of occupation, which is a significant factor in the permanency determination. At the same time, what her work status is currently with Respondent is not exactly clear, and thus it is unclear whether she can be accommodated with Respondent into another position or not, or whether she has attempted to do so.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 53 years old at the time of the initial accident, and 55 years old at the time of the second accident. Neither party has presented evidence in support of how the Petitioner's age plays a role in any permanent disability resulting from either accident. This factor therefore carries no weight in the permanency determination.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that the Petitioner testified she is still an employee of the Respondent but did not testify as to in what capacity. Dr. Garland has indicated that she should not work in her regular job as a mental health technician (in agreement with Armes), but has opined that she should be able to otherwise return to work with no noted psychiatric restrictions. Her current physical condition is also unclear to the Arbitrator, as no medical treatment was indicated after her 2/11/15 visit with Dr. Doll. Respondent's examining physician, Dr. Doll opined Petitioner had reached MMI at that point physically and did not need any work restrictions. The last note of physiatrist Dr. Burns in evidence appears to be from 10/20/14, when he diagnosed a lumbar strain with diffuse contusions, as well as diffuse contusions of the elbow, hip and thoracic spine. He recommended ibuprofen, a short course of therapy followed by home exercise, and stated: "She is currently on a leave which she describes as non-occupational. I think she is needing to demonstrate the ability to return to the workplace prior to that time and the best way to do that is to monitor her response to therapy." She was given a permanent restriction from working any significant overtime. Petitioner is still employed for Respondent in the same position as she was prior to her accidents. She has not worked since 2014 and yet testified she has not looked for work. She also did not testify as to whether she has contacted the Respondent with regard to her job status. The Arbitrator finds that it's reasonable to conclude that the Petitioner likely has suffered some degree of a loss of earning capacity based on the recommendation that she not return to work as a mental health technician, and a significant work history involving working with mental health patients. However, what that degree of loss this may be is speculative given there has been no direct evidence presented in support of a diminished future earning capacity. This factor carries some weight in the permanency determination.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the Petitioner has alleged physical and mental disabilities arising out of her two dates of injury.

With regard to her physical condition, the Arbitrator notes that the initial accident mainly resulted in complaints involving the left hip and to some degree the left buttocks and leg. However, the Petitioner's medical records clearly reference some level of preexisting condition in terms of cramps and fasciculations in her body, and specifically in her thighs. Additionally, Dr. Lents stated it was difficult to pinpoint her pain prior to referring Petitioner to a physiatrist. Dr. Godbey ultimately determined that she had multiple contusions and diffuse strains that were all stable as of 6/2/14, and the only restriction he put on her work was a permanent restriction on overtime work. She otherwise had returned to her regular job from 1/4/13 to 8/21/14.

Following the second accident, the was diagnosed with lumbosacral and left elbow sprains. The last physical medicine visit she had was with Dr. Burns on 10/20/14, at which time he diagnosed lumbar strain with diffuse contusions. While he prescribed therapy and advised that Petitioner would need to demonstrate the ability to return to work following therapy, there is no evidence that Petitioner performed this therapy. While she testified that the Respondent was disputing her case, there is no indication that she pressed for treatment via Section 19(b) of the Act or that she sought treatment via group health insurance. Dr. Doll diagnosed Petitioner with a mild neck strain, left forearm contusion or strain, and left hip contusion or strain, all of which he opined were related to her 2014 work injury. Petitioner was diagnosed with other ailments which were unrelated to her work accidents. Of note is that Petitioner had a history of a chronic condition involving her left hip and leg, as supported by the medical records. Petitioner initially denied this to Dr. Doll. Petitioner also experienced fasciculations and cramps throughout her body for which she had sought medical treatment prior both work accidents, with one note indicating she has had this for most of her life. Dr. Godbey suspected Petitioner might have some sort of neuromuscular disease. In August of 2012, just prior to the initial patient assault, Petitioner complained to Dr. Godbey of aching in her muscles when working a double shift or overtime. Dr. Sudekum opined that Petitioner's bilateral thumb basal joint arthritis was unrelated to her employment, but it is unclear where Petitioner even may have previously treated for this. There are indications in the records of Dr. Burns and MedStop One that the Petitioner saw a Dr. Bieser or Dr. Biesner, but the Arbitrator did not locate any records from such physician in the record. Petitioner's physical treatment was relatively minimal, involving mainly physical therapy and an injection. Her subjective complaints were not substantiated by objective testing according to Dr. Doll, and he asserted Petitioner had exaggerated her pain responses. This was supported to some degree by the medical records kept by Petitioner's own physicians, who noted pain responses but no issues with range of motion only weeks after her accident.

There were some inconsistencies in Petitioner's account of events. Petitioner reported to Dr. Armes that an African American male had assaulted her in 2014. She told Dr. Garland she had been assaulted by a man in 2014 at the facility as well. However, at trial, she testified she was assaulted by a rather large African American female patient. The height and weights of the patients involved in these events has also changed somewhat through Petitioner's treatment. Other factors were also noted to have impacted Petitioner's mental health, such as a history of abuse from an ex-husband, financial issues, family disputes, and other health concerns unrelated to her employment activities. Dr. Garland termed Petitioner's prognosis as poor, not because of her actual diagnosis, but because Petitioner believed herself to be mentally ill and unable to work. According to Dr. Garland, they are not causing issues in her everyday life. Dr. Garland testified that a return to employment would benefit Petitioner and, as noted, it is unclear if Petitioner has made any attempt to do so. The Arbitrator places significant weight on this factor.

Based on the lack of physical treatment after 10/20/14, and the opinions of Dr. Garland on 3/8/16 that the Petitioner had reached maximum psychological improvement, the Arbitrator finds that the Petitioner reached MMI as of 3/8/16.

Based on the above factors, the record taken as a whole and a review of prior Commission awards involving similar circumstances and outcomes, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of the loss of 17.5% of the person as a whole in total between the two accidents. While Dr. Garland has opined that the Petitioner's disability is related to the initial accident, the Arbitrator notes that the Petitioner had been able to return to work following that accident, and therefore the second accident was also a contributor to her current condition. The Arbitrator finds that the Petitioner sustained permanent partial disability to the extent of the loss of 5% of the person as a whole with regard to the 9/6/12 accident, and sustained permanent partial disability to the extent of the loss of 12.5% of the person as a whole with regard to the 8/21/14 accident, both pursuant to §8(d)2 of the Act. There are clearly questions with regard to the Petitioner's exact level of disability, both physically and mentally. However, it is also clear that the Petitioner is unable to return to her regular employment, which appears to be the same or similar to what she has done for the last 20 years. Thus, the Arbitrator bases the determination in significant part on a loss of trade. It is understandable that someone who is physically attacked twice at the same facility would have difficulty returning to that job. At the same time, the Arbitrator notes that the Petitioner does not appear to have any significant ongoing disability, either physically or mentally, that would prevent her from returning to a job outside of the mental health field.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jennifer Cain,
Petitioner,

vs. No. 14 WC 032892

Choate Mental Health Center,
Respondent.

19IWCC0502

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner, and notice given to all parties, the Commission, after considering the issue of permanent disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Arbitrator awarded Petitioner 12.5% person-as-a-whole pursuant to §8(d)2, primarily based upon Petitioner's loss of occupation. The Commission finds that award insufficient based upon its review of the five factors outlined in Section 8.1b(b) and increases the permanency award to 20% of the person-as–a whole.

The Commission notes that the arbitrator has set forth facts relevant to a determination of permanent partial disability and adopts the arbitrator's statement of facts as its own. However, the Commission evaluates the evidence in this case differently, based upon the following factors under Section 8.1b:

(i) Disability impairment rating: *no weight,* because neither party offered an AMA impairment rating.

(ii) Employee's occupation: *significant weight,* because Petitioner has been advised not to return to work as a mental health technician, though she has spent her entire career caring for mentally disabled patients and students.

(iii) Employee's age: *significant weight,* because Petitioner faces limitations on her employment options as a result of her PTSD and permanent restrictions against working overtime. Fifty-five at the time of the assault, she may have more than a decade of work life ahead, yet her age may be an obstacle to starting a new career path.

(iv) Future earning capacity: *significant weight,* because of her loss of occupation. Although Petitioner testified that she is still considered an employee of Respondent, she has not returned to work since her 2014 assault, nor has she sought other employment. She has been advised by her psychiatric nurse practitioner not to return to work as a mental health technician, a prohibition affirmed by Respondent's Section 12 examiner.

(v) Evidence of disability corroborated by the treating records: *significant weight*, because Petitioner suffers from post-traumatic stress disorder as a result of the assault and has been advised not to return to her career position as a mental health technician.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator awarding Petitioner 12.5% person-as-a-whole under §8(d)2, filed November 5, 2018, is hereby modified to increase Petitioner's permanent partial disability award to 20% of the person-as-a-whole.

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: SEP 13 2019

o-08/1/19
dk/mcp
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Marc Parker

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CAIN, JENNIFER
Employee/Petitioner

Case# **14WC032892**

12WC039682

SOI/CHOATE MENTAL HEALTH CENTER
Employer/Respondent

19IWCC0502

On 11/5/2018, 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 2.43% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1315 DWORKIN AND MACIARIELLO
GERALD CONNOR
134 N LASALLE ST SUITE 650
CHICAGO, IL 60602

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

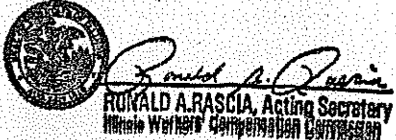
0558 ASSISTANT ATTORNEY GENERAL
SHANNON D RIECKENBERG
93 MORBER RD
AVA, IL 62907

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

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

NOV 5 - 2018



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

STATE OF ILLINOIS)
)SS.
COUNTY OF **WILLIAMSON**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

JENNIFER CAIN
Employee/Petitioner

Case # **14** WC **32892**

v.

Consolidated cases: **12 WC 39682**

STATE OF ILLINOIS / CHOATE MENTAL HEALTH CENTER
Employer/Respondent

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Cellini**, Arbitrator of the Commission, in the city of **Herrin**, on **December 12, 2017**. By stipulation, the parties agree:

On the date of accident, **August 21, 2014**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**54,648.36**, and the average weekly wage was $**1,050.93**.

At the time of injury, Petitioner was **55** years of age, ***single*** with **0** dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

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

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of **$630.56 per week** for **62.5 weeks**, because the injuries sustained caused the **12.5% loss of the person as a whole**, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from **March 8, 2016** through **December 12, 2017**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Paul V. Cellini

Signature of Arbitrator

October 29, 2018

Date

NOV 5 - 2018

STATEMENT OF FACTS and CONCLUSIONS OF LAW

An employee for the Respondent since 2002, the Petitioner testified she was employed as a mental health technician III with Choate Mental Health Center on 9/6/12. Her job duties included working with mental health patients on a daily basis, including doing "face checks", making the schedule for the other workers on the same shift, and ensuring everyone was doing their jobs. Petitioner indicated she remains a Respondent employee.

Petitioner testified that on 9/6/12 she was sexually assaulted in the chart room. She was doing a face check at 12:45, i.e. making sure all patients were present and accounted for. Petitioner stated she entered a patient's room, announced she was doing a face check, shut the door, and went down the hallway to the next room. After making it halfway up the hallway, she heard someone running up behind her, and it was one of the patients she just checked. She told the patient she was unable to talk at that time but would come talk to him when she was finished. Petitioner said the patient began simulating sex with a handrail. Petitioner was continuing up the hallway to complete the face check when the patient grabbed her and turned her around. She again indicated she couldn't stop and talk at that time, at which point the patient then continued to simulate sex with the handrails. She next went to the chart room to tell the nurse the patient needed one-on-one supervision. She closed the door behind her, indicating the patient was there and grabbed her, put her on his lap and started simulating sex with

her in the seated position. Petitioner indicated she was able to get away, but her radio fell off. The nurse picked up her radio and called for help. Petitioner testified the patient then grabbed her again and that she blacked out. She testified that when she regained consciousness, she was on the floor and the patient was on top of her, groping her and again simulating sex.

Petitioner testified the patient that assaulted her was 6'2" to 6'6" and weighed over 200 pounds, while she is 4'11". Petitioner explained that she felt violated after the incident, and experienced pain in her head, neck, back, butt and hip. The floor she had landed on was like marble and very hard. She testified she sought treatment, which included a steroid injection, physical therapy, and diagnostic testing, with Advanced Orthopedic Specialists after the incident. Petitioner said she had a lot of anxiety and night terrors or dreams after the incident, and indicated she was referred to a psychiatrist for her mental injury.

Prior to the incident, on 7/24/12, Petitioner had presented to Dr. Godbey on referral from a Dr. Koonce for additional evaluation as to her complaints of muscle spasms and cramping. She indicated a sensation in her thighs was causing issues with her sleep patterns. She reported a "rippling" sensation in her thighs, cramping throughout her body brought on by laying on her stomach or back, and "creepy crawly" sensation in her legs if she sat for long periods of time. She indicated she first began experiencing these sensations in 2007 and had felt the cramping in her legs her whole life. (Px7).

On 7/30/12, an EMG/NCS study at Saint Francis Medical Center was noted to be a normal study. (Px7). On 8/10/12, Petitioner returned to Dr. Godbey for complaints of muscle aches. She reported she was continuing to experience cramps and fasciculations throughout her body, but the cramping had improved. She also reported issues with aching in her muscles after working a double shift at work. Dr. Godbey thought Petitioner might have a neuromuscular disease. (Px7).

Following the 9/6/12 accident, Petitioner presented to MedStop One on 9/10/12. She indicated she had been sexually assaulted a few days prior while at work and was complaining of left leg and breast pain. Petitioner was tender at the gluteus medius and vastus lateralis, but no bruising was noted. Petitioner returned on 9/24/12, stating she did not feel she could mentally or physically return to work following the assault there. She indicated she could stand for 15 to 20 minutes before her left lateral thigh would start to burn. She was referred to a psychologist. On 10/1/12, Petitioner returned to MedStop One as she was feeling some anxiety over the sexual assault at work. She was advised to remain off work at that time. (Px8).

On 10/19/12, Petitioner sought treatment with Dr. Godbey and indicated she was assaulted at work by a patient that pushed her to the ground and punched her multiple times. She reported pain in the left thigh. Petitioner was advised to use Tylenol and follow up with her occupational medicine physician. (Px7).

Petitioner returned to MedStop on 10/23/12 and requested an orthopedic consult as well as referral to her neurologist, Dr. Godbey. She complained of left buttock pain with radiation in to the lateral knee, and trochanteric tenderness with walking, stooping, standing, or sitting since the sexual assault at work. A 10/31/12 x-ray of her left hip reflected no acute findings and minor degenerative changes. She underwent an MRI of the pelvis on that same date which showed no acute osseous abnormality, minimal degenerative changes of the sacroiliac joints without evidence of active sacroiliitis or ankyloses, small ovarian cysts, trace greater trochanteric bursitis bilaterally, and mild common hamstring tendinosis bilaterally without evidence of a tear. A left femur MRI reportedly showed nonspecific subcutaneous edema anteriorly within the thighs bilaterally, no acute osseous abnormality, and lateral subluxation of the patella. (Px8).

On 11/9/12, Petitioner presented to Dr. Lents of Advanced Orthopedic Specialists for left hip pain. She reported a 9/7/12 assault at work which resulted in an injury to her left hip. Her symptoms included pain on the lateral side which increased after sitting, along with stiffness. Dr. Lents noted the MRIs of the left femur and pelvis were normal. Petitioner was diagnosed with trochanteric bursitis of the left hip and was given an injection of Depo-Medrol and lidocaine. She was advised to begin physical therapy for range of motion and strengthening. (Px6).

On 11/6/12, Petitioner returned to MedStop One with complaints of tenderness at the trochanteric area. While the report notes she was there to follow up on the results of her MRI, there was no indication of the MRI results in the report. (Px8). On 12/7/12, Petitioner returned to Dr. Lents with complaints of continued left hip pain, and continued therapy was recommended. She also went to MedStop One that same day and advised that Dr. Lents was treating her for hip issues with a cortisone injection and physical therapy. (Px6 & 8).

On 1/4/13, Dr. Lents indicated Petitioner was improved and her pain was lessening. The diagnosis was a left hip sprain, and she was advised to continue in physical therapy and to return to work. (Px6). Petitioner testified that she returned to full duty work on 1/4/13. However, at MedStop One on 1/8/13, Petitioner indicated physical therapy was helping and she hoped to return to work the next week. (Px8).

On 1/28/13, Petitioner returned to Dr. Lents with continued reports of pain in her left leg, thigh, and up her back. Dr. Lents noted it was difficult to pinpoint what was causing her pain and recommended Petitioner be followed by a physiatrist. (Px6).

On 2/4/13, Petitioner underwent an ultrasound of the pelvis which showed a 1.3 cm anterior uterine body, tiny cervical cyst, and normal ovaries. On 2/8/13, she returned to MedStop One for issues with her menstrual cycle. (Px8). On 6/24/13, Petitioner was notified she had been authorized to meet with a physiatrist, and she indicated she had met with Dr. Bieser and an MRI was being performed. (Px6).

On 7/2/13, Petitioner presented to Dr. Burns, D.O., of Advanced Orthopedic Specialists for diffuse left leg and thigh pain. Dr. Burns recounted Petitioner's assault and summarized that the patient was not able to do a lot of injury to Petitioner. Petitioner reported pain with sitting, standing, and walking which including a tightening and burning feeling. Petitioner told Dr. Burns that redirecting patients bothers her, but she believed being assigned elsewhere would make things worse for her. The doctor noted Petitioner's MRI showed degenerative disc disease, but nothing that would cause her current physical symptoms. He noted that she had recently seen Dr. Biesner at Advanced Orthopedic Specialists, and that he had recommended a bursal injection like the one she had received in November, but that Petitioner indicated this had only made her worse and caused a sleep disturbance. It was noted that physical therapy had helped her, but she had not continued with it. As to her sleep patterns, Petitioner reported bad dreams and a little bit of fear in the workplace, along with waking a few times per night and sleep latency of up to three hours when she first goes to bed. Dr. Burns thought Petitioner had "a touch" of post-traumatic stress disorder but did not think extensive treatment was warranted. (Px6).

On 7/15/13, Petitioner returned to Dr. Burns for follow up. He noted her prior physical therapy notes indicated "somewhat guarded progress." Petitioner was diagnosed with hip strain, lumbar strain, tight iliotibial band, and clinical evidence of bursitis but negative response to 2 bursal injections. Petitioner was restricted from performing overtime work. (Px6).

On 8/12/13, Dr. Burns indicated Petitioner was improving through physical therapy, and her work restrictions were continued. On 10/14/13, Dr. Burns indicated Petitioner's diagnosis was changed to include multiple contusions and lumbar and iliotibial strain. Petitioner was responding well to the complexity of her injury and

the overlay from her workplace. On 1/2/14, Petitioner was doing quite well as her formal therapy program had been shifted to a home program. She had developed lateral hip pain which she could not associate with any particular injury. Petitioner was continuing to work but with ongoing restriction against overtime hours. (Px6).

On 2/10/14, Petitioner returned to Dr. Burns for follow up and indicated she was responding well to the exercise program and her medications. Petitioner's diagnosis was changed to chronic pain syndrome, and Dr. Burns felt Petitioner was close to maximum medical improvement (MMI). (Px6).

On 6/2/14, Petitioner was noted to be performing her daily home exercise program. Dr. Burns' diagnosis was assault with multiple contusions and diffuse strain, and that all felt stable. He recommended a permanent restriction against a lot of overtime hours, as she had poorly tolerated this since the accident, and placed her at MMI. He did not envision the need for extensive treatment in the future, other than a review of her exercise regimen a couple of times a year, as he had no expectation of any significant reoccurrence or re-exacerbation without further trauma. (Px6).

On 8/21/14, Petitioner testified she was working her regular evening shift doing a face check. She indicated a girl was standing in the hallway as she came from the "Dogwood" wing onto "Magnolia." Petitioner stated a patient came towards her with her arms open, and she told the patient she was not going to hug her at that time, but she would come back when her work was completed. Petitioner testified that the patient then grabbed her and put her in a choke hold. She was able to get out of it twice, because the patient was so tall, before the patient then threw her against the handrail, causing her to hit her head and black out again. Petitioner said the patient then went after another staff member in the hallway. Petitioner described this patient as being a 6'4" female weighing over 300 pounds. Petitioner testified that she injured her neck, back, and left forearm, and she again sought treatment with Advanced Orthopedic Specialists.

Petitioner testified that she had a hard time seeing a doctor because her claim was being denied, and her doctor wouldn't see her for any injuries that happened at work. Petitioner said she had not taken psychiatric medication prior to the date of accident.

On 9/4/14, Petitioner presented to Dr. Smith with left arm, lower back, bilateral hip and left thigh complaints following the 8/21/14 assault. Dr. Smith diagnosed lumbosacral and left elbow sprains. Petitioner was directed to begin physical therapy and advised to take over the counter ibuprofen. She also was provided with activity modifications of lifting up to 10 pounds up to 5 times per hour, limited/no bending, limited/no lifting below waist or shoulder level, and limited/no strenuous or repetitive gripping or grasping of the left arm. (Px5).

On 9/11/14, Petitioner returned to Dr. Smith, but only the only report from this visit in evidence is a Work Status Worksheet. Petitioner's activity restrictions were changed to include lifting up to 10 pounds up to 5 times per hour and no strenuous or repetitive gripping or grasping of the left arm. (Px5).

Petitioner returned to Dr. Burns on 10/20/14 with complaints of recurrent low and mid back, neck, and buttock pain. The doctor recommended a short course of physical therapy to help with range of motion, stretching, development of a home program, modalities, and to allow for exercise. He opined that the Petitioner needed to demonstrate the ability to return to work. (Px7).

On 12/18/14, Petitioner attended a Section 12 examination with Dr. Sudekum at the request of Respondent. Dr. Sudekum diagnosed significant bilateral thumb basal joint arthritis, left greater than right, and opined that this condition had developed over several years, as supported by Petitioner's history of pain in the CMC joint region, x-rays, and physical exam findings. As such, Dr. Sudekum opined this condition was not related to Petitioner's

work injury. The doctor's conclusion was based, in part, on the fact that there was no indication in the medical records that Petitioner sustained any direct injury to her left forearm and instead had reported radial neuropathy symptoms for the past 28 years. He felt Petitioner would benefit from conservative treatment including therapy, splinting, nonsteroidal anti-inflammatory medications, and possible steroid injection, but was not a surgical candidate. (Rx6).

A second Section 12 examination was performed on 12/22/14 with Dr. Doll. Petitioner reported being attacked on 8/21/14 by a large, 6'1" female patient who weighed about 350 pounds. Dr. Doll diagnosed Petitioner with a mild neck strain, left proximal forearm contusion/strain and left lumbosacral/hip contusion/strain related to her 2014 work injury. He opined that the diagnoses of chronic left hip/leg pain, history of left lateral elbow surgery and cervical spondylosis were unrelated to Petitioner's 8/21/14 work injury. Of note, is that Petitioner indicated to Dr. Doll she had no prior complaints in the areas of the body listed above. Upon further review of the medical records, it was discovered Petitioner had a pre-existing underlying chronic condition involving her left hip and leg, and she had undergone diagnostic studies of her neck and back. Considering this and the patient's own complaints, Dr. Doll found Petitioner to have exaggerated pain responses and inconsistencies which were not supported by objective findings. Dr. Doll opined that the Petitioner had reached MMI without restrictions as it related to her 8/21/14 work injury. (Rx4).

On 2/11/15, the parties took the deposition of Dr. Doll. The doctor maintained his diagnoses as listed in his report, but also emphasized that Petitioner's weight could have been playing a role in her continued pain. Dr. Doll also noted a 9/4/14 progress note wherein Dr. Smith listed numerous symptoms for Petitioner but also indicated she had full range of motion in her back, hips, and left arm, which made Petitioner's responses questionable to Dr. Doll. He continued to opine that Petitioner was at MMI and did not need work restrictions. (Rx5).

On 2/23/15, Petitioner presented to Tiffany Armes, PMHNP-BC, for evaluation and treatment regarding anxiety associated with assaults occurring in the workplace. Petitioner reported the assault in 2012 occurred when a patient jumped over the nurses' station, came into the chart room, and started humping her. Petitioner reported the assault in 2014 occurred when a 6', 300 pound African American man head locked her and threw her into the wall. Petitioner stated she initially experienced nightmares but that they had become less frequent. She described feelings of anxiety around crowds and around African American males, which had led to avoidance of activities. Petitioner also indicated she was physically abused by a previous husband, leading to trust issues. (Px9).

Petitioner returned to Ms. Armes on 3/16/15, rating her anxiety level as three out of ten. She had not had any panic attacks. On 4/20/15, Petitioner reported one panic attack while car shopping and one nightmare she was unable to remember. She described her mood as fine. Petitioner indicated she would likely not be able to return to work because of her age and all of the attacks. On 5/18/15, Petitioner returned to Ms. Armes, noting she was experiencing stress as her disability had been "revoked", and she was also concerned over health problems involving fasciculations and ulcers which were not work related. She reported an increase in sleep and only sporadic nightmares. Petitioner described her anxiety as manageable and that she had just situational stress. (Px9).

On 7/13/15, Petitioner returned to Dr. Armes. Petitioner reported she had been doing fairly well and had only experienced anxiety around men who stare or look "creepy." Dr. Armes recommended Petitioner not return to work as a mental health technician but indicated that her office provided only clinical services and does not provide in-depth disability evaluations. (Px9).

On 3/8/16, Petitioner attended a psychiatric evaluation with psychiatrist Dr. Garland at the Respondent's request. Petitioner recounted the events of the 9/6/12 work injury to Dr. Garland. Petitioner reported she had nightmares after the incident, isolated herself, and could no longer go dancing anymore because of the pain she experienced. Petitioner also recounted the events of the 8/21/14 work injury, stating she was assaulted by a man. Petitioner indicated she experienced back, hip and leg pain. She also reported frustration with the doctors who would not see her because her injury involved a workers' compensation injury. She indicated she was in a stressful situation with her deceased husband's family members. Petitioner reported problems with sleeping since 2012. She described feelings of being scared of everything. Petitioner initially indicated she had been suicidal on one occasion, but later stated she was suicidal every day for 2 months after the 2012 altercation. Dr. Garland and the Petitioner discussed what brings about her anxiety and how it had affected her daily living. Ultimately, Dr. Garland diagnosed Petitioner with post-traumatic stress disorder in remission, which he opined was unrelated to the work injury of 8/21/14. The doctor believed Petitioner's current complaints were instead related to her 9/6/12 work injury, along with the ongoing litigation process and her financial stress. Dr. Garland believed Petitioner's prognosis was poor because Petitioner was of the belief that she was severely mentally ill and unable to work. Dr. Garland opined that the Petitioner was able to perform normal life capabilities and work, but recommended she not work as a mental health technician due to the physical nature of the job and the potential for future altercations. Dr. Garland believed the Petitioner had reached MMI. (Rx7).

On 8/25/16, Dr. Garland authored an addendum after reviewing additional medical records. Review of the records did not change her causation opinion or prognosis. She did opine that Petitioner could continue to take paroxetine, as it appeared to have improved her symptoms, but as the Petitioner reported limited benefit with psychotherapy, Dr. Garland indicated this could be discontinued. (Rx8).

On 10/26/16, the parties took the deposition of Dr. Garland. She explained that her diagnosis for Petitioner of post-traumatic stress disorder in remission meant that the symptoms were improved and were not causing any problems in her everyday life. The doctor based her diagnosis on the fact that Petitioner was able to return to work after her accident in 2012. She was also able to easily talk about the patient assaults, her sleep pattern appeared to be fine, and she had engaged in activities, with the only limitation being due to physical pain. She reported intermittent nightmares, but it didn't seem to be at the point that it affected her sleep. While noting she only reviewed some limited psychiatric records, Dr. Garland opined that psychiatric treatment to date appeared reasonable, and she reiterated the future recommendations she had noted in her addendum report. Dr. Garland opined that Petitioner could return to work outside of a mental health facility, and even could return to work at Choate Mental Health Center, but that practically speaking she would not recommend that she return to work there. Her prognosis was poor because of her own belief that she was severely mentally ill and disabled. Dr. Garland thought a return to work in general would help the Petitioner by giving meaning and structure to her life again. (Px1; Rx8).

Petitioner acknowledged that she met with Dr. Garland, was examined for her psychiatric injury and that she was aware Dr. Garland testified and opined she should not go back to work in the field of mental health technician. Petitioner testified she has not returned to her job as a mental health technician since 8/21/14 and did not feel she could return to that position at this time.

When asked if she was experiencing psychiatric symptoms as she sat in the hearing room, Petitioner testified she was not because none of her triggers were present. Petitioner described her triggers as including experiencing someone who is agitated, or a black male of the body type of the male patient that assaulted her. Petitioner said these things give her anxiety. Petitioner indicated she did not experience these issues prior to work accident.

Petitioner testified she is not currently working. She is 58 years old. Petitioner stated she has a GED and also completed some college classes. Petitioner described her job experience as including being a teachers' aide for developmentally disabled and mentally ill behavior disorder adolescents. Petitioner confirmed she has been working with the mentally handicapped prior to her employment with Choate Mental Health Center for 20 years.

On cross examination, Petitioner again indicated that to her knowledge she remains a Respondent employee. She last worked in August of 2014 and had not returned to work since, including any sort of modified duty. Petitioner has not secured other employment or completed any employment searches since August of 2014. She testified she remains under the care of psychiatric nurse practitioner Armes. She takes an anxiety medication on an as needed basis but could not recall the name of it, as it recently changed. Petitioner stated she takes the medication if she goes anywhere besides church where there is a large crowd. Petitioner explained this does not mean she takes it very often as she does not go many places, but would, for example, take it if going to St. Louis. Petitioner testified she was seeing Ms. Armes every 3 months but recently had her change it to every 6 months because she is paying for it herself. Petitioner said the last time she met with the doctor was the week prior to the hearing date.

WITH RESPECT TO THE ISSUE OF THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

At Arbitration, the parties that compensable accidents occurred on 9/6/12 and 8/21/14 while Petitioner was employed by the State of Illinois. The parties also agreed that Respondent has paid or will pay all reasonable and causally related medical bills. The parties further agreed that any temporary total disability (TTD) benefits due Petitioner had been paid and that there is no further dispute as to said benefits. Thus, the only issue at hearing was the nature and extent of any permanent disability sustained by Petitioner as a result of these accidents.

As a result of the patient assault Petitioner encountered at Choate Mental Health Center in 2012, it was recommended in 2016 by Section 12 examiner Dr. Garland that Petitioner not return to her position as a mental health technician. Consideration was given to the second assault of 8/21/14, but Dr. Garland felt Petitioner's PTSD in remission had actually stemmed from the 2012 incident. Designating the diagnosis of PTSD in remission indicated, per Dr. Garland, that Petitioner could return to the work force, though he did not believe she should do so at the Choate Mental Health Center. There are no medical restrictions barring her from returning to the workforce outside of current employment. The only physical restriction in place for Petitioner is that which excludes her from participating in overtime. This restriction was not an issue for the facility to accommodate. Accordingly, this Arbitrator finds that Petitioner is not medically permanently and totally disabled.

Alternatively, Petitioner could seek permanent total disability benefits pursuant to the "odd-lot" theory or could argue she is entitled to a wage differential award as her injury may prevent her from continuing in her previous line of employment. 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, 397 N.E.2d 804, 34 Ill. Dec. 132 (1979). If the employee'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 employee to establish by a preponderance of the evidence that he falls into the "odd lot" category, that is, 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. *Westin Hotel v. Workers'*

Compensation Comm'n, 372 Ill. App. 3d 527, 544, 865 N.E.2d 342, 310 Ill. Dec. 18 (2007). An employee satisfies his burden of proving that he falls into the "odd-lot" category by showing either (1) a diligent but unsuccessful attempt to find work or (2) 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. *Westin Hotel*, 372 Ill. App. 3d at 544. Petitioner has failed to show either of these factors are applicable. Petitioner presented no evidence to support the contention she cannot be regularly employed in the labor market in order to qualify for permanent benefits under the "odd-lot" theory. Petitioner testified she remains an employee of the Respondent and has not attempted to secure alternative employment. Petitioner did not present any evidence sufficient to support the contention that her age, skills, training, and work history would hinder her from being regularly employed in the general labor market. The Petitioner has failed to prove that she is permanently and totally disabled pursuant to the Act.

The Arbitrator must next determine if Section 8(d)1 is applicable to this case. The Arbitrator finds that the Petitioner also has failed to fulfill her burden or proof that she is entitled to a wage differential. To qualify for a wage differential award, Petitioner must show both that the disability has caused (a) a partial incapacity that prevents him or her from pursuing his or her usual and customary line of employment, and (b) impairment of earnings. *Sobolyev v. Yellow Transp.*, 08 IL.W.C. 43283 (Ill.Indus.Com'n), 15 I.W.C.C. 0623, 2015 WL 5351031 citing *Albrecht v. Industrial Comm'n*, 271 Ill.App.3d 756, 648 N.E.2d 923, 925, 208 Ill.Dec 1 (1995).

Petitioner testified she continues as an employee of Choate Mental Health Center which has been her usual and customary line of employment since 2002. At the same time, Dr. Garland has indicated that the Petitioner cannot return to her usual and customary employment as a mental health technician III. However, the Petitioner did not provide any evidence to support the second prong of the test, i.e. that she has suffered an impairment of earnings. It is entirely possible that she has, but evidence was simply not presented in support of this theory. Petitioner provided no evidence as to the income she would be able to earn in any other position of employment outside of Choate Mental Health Center. She has not performed a job search. She did not obtain a labor market survey or obtain vocational assistance. It appears to the Arbitrator that from her testimony she has not ruled out returning to work for the Respondent in some fashion. To award a wage differential by guessing as to what type of employment position Petitioner could obtain and without any income information upon which to base the award would be speculative in nature, and would make such an award inappropriate based on the evidence presented.

As a result of failing to prove she is entitled to a permanent and total disability awards outlined above, the analysis turns to consideration of a permanent partial disability award. Pursuant to §8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

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

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

(i) the reported level of impairment pursuant to subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of the injury;

(iv) the employee's future earning capacity; and
(v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no weight is placed on this factor as neither party provided an AMA rating for consideration.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a mental health technician III. It appears that she remains employed in this position with Respondent, but has not returned to work since August 2014, and cannot return to work performing her regular job according to both psychiatric nurse practitioner Armes and Dr. Garland. Thus, it appears that the Petitioner has suffered a loss of occupation, which is a significant factor in the permanency determination. At the same time, what her work status is currently with Respondent is not exactly clear, and thus it is unclear whether she can be accommodated with Respondent into another position or not, or whether she has attempted to do so.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 53 years old at the time of the initial accident, and 55 years old at the time of the second accident. Neither party has presented evidence in support of how the Petitioner's age plays a role in any permanent disability resulting from either accident. This factor therefore carries no weight in the permanency determination.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that the Petitioner testified she is still an employee of the Respondent but did not testify as to in what capacity. Dr. Garland has indicated that she should not work in her regular job as a mental health technician (in agreement with Armes), but has opined that she should be able to otherwise return to work with no noted psychiatric restrictions. Her current physical condition is also unclear to the Arbitrator, as no medical treatment was indicated after her 2/11/15 visit with Dr. Doll. Respondent's examining physician, Dr. Doll opined Petitioner had reached MMI at that point physically and did not need any work restrictions. The last note of physiatrist Dr. Burns in evidence appears to be from 10/20/14, when he diagnosed a lumbar strain with diffuse contusions, as well as diffuse contusions of the elbow, hip and thoracic spine. He recommended ibuprofen, a short course of therapy followed by home exercise, and stated: "She is currently on a leave which she describes as non-occupational. I think she is needing to demonstrate the ability to return to the workplace prior to that time and the best way to do that is to monitor her response to therapy." She was given a permanent restriction from working any significant overtime. Petitioner is still employed for Respondent in the same position as she was prior to her accidents. She has not worked since 2014 and yet testified she has not looked for work. She also did not testify as to whether she has contacted the Respondent with regard to her job status. The Arbitrator finds that it's reasonable to conclude that the Petitioner likely has suffered some degree of a loss of earning capacity based on the recommendation that she not return to work as a mental health technician, and a significant work history involving working with mental health patients. However, what that degree of loss this may be is speculative given there has been no direct evidence presented in support of a diminished future earning capacity. This factor carries some weight in the permanency determination.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the Petitioner has alleged physical and mental disabilities arising out of her two dates of injury.

With regard to her physical condition, the Arbitrator notes that the initial accident mainly resulted in complaints involving the left hip and to some degree the left buttocks and leg. However, the Petitioner's medical records clearly reference some level of preexisting condition in terms of cramps and fasciculations in her body, and specifically in her thighs. Additionally, Dr. Lents stated it was difficult to pinpoint her pain prior to referring Petitioner to a physiatrist. Dr. Godbey ultimately determined that she had multiple contusions and diffuse strains that were all stable as of 6/2/14, and the only restriction he put on her work was a permanent restriction on overtime work. She otherwise had returned to her regular job from 1/4/13 to 8/21/14.

Following the second accident, the was diagnosed with lumbosacral and left elbow sprains. The last physical medicine visit she had was with Dr. Burns on 10/20/14, at which time he diagnosed lumbar strain with diffuse contusions. While he prescribed therapy and advised that Petitioner would need to demonstrate the ability to return to work following therapy, there is no evidence that Petitioner performed this therapy. While she testified that the Respondent was disputing her case, there is no indication that she pressed for treatment via Section 19(b) of the Act or that she sought treatment via group health insurance. Dr. Doll diagnosed Petitioner with a mild neck strain, left forearm contusion or strain, and left hip contusion or strain, all of which he opined were related to her 2014 work injury. Petitioner was diagnosed with other ailments which were unrelated to her work accidents. Of note is that Petitioner had a history of a chronic condition involving her left hip and leg, as supported by the medical records. Petitioner initially denied this to Dr. Doll. Petitioner also experienced fasciculations and cramps throughout her body for which she had sought medical treatment prior both work accidents, with one note indicating she has had this for most of her life. Dr. Godbey suspected Petitioner might have some sort of neuromuscular disease. In August of 2012, just prior to the initial patient assault, Petitioner complained to Dr. Godbey of aching in her muscles when working a double shift or overtime. Dr. Sudekum opined that Petitioner's bilateral thumb basal joint arthritis was unrelated to her employment, but it is unclear where Petitioner even may have previously treated for this. There are indications in the records of Dr. Burns and MedStop One that the Petitioner saw a Dr. Bieser or Dr. Biesner, but the Arbitrator did not locate any records from such physician in the record. Petitioner's physical treatment was relatively minimal, involving mainly physical therapy and an injection. Her subjective complaints were not substantiated by objective testing according to Dr. Doll, and he asserted Petitioner had exaggerated her pain responses. This was supported to some degree by the medical records kept by Petitioner's own physicians, who noted pain responses but no issues with range of motion only weeks after her accident.

There were some inconsistencies in Petitioner's account of events. Petitioner reported to Dr. Armes that an African American male had assaulted her in 2014. She told Dr. Garland she had been assaulted by a man in 2014 at the facility as well. However, at trial, she testified she was assaulted by a rather large African American female patient. The height and weights of the patients involved in these events has also changed somewhat through Petitioner's treatment. Other factors were also noted to have impacted Petitioner's mental health, such as a history of abuse from an ex-husband, financial issues, family disputes, and other health concerns unrelated to her employment activities. Dr. Garland termed Petitioner's prognosis as poor, not because of her actual diagnosis, but because Petitioner believed herself to be mentally ill and unable to work. According to Dr. Garland, they are not causing issues in her everyday life. Dr. Garland testified that a return to employment would benefit Petitioner and, as noted, it is unclear if Petitioner has made any attempt to do so. The Arbitrator places significant weight on this factor.

Based on the lack of physical treatment after 10/20/14, and the opinions of Dr. Garland on 3/8/16 that the Petitioner had reached maximum psychological improvement, the Arbitrator finds that the Petitioner reached MMI as of 3/8/16.

Based on the above factors, the record taken as a whole and a review of prior Commission awards involving similar circumstances and outcomes, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of the loss of 17.5% of the person as a whole in total between the two accidents. While Dr. Garland has opined that the Petitioner's disability is related to the initial accident, the Arbitrator notes that the Petitioner had been able to return to work following that accident, and therefore the second accident was also a contributor to her current condition. The Arbitrator finds that the Petitioner sustained permanent partial disability to the extent of the loss of 5% of the person as a whole with regard to the 9/6/12 accident, and sustained permanent partial disability to the extent of the loss of 12.5% of the person as a whole with regard to the 8/21/14 accident, both pursuant to §8(d)2 of the Act. There are clearly questions with regard to the Petitioner's exact level of disability, both physically and mentally. However, it is also clear that the Petitioner is unable to return to her regular employment, which appears to be the same or similar to what she has done for the last 20 years. Thus, the Arbitrator bases the determination in significant part on a loss of trade. It is understandable that someone who is physically attacked twice at the same facility would have difficulty returning to that job. At the same time, the Arbitrator notes that the Petitioner does not appear to have any significant ongoing disability, either physically or mentally, that would prevent her from returning to a job outside of the mental health field.

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

DONALD E. HAEPP, III

Petitioner,

vs.

NO: 10 WC 25879
(Consolidated with: 11 WC 17266, 14 WC 24735, and 15 WC 1963)

CITY OF CHICAGO,

Respondent.

19IWCC0503

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 permanent partial disability (PPD) benefits and penalties and attorney's fees, and being advised of the facts and law, modifies the Arbitrator's Decision as stated below, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. Separate Decisions have been issued for case numbers 11 WC 17266, 14 WC 24735, and 15 WC 1963.

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. 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 (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 finds that the Arbitrator erred in merging the permanency award for this claim, 10 WC 25879, with the permanency award in the subsequent filing of 11 WC 17266. All else is affirmed and adopted.

On May 4, 2010, Petitioner sustained a flap tear of the posterior horn of the lateral meniscus in the left knee as a result of his work injury. The Arbitrator noted that Petitioner then re-injured his left knee on January 26, 2011. Following the final arbitration hearing on Petitioner's consolidated claims, which took place on March 26, 2018, the Arbitrator ordered one award for both claims, 10 WC 25879 and 11 WC 17266, under Section 8(d)2 of the Act. The Arbitrator found that Petitioner was entitled to twenty percent (20%) loss of use of the person as a whole because Petitioner was partially incapacitated from pursuing the duties of his usual and customary line of employment, but suffered no impairment in earning capacity. The Arbitrator did not find evidence to support a single wage differential award encompassing both claims.

The Arbitrator further noted that Petitioner had previously settled two workers' compensation claims, 00 WC 64646 and 00 WC 64647, wherein Petitioner was awarded twenty-two-and-a-half percent (22.5%) loss of use of the left leg. As the Arbitrator had awarded Petitioner compensation under Section 8(d)2 of the Act, credit for Respondent from Petitioner's previous settlement for his left leg was not relevant.

The Commission finds that the Arbitrator should not have merged the permanency awards in 10 WC 25879 and 11 WC 17266. Instead, Petitioner is entitled to a separate award for the May 4, 2010 accident of twenty-five percent (25%) loss of use of the left leg under Section 8(e) of the Act, subject to a credit of twenty-two-and-a half percent (22.5%) loss of use of the left leg which had been previously awarded.

In claims involving two separate injuries to the same body part, our Appellate Court has instructed as follows:

> [W]here a claimant has sustained *two separate and distinct injuries to the same body part* and the claims are consolidated for hearing and decision, it is proper for the Commission to *consider all of the evidence presented to determine the nature and extent of his permanent disability as of the date of the hearing. Pisano v. Ill. Workers' Comp. Comm'n*, 2018 IL App (1st) 172712WC, ¶ 68, citing to *Baumgardner v. Ill. Workers' Comp. Comm'n*, 409 Ill. App. 3d 274, 279-80 (2011) (emphasis added).

While the Appellate Court in *Pisano* directed the Commission to consider all the evidence to determine the nature and extent of two separate and distinct injuries to the same body part, the Court did not foreclose consideration of awarding either one combined award or two separate awards for each work-related injury. The only restriction provided under our Act, and case law, is that a scheduled PPD award under Section 8(e) of the Act and a wage-differential award under Section 8(d)1 of the Act cannot be awarded at the same time. "As this court held in *Baumgardner*, however, the plain language of the Act provides that compensation is proper under either section 8(e) or 8(d)(1), but not both at once." *Pisano v. Ill. Workers' Comp. Comm'n*, 2018 IL App (1st)

172712WC, ¶ 70, citing to *Baumgardner v. Ill. Workers' Comp. Comm'n*, 409 Ill. App. 3d 274, 279 (2011).

In *Baumgardner*, Justice Stewart offered further explanation in his concurring opinion:

> In my view, the issue of whether a claimant asserting separate claims for injuries to the same body part in a consolidated hearing is entitled to separate, PPD awards is a factual determination to be made by the Commission. If the commission determines that separate accidents have caused one indivisible injury justifying a single PPD award, and that factual determination is not against the manifest weight of the evidence, the decision should be affirmed. On the other hand, if the commission determines that a claimant has proved separate compensable injuries from separate accidents and awards PPD for each accident, and that decision is not against the manifest weight of the evidence, it should also be affirmed. *Baumgardner v. Ill. Workers' Comp. Comm'n*, 409 Ill. App. 3d 274, 281-82 (2011).
>
> I disagree, however, with the majority's suggestion that a different analysis applies when multiple claims for injuries to the same body part are tried at a consolidated arbitration hearing. Whether they are tried separately, or in a consolidated hearing, a claimant is entitled to separate consideration of multiple claims. By suggesting that the commission should only consider the claimant's condition of ill-being at the time of the arbitration hearing, the majority tilts the analysis in favor of a single PPD award. In order to determine whether a claimant sustained separate compensable injuries in two accidents, the Commission must consider his condition of ill-being prior to the second accident. The result should not be different solely because multiple claims have been consolidated for hearing. *Baumgardner v. Ill. Workers' Comp. Comm'n*, 409 Ill. App. 3d 274, 282 (2011).

In *Baumgardner*, the claimant had sustained four separate injuries to his right knee. However, the claimant filed applications for two of the four injuries to his right knee – the first and last accidents. *Baumgardner v. Ill. Workers' Comp. Comm'n*, 409 Ill. App. 3d 274, 275-76 (2011). The claimant appealed the Commission's Decision to award him only a wage differential under Section 8(d)1 for both injuries to his right knee. The claimant argued that he was entitled to both an award under Section 8(e) of the Act for the first right knee claim and a wage differential for the second workers' compensation claim. *Baumgardner*, 409 Ill. App. 3d at 278. Citing to the Act, the Appellate Court in *Baumgardner* affirmed the Commission's Decision to award only a wage differential under Section 8(d)1 for both injuries to his right knee.

The Appellate Court further agreed with the Commission's Decision to consider all the evidence presented to determine the nature and extent of the claimant's right knee injury, as well as the Commission's finding that the claimant was not entitled to a separate permanency award for

the first accident because the claimant had sustained a subsequent, aggravating injury to the same body part. *Baumgardner v. Ill. Workers' Comp. Comm'n*, 409 Ill. App. 3d 274, 278-80 (2011).

In the second case of *Pisano*, the Appellate Court applied the principles of *Baumgardner*, and considered all of the evidence presented to determine the nature and extent of claimant's injury. *Pisano v. Ill. Workers' Comp. Comm'n*, 2018 IL App (1st) 172712WC, ¶ 68. The claimant had sustained three work-related injuries: the first accident injured his right elbow, right wrist, and right shoulder; the second accident affected his right wrist; and, the third accident injured the claimant's back, neck, and bilateral shoulders. *Id.* at ¶ 21. The Appellate Court affirmed the Commission's Decision to award Section 8(e) benefits to the claimant for his right elbow injury. *Id.* at ¶ 69. However, the Appellate Court vacated the Commission's Decision to award Section 8(e) benefits for the right wrist for the first accident and a wage differential award for the right wrist for the second accident. Again, citing to the Act, the Appellate Court found that a separate wage differential award to address the claimant's right wrist injuries from the first and second accidents was the appropriate compensation. *Id.* at ¶ 70. It is worth emphasizing here that although the claimant was awarded both 8(e) and 8(d)1 benefits for his consolidated claims, the award addressed different body parts.

In light of *Baumgardner* and *Pisano*, Petitioner Haepp is precluded from obtaining both Section 8(e) and Section 8(d)1 awards. However, Petitioner here is not precluded from obtaining separate awards under Section 8(e) and Section 8(d)2. Unlike the claimant in *Baumgardner*, Petitioner did not sustain a subsequent, aggravating injury to the same body part; Petitioner instead sustained a new injury on January 26, 2011. Thus, the Commission finds that based on the totality of the evidence, two separate awards for PPD benefits are warranted. Additionally, the Commission affirms the Arbitrator's finding and conclusion that the evidence does not support any wage differential award for either Claim No. 10 WC 25879 or Claim No. 11 WC 17266.

Here, we have two accidents affecting the left knee. Petitioner testified that he had previously injured his left knee approximately 10 years prior to the May 2010 accident. (T.74; T.112). Petitioner filed a workers' compensation claim and received twenty-two-and-a-half percent (22.5%) loss of use of the left leg. (RX1). Thereafter, Petitioner returned to work for Respondent, and in the approximate seven years prior to May 2010, Petitioner did not have any problems with, take any medication for, or seek any treatment for his left knee. (T.74-75).

Following the May 4, 2010 accident, Petitioner did require medication, physical therapy, and surgery. Petitioner underwent a left knee arthroscopy, partial medial and lateral meniscectomies, and excision of plica. Petitioner's post-operative diagnosis was left knee lateral meniscal tear with medial meniscal tear and large fibrotic medial plica. (PX2; PX4). Petitioner was eventually discharged from MercyWorks on January 7, 2011. The medical record indicated that Petitioner's pain level was a two out of 10, he had good flexion, and his left knee was slightly tender. Petitioner's diagnosis on this date was status post left knee arthroscopy. (PX1). Petitioner was allowed to return to full duty work on January 10, 2011. (T.74; PX1). Petitioner returned to his regular duties with Respondent.

Sixteen days later, on January 26, 2011, Petitioner sustained a second work-related accident to his left knee. Dr. Michael Maday noted on February 9, 2011 that Petitioner had been doing well

and had returned to work until his fall in an elevator. Dr. Maday ordered an MRI of the left knee, and reviewed the MRI results on April 6, 2011. He noted the tear of the lateral meniscus, and indicated that this tear appeared to be new. The office visit note stated that the tear was in an area where there was previously not a tear on arthroscopy. "Therefore it appears to be a new injury related to his injury within the elevator." (T.76; PX2).

Petitioner proceeded with surgery on September 8, 2011. (T.76; PX2). Dr. Maday performed a left knee arthroscopy, chondroplasty, patellofemoral joint and medial femoral condyle with partial lateral meniscectomy, removal of loose bodies, extensive debridement, and an injection of the iliotibial band. Petitioner's post-operative diagnoses were left knee lateral meniscal tear with chondrosis and fibrotic scar tissue with loose bodies, and iliotibial band pain. At the post-operative, follow-up appointment with Dr. Maday on September 14, 2011, Dr. Maday again indicated that the meniscal tear was in a different location. (PX2).

Respondent's own Section 12 examiner, Dr. Brian Cole, in November 2014, also did not consider Petitioner's current condition to be an aggravation from the May 2010 injury, but instead, tied everything to the January 26, 2011 accident. Dr. Cole diagnosed Petitioner with advanced osteoarthritis in the left knee and an unresolved aggravation of his pre-existing left knee condition. Dr. Cole opined that Petitioner's condition, "given the fact pattern provided in his personal report, remains the sequelae of a work-related injury on January 26, 2011." (PX25). Thus, unlike the claimant in *Baumgardner*, Petitioner did not sustain a subsequent, aggravating injury to the same body part stemming from the May 2010 accident, but instead sustained a new injury to his left knee on January 26, 2011, which had aggravated his underlying osteoarthritis and had remained unresolved as of the date of the Section 12 examination despite conservative treatment and an additional arthroscopic procedure.

Thus, the Commission finds that Petitioner has proven separate, compensable injuries from two separate accidents, and accordingly awards separate PPD benefits for each accident. An award under Section 8(e) is proper as there is no evidence Petitioner was partially incapacitated from pursuing the duties of his usual and customary line of employment, nor was there evidence that Petitioner suffered an impairment in earning capacity. The Commission therefore awards Petitioner a total of twenty-five percent (25%) loss of use of the left leg, subject to a credit of twenty-two-and-a half percent (22.5%) loss of use of the left leg which was previously awarded. This award is separate and distinct from the permanency award in 11 WC 17266, which will be further discussed under separate Decision for said 11 WC 17266.

The remainder of the Arbitrator's Decision in 10 WC 25879 is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed August 7, 2018, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the reasonable and necessary radiologist bill of $46.00, pursuant to Section 8(a) of the Act and to be adjusted in accord with the medical fee schedule provided in Section 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall receive credit for medical bills paid through its group medical plan as provided in 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.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given a credit of $18,982.75 for temporary total disability benefits that have been paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $664.72 per week for a period of 53.75 weeks, as provided in Section 8(e) of the Act, for the reason that the injuries sustained caused twenty-five percent (25%) loss of use of the left leg. This award is subject to a credit of twenty-two-and-a half percent (22.5%) loss of use of the left leg which had been previously awarded.

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.

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: SEP 16 2019

D. Douglas McCarthy

DDM/pm
O: 7-17-19
052

Stephen Mathis

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HAEPP III, DONALD E
Employee/Petitioner

Case# **10WC025879**
11WC017266
14WC024735
15WC001963

CITY OF CHICAGO
Employer/Respondent

19IWCC0503

On 8/7/2018, 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 2.18% 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:

0391 HEALY SCANLON
KEVIN T VEUGELER
111 W WASHINGTON ST STE 1425
CHICAGO, IL 60602

0010 CITY OF CHICAGO
D TAYLOR CHITTICK
30 N LASALLE ST 8TH FLR
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

Donald E. Haepp, III
Employee/Petitioner

Case # **10** WC **25879**

v.

19IWCC0503

Consolidated cases: **11 WC 17266, 14 WC 24735, 15 WC 1963**

City of Chicago
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Tiffany Kay**, Arbitrator of the Commission, in the city of **Chicago**, on **March 26, 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. [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. [x] Should penalties or fees be imposed upon Respondent?
N. [x] Is Respondent due any credit?
O. [x] Other **Wage Differential**

FINDINGS

On **May 4, 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 $**84,261.01**; the average weekly wage was $**1,620.40**.

On the date of accident, Petitioner was **55** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**18,982.75** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**18,982.75**.

ORDER

Medical benefits
Respondent shall pay reasonable and necessary medical services of **$46.00**, pursuant to the medical fee schedule as provided in Section 8(a) and 8.2 of the Act.

Nature and Extent

The Arbitrator finds that since the Petitioner re-injured his left knee and filed a subsequent, consolidated claim 11 WC 17266, the Arbitrator has merged the awards and will address permanency for both claims on the later filing.

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

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

Tiffany Kay

Signature of Arbitrator

8/7/18

Date

AUG 7 - 2018

PROCEDURAL HISTORY

This case has been consolidated with the following cases: #11WC17266, 14WC24735 and 15WC1963.

This matter, case #10WC25879, was previously heard under a Section 19(b) trial, before the Honorable Joseph Prieto, Arbitrator of the Commission, in the city of Chicago, on January 12, 2011. The parties stipulated that the Respondent was operating under the Act on May 4, 2010 (the date of the accident), that there was an employer-employee relationship between the Respondent and Petitioner, the Petitioner did sustain an accident that arose out of and in the course of employment, timely notice was given, and Petitioner's condition of ill-being was causally related to the accident. The parties disputed the necessity and reasonableness of the medical services provided and whether the Respondent had paid all the appropriate charges for the services, temporary total disability benefits, and whether fees or penalties should be imposed against the Respondent. On March 7, 2011 Arbitrator Prieto rendered a decision finding that the Respondent pay reasonable and necessary medical services in the amount of $3522.81 for treatment provided by Midland Orthopedics and $16, 932.54 for treatment from Sport and Ortho Therapy pursuant to the fee schedule, Respondent pay TTD for benefits of $1080.27/week for 17 3/7th weeks for the period of September 9, 2010 through January 9, 2011, and penalties in the amount of $17, 675.03 pursuant to Section 19(k) and $7,500 pursuant to Section 19(l), in addition $7,378.66 in fees provided by Section 16 of the Act.

On November 21, 2011, the Respondent filed a timely petition for review of the 19(b)-arbitration decision before the Illinois Workers' Compensation Commission. (PX26) The Commission considered the issues of penalties, the facts and law and affirmed and adopted the Decision of Arbitrator Prieto that was rendered on March 7, 2011. The Commission remanded the 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, 35Ill. Dec. 794 (1980).

The matter, case # 11WC17266, was previously heard under a Section 19(b) trial, before the Honorable Svetlana Kelmanson, Arbitrator of the Commission, in the city of Chicago, on December 19, 2011. The parties stipulated that the Respondent was operating under the Act on January 26, 2011 (the date of the accident), that there was an employer-employee relationship between the Respondent and Petitioner, the Petitioner did sustain an accident that arose out of and in the course of employment, and that timely notice was given of said accident. The Respondent disputed whether the Petitioner's condition of ill-being was causally related to the injury, the necessity and reasonableness of the medical services provided, temporary total disability benefits, whether fees or penalties should be imposed against the Respondent and whether the Respondent was due any credit pursuant to §8j of the Act. On January 5, 2012 Arbitrator Kelmanson rendered a decision finding that Petitioner's additional tear of the meniscus of his left knee was causally related to the accident on January 26, 2011, that Respondent had not paid all necessary and reasonable medical expenses, that Petitioner was entitled to TTD benefits in the amount of $1,087.20 per week for 12 weeks from September 8, 2011 through November 30, 2011, that Petitioner was entitled to TTD that accrued from January 26, 2011 through December 19, 2011, that Respondent pay the necessary medical bills in Petitioner's exhibits 4 through 6 that were related to the accident on January 26, 2011, and that Respondent was due credit for the payments it had made in the matter. The Arbitrator did not award ay penalties or fees.

Both parties filed a petition for review of the 19(b)-arbitration decision before the Illinois Workers' Compensation Commission. (PX27) The Commission considered the issues of medical expenses, TTD, §19(k) and §19(l) penalties and §16 fees and being advised of the facts and law, modified the Decision of the Arbitrator and affirmed the and adopted the Decision of the Arbitrator. In contrast to the Arbitrator, the Commission found

that Respondent's failure to pay TTD benefits during the period of September 8, 2011 through November 30, 2011, and the under payment of TTD once the Respondent actually paid the TTD benefits, warranted penalties under §19k in the amount of $6,523.20, penalties in the amount of $3,090.00 under §19(l) and $2,609.28 in attorney's fees pursuant to §16. All else under Arbitrator Kelmanson's January 5, 2012 Decision was affirmed and adopted.

This consolidated matter was originally scheduled to be heard before Arbitrator Douglas Steffenson (hereinafter "Arbitrator Steffenson") on March 26, 2018 in Chicago, Illinois. However, Arbitrator Tiffany Kay (hereinafter "Arbitrator Kay") covered Arbitrator Steffenson's trial call on March 26, 2018. Therefore, by agreement of both parties, this matter was tried before Arbitrator Kay and the decision rendered by Arbitrator Kay. Arbitrator Kay has examined the submitted records.

SUMMARY OF FACTS AND EVIDENCE

May 4, 2010 accident – 10WC25879

The parties proceeded to hearing on March 26, 2018, with disputed issues as to whether the current condition of ill-being is causally connected to Mr. Donald Haepp's (hereinafter "Petitioner") injury, whether the City of Chicago (hereinafter "Respondent") is liable for unpaid medical bills, whether the Respondent is entitled to credit in accordance to §8(j) of the Act, the nature and extent of the injuries that occurred, whether the Petitioner is entitled to penalties under §19(k), §19(l) and attorney fees pursuant to §16, and whether the Petitioner is entitled to a wage differential. (ArbX1)

The parties stipulated that Respondent was operating under the Act on May 4, 2010. (Arb. X1) The parties stipulated that the date of the accident was May 4, 2010 and that the Petitioner and Respondent had a relationship of employer and employee, and that the accident arose out of during the course of employment. (ArbX1) The parties also stipulated that the Petitioner worked for the Respondent as a Carpenter, notice of the accident was given within the time limits stated in the Act, Petitioner was 55 years of age on the date of the accident, and married with 0 dependent children. (Arb.X1) The stipulated average weekly wage, calculated pursuant to Section 10 of the Act, was $1620.40. (Arb.X1)

The Petitioner testified that on May 4, 2010, he had been employed by Respondent as a carpenter in the Department of Fleet and Facility Management since 1999. Petitioner testified that on May 4, 2010 he was on duty and sustained an accidental injury to his left knee when he stepped in a hole while carrying a ladder. The Petitioner was directed to the Respondent's occupational clinic, Mercy Works. A May 27, 2010 MRI revealed a tear of the posterior horn of the lateral meniscus. Petitioner was referred to see Dr. Michael Maday at Midland Orthopedics by the Respondent and underwent left knee arthroscopic surgery on September 20, 2010. (PX2) The surgery revealed that the Petitioner had a flap tear in the posterior horn of the lateral meniscus. After the surgery the Petitioner underwent a regimen of post-operative physical therapy and continued to follow-up with Dr. Maday. (P.X2) On January 10, 2011 Petitioner returned to work full duty per Dr. Maday's release.

January 26, 2011 accident – 11WC17266

The parties proceeded to hearing on March 26, 2018, with disputed issues as to whether the current condition of ill-being is causally connected to Mr. Donald Haepp's (hereinafter "Petitioner") injury, whether the City of Chicago (hereinafter "Respondent") is liable for unpaid medical bills, whether the Respondent is entitled to credit in accordance to §8(j) of the Act, the nature and extent of the injury that occurred, whether the

Petitioner is entitled to penalties under §19(k), §19(l) and attorney fees pursuant to §16, and whether the Petitioner is entitled to a wage differential. (ArbX2)

The parties stipulated that Respondent was operating under the Act on January 26, 2011. (Arb. X2) The parties stipulated that the date of the accident was January 26, 2011 and that the Petitioner and Respondent had a relationship of employer and employee, and that the accident arose out of and during the course of employment. (ArbX2) The parties also stipulated that the Petitioner worked for the Respondent as a Carpenter, notice of the accident was given within the time limits stated in the Act, Petitioner was 56 years of age on the date of the accident, and married with 0 dependent children. (Arb.X2) The stipulated average weekly wage, calculated pursuant to Section 10 of the Act, was $1630.80. (Arb.X2)

On January 26, 2011, Petitioner was on duty when he was entering an elevator with tools in his hands. Petitioner testified that the elevator floor was raised approximately 6 to 8 inches above the lobby floor. As Petitioner attempted to enter the elevator, he tripped and fell into the elevator. Petitioner's fall resulted in him re-injuring his left knee. On February 9, 2011, following this incident, Petitioner returned to see Dr. Michael Maday, at Midland Orthopedics for treatment. (P.X2) At this visit Petitioner reported doing well until he reinjured his knee. (P.X2) Prior to the re-injury he reported doing well and had returned to work. Dr. Maday diagnosed the Petitioner with "a new injury, not related to his previous injury and he would need him to report this as such." (P.X2) However, he instructed the Petitioner to continue his full unrestricted activities. On February 23, 2011, Petitioner returned to see Dr. Maday and reported increased pain in the iliotibial band area. Dr. Maday assessed him with iliotibial band pain following his injury. At Petitioner's request, he received a left knee injection of Depomedrol and lidocaine to relieve his symptoms. On March 19, 2011, Petitioner underwent an MRI at MRI of River North. On April 6, 2011, Dr. Maday reviewed the MRI and assessed a moderate size radial free edge tear of the lateral meniscus that appeared to be a new tear in an area where there was previously not a tear. Dr. Maday opined that it appeared to be a new injury related to his injury with the elevator. Dr. Maday recommended the Petitioner have surgery to address the meniscal pathology. The Petitioner continued to work full duty while awaiting Worker's Compensation approval. (P.X2)

On September 8, 2011, Dr. Maday performed a left knee arthroscopy on Petitioner. (P.X2) The surgery also consisted of chondroplasty, patellofemoral joint and medial femoral condyle with partial lateral meniscectomy, removal of loose bodies, extensive debridement and injection of the iliotibial band performed by Dr. Maday (P.X2). After surgery, the Petitioner remained off work and began a new course of physical therapy. On November 23, 2011, Petitioner returned to see Dr. Maday. Petitioner reported still having difficulty with stairs, squatting and kneeling. Dr. Maday planned on allowing the Petitioner to return to work full duty as of December 1, 2011. (P.X2) Therapy notes confirm that Petitioner was instructed to avoid kneeling activities and excessive squatting. (PX4). On December 5, 2011, Petitioner was also evaluated at Advocate Occupational Clinic at the request of Respondent. (PX3). Respondent's physicians released Petitioner back to work with restrictions of no kneeling along with the medications Vicodin and Tramadol. (PX3).

Petitioner testified that Respondent accommodated his restrictions. However, he continued to experience difficulty with his left knee. On January 25, 2012, Petitioner returned to Dr. Maday complaining of continued pain in his left knee. (PX2). Dr. Maday recommended a repeat MRI. (PX2) A February 7, 2012 MRI revealed joint effusion of the left knee. (PX2) After reviewing the results of the MRI, Dr. Maday referred Petitioner to Dr. Robert Strugala for platelet rich plasma injections. (PX2) The first injection was completed on March 8, 2012, and a second injection was prescribed on April 12, 2012. (PX2) At that April 12, 2012 visit, Dr. Strugala noted residual symptoms in the left knee, recommended a home exercise program, and requested

authorization for an additional injection. (PX2) No additional authorization for further treatment was provided by Respondent.

On July 14, 2014, following a period of full duty work, Petitioner sought treatment for ongoing left knee symptoms with Dr. Mark Bowen of North Shore Orthopaedic Institute (PX28). Dr. Bowen noted that Petitioner has had three different surgeries in 2004, 2011 and 2012. (P.X10) He noted that Petitioner has restrictions in terms of squatting and twisting. Petitioner complained of only being able to walk one flight of stairs and then having to rest due to pain. (PX10) Dr. Bowen's physical exam revealed slight valgus alignment, palpable osteophytes and crepitation. Additionally, Dr. Bowen noted advanced lateral compartment degenerative arthritis and patellofemoral degenerative joint disease and referred Petitioner to Dr. Raju Ghate for consideration of a total knee replacement. (PX10)

On November 20, 2014, Petitioner attended an Independent Medical Examination (IME) with Dr. Brian Cole at Midwest Orthopedics. (PX25) Dr. Cole noted that Petitioner stated he had a work-related injury in 2003 and had a left knee arthroscopy. He noted that Petitioner told him he made a full recovery from that with no sequalae. Since the 2011 injury, Petitioner stated he had two arthroscopic surgeries to his left knee with Dr. Maday, "first 2011 (he says he was worse and did not recover well), and a second in 2012, also saying he made no change or improvement after that." (PX25) Dr. Cole noted that Petitioner told him he saw Dr. Mark Bowen for a second opinion and was told he would need a total knee replacement. After examination, Dr. Cole noted an impression of advanced osteoarthritis, left knee, and unresolved-aggravation of pre-existing condition. Dr. Cole opined that Petitioner still maintained symptoms that remained a sequelae of a work-related injury of January 26, 2011. He further stated that he appeared to have had sustained an aggravation of a pre-existing condition that has not been brought to a stable endpoint of care and remains and on-going aggravation of a pre-existing condition. Additionally, Petitioner was pursuing further care and has never had a stationary endpoint to bring his period of causally-related treatment to an end. Dr. Cole prescribed a total knee replacement and recommended in the meantime, that Petitioner could work in a restricted duty job with limited squatting, kneeling, climbing and minimum bending and stooping. (PX25). Dr. Cole also confirmed that all treatment to date was reasonable, necessary and related to his January 26, 2011 injury. (PX25)

On January 27, 2015, Petitioner was evaluated by Dr. Raju S. Ghate for the left knee. (PX11). Dr. Ghate recommended a cortisone injection and consideration for a total knee replacement. A cortisone injection was done at that time. (PX11) On April 21, 2015, a utilization review report was issued on behalf of Respondent and it was determined that the prescribed left knee total knee arthroplasty and inpatient hospital stay for 3 nights was certified and medically necessary. (P.X24) On June 1, 2015, Petitioner underwent left total knee replacement surgery performed by Dr. Raju Ghate. (PX11)

On November 3, 2015, Dr. Ghate evaluated Petitioner and recommended a course of work hardening. (PX11) On November 24, 2015, Petitioner returned to Dr. Ghate. (PX11). Dr. Ghate noted Petitioner continued to take Tramadol for occasional knee pain. (PX11) Dr. Ghate noted a good recovery from the total knee replacement and recommended Petitioner return to work December 1, 2015 with restrictions of no kneeling or squatting and return for a follow up visit in six months. (PX11) On June 24, 2016, Petitioner returned to Dr. Ghate for his one year follow up. (PX11) Dr. Ghate noted a good recovery, but left knee pain with twisting/pivoting, pain with stairs, and difficulty bending to the floor. X-rays that were taken at that time showed joint effusion. (PX11) Petitioner was still taking Tramadol for pain, and Dr. Ghate ordered Petitioner's work restrictions permanent. (PX11).

June 27, 2014 accident – 14WC24735

The parties proceeded to hearing on March 26, 2018, with disputed issues as to whether the current condition of ill-being is causally connected to Mr. Donald Haepp's (hereinafter "Petitioner") injury, whether the City of Chicago (hereinafter "Respondent") is liable for unpaid medical bills, whether the Respondent is entitled to credit in accordance to §8(j) of the Act, the nature and extent of the injury that occurred, and whether the Petitioner is entitled to penalties under §19(k), §19(l) and attorney fees pursuant to §16. (ArbX3)

The parties stipulated that Respondent was operating under the Act on June 27, 2014. (ArbX3) The parties stipulated that the date of the accident was June 26, 2014 and that the Petitioner and Respondent had a relationship of employer and employee, and that the accident arose out of and during the course of employment. (ArbX3) The parties also stipulated that the Petitioner worked for the Respondent as a Carpenter, notice of the accident was given within the time limits stated in the Act, Petitioner was 59 years of age on the date of the accident, and married with 0 dependent children. (ArbX3) The stipulated average weekly wage, calculated pursuant to Section 10 of the Act, was $1699.16. (ArbX3)

Petitioner testified that while on duty, on June 27, 2014, he was lifting drywall with a co-worker and felt a twinge in his stomach area and noted a bump in his belly button. (PX1) Petitioner testified that he finished completing the work and then reported the incident. Following the incident, Petitioner was directed to go to the City of Chicago's occupational clinic, Mercy Works, where he was seen by Dr. Homer Diadula (hereinafter "Dr. Diadula"). (PX1) Dr. Diadula diagnosed Petitioner with an umbilical hernia, ordered Petitioner off of work due to a work-related condition, and referred him to see Dr. Daniel Kacey (hereinafter "Dr. Kacey) at Mercy Hospital and Medical Center. (PX1) On July 1, 2014, Petitioner was seen by Dr. Kacey who noted that Petitioner had an acute umbilical hernia. (PX5) Dr. Kacey recommended surgical repair with simple preperitoneal mesh. (PX5) Dr. Kacey noted that Petitioner's expected disability related to repair would be 4-6 weeks. (PX5) Petitioner was referred to his family doctor regarding his overall fitness for surgery.

On July 1, 2014, Petitioner sought additional consultation with his primary care physician, Dr. Timothy Wollner of Little Company of Mary Affiliated Services (hereinafter "Little Company"). (PX6) Dr. Wollner discussed with Petitioner his treatment options, and Petitioner elected to pursue surgical repair. Dr. Wollner referred Petitioner to Dr. Michael Fiorucci (hereinafter "Dr. Fiorucci") to perform the surgery. (PX6) On July 24, 2014, Dr. Fiorucci performed an umbilical hernia repair with mesh. (PX6) Petitioner was discharged from the hospital with the restriction of no lifting over 15lbs. (PX7) On July 26, 2014, Petitioner was re-admitted to Little Company with abdominal pain and swelling. (PX7) Petitioner was diagnosed with postoperative constipation due to the narcotic medication given at the time of surgery and obstruction of the intestine. (PX7) Petitioner was treated and released from the hospital on July 28, 2014. (PX7) On August 6, 2014, Dr. Fiorucci re-evaluated Petitioner and noted he was doing well post-surgery. (PX6). On August 25, 2014 Petitioner returned back to work full duty with no restrictions concerning his umbilical hernia.

December 15, 2014 accident – 15WC1963

The parties proceeded to hearing on March 26, 2018, with disputed issues as to whether the current condition of ill-being is causally connected to Mr. Donald Haepp's (hereinafter "Petitioner") injury, whether the City of Chicago (hereinafter "Respondent") is liable for unpaid medical bills, whether the Respondent is entitled

to credit in accordance to §8(j) of the Act, the nature and extent of the injury that occurred, and whether the Petitioner is entitled to penalties under §19(k), §19(l) and attorney fees pursuant to §16. (ArbX4)

The parties stipulated that Respondent was operating under the Act on December 15, 2014. (Arb. X4) The parties stipulated that the date of the accident was December 15, 2014 and that the Petitioner and Respondent had a relationship of employer and employee, and that the accident arose out of and during the course of employment. (ArbX4) The parties also stipulated that the Petitioner worked for the Respondent as a Carpenter, notice of the accident was given within the time limits stated in the Act, Petitioner was 60 years of age on the date of the accident, and married with 0 dependent children. (Arb.X4) The stipulated average weekly wage, calculated pursuant to Section 10 of the Act, was $1714.72. (Arb.X4)

Petitioner testified that while on duty, December 15, 2014, he was hanging dry wall overhead and began to experience pain in his right shoulder. Petitioner reported the incident to the Respondent the next morning, December 16, 2014. On December 16, 2014, Petitioner sought treatment at Mercyworks with Dr. Diadula. Petitioner complained of difficulty raising his arm up and had pain in his neck and right shoulder. (PX1) Dr. Diadula diagnosed Petitioner with a right shoulder strain/sprain, right cervical sprain and right shoulder rule out labrum tear. (PX1) Dr. Diadula instructed the Petitioner to use over the counter Tylenol for pain and an MRI was ordered of the right shoulder to rule out glenoid or labrum tear. (PX1) Dr. Diadula ordered the Petitioner off work. (PX1)

On December 22, 2014, Petitioner returned to Mercy Works with complaints of pain. (PX1). Physical therapy and medication was prescribed and Petitioner was instructed to remain off work. (PX1). On December 29, 2014, Petitioner was re- examined and the Dr. found decreased range of motion and difficulty in lifting the right arm without pain. (PX1) On January 6, 2015, an MRI was approved and performed showing results positive for supraspinatus tendinopathy. (PX10) On January 8, 2015, a MercyWorks physician reviewed the MRI results, noted the supraspinatus defect, and recommended Petitioner see an orthopedic shoulder specialist, prescribed medication and instructed Petitioner to remain off work. (PX1) On January 19, 2015, Petitioner saw Dr. Mark Bowen (hereinafter "Dr. Bowen") of Northshore Orthopedics, who found no significant atrophy, asymmetry or swelling. (PX10) Dr. Bowen noted, after review of his MRI, that there was some strain pattern in the muscle, probable slight tendinopathy but no evidence of a full-thickness tear. Dr. Bowen's final impression was that there was a rotator cuff strain and recommended a course of physical therapy. (PX10) On March 18, 2015, Petitioner returned to Dr. Bowen with noted improvement but persistent signs of impingement. Petitioner was given a cortisone injection, instructed to continue physical therapy and to remain off work. (PX10) On April 29, 2015, Petitioner returned to Dr. Bowen complaining of pain and cracking with overhead lifting. (PX10) An exam on that date was again positive for impingement. (PX10) Dr. Bowen recommended a surgical decompression of the right shoulder after the completion of knee surgery and prescribed continued physical therapy and continued off work. (PX10)

On December 9, 2015, following the total knee replacement surgery, Petitioner returned to Dr. Bowen for his right shoulder (PX10). During his visit, Petitioner reported to Dr. Bowen that his right shoulder was not bothering him that much from a pain perspective but he still noticed some crepitation or noise through range of motion. (PX28) Petitioner also complained of numbness and tingling in both hands that radiated down his arm. (PX28) Dr. Bowen suggested an MRI and EMG results to evaluate Petitioner's cervical symptoms and ordered him off work. (PX28) On January 6, 2016, Petitioner returned to Dr. Bowen, who authorized Petitioner to return to work with no restrictions concerning his right shoulder effective January 7, 2016.

On April 17, 2017, Petitioner attended a vocational rehabilitation interview with Steven Blumenthal of Blumenthal Associates. (PX20) Mr. Blumenthal issued a report on June 20, 2017 based on his interview with the Petitioner.

CONCLUSIONS OF LAW

Arbitrator's Credibility Assessment/Summary of Testimony:

At hearing, the Petitioner had three witnesses testify, Mr. Edmund Sexton, Mr. Steven Blumenthol and the Petitioner. The Respondent had one witness testify, Mr. Elgin Swanigan. Overall the Arbitrator found the testimony of all of the witnesses to be truthful, credible and otherwise unrebutted.

Mr. Edmund Sexton, a business representative for the Carpenter's Union, was called to testify on behalf of Petitioner. Mr. Sexton testified that he has been in the Union for 13 years and as Union representative he represents all carpenters that work for Respondent. He also testified that he has been a carpenter for 25 years. Mr. Sexton testified to Petitioner's permanent restrictions of no kneeling or squatting that resulted from his 2011WC17266 injury. He testified that the restrictions of no kneeling or squatting for a carpenter would impact a majority of the jobs a carpenter would need to do. Additionally, he testified that if Petitioner was fired from working for the Respondent it would be difficult to place someone with his restrictions in another position as a carpenter elsewhere. However, he acknowledged after review of Petitioner's job duties, some of the duties could be completed without kneeling or bending. On cross-examination, Mr. Sexton testified that he had never observed Petitioner in the performance of his job duties as a Carpenter. Mr. Sexton acknowledged Petitioner's age of 63, and stated that there had been no grievances filed with the union regarding Petitioner's performance of his job duties.

Mr. Steven Blumenthal, a certified vocational rehabilitation counselor with Blumenthal Associates, was called to testify on behalf of Petitioner. On April 17, 2017, Petitioner attended a vocational rehabilitation interview with Mr. Blumenthal. (PX20) Mr. Blumenthal testified that he has been in his field for 38 years and had his practice for 16 years. (PX29) Mr. Blumenthal issued a vocational assessment of Petitioner in a report he issued on June 20, 2017. Mr. Blumenthal's testimony was consistent with his report. On cross-examination, Mr. Blumenthal acknowledged that his April 17, 2017 vocational rehabilitation interview with Petitioner lasted approximately an hour and a half. Mr. Blumenthal testified that the interview was the only meeting he attended with Petitioner. Mr. Blumenthal also testified that he spent less than an hour reviewing Petitioner's records prior to issuing his June 20, 2017 report. Mr. Blumenthal testified that he was aware that Petitioner works as a Carpenter for Respondent and has done so consistently since early 2016.

The Petitioner, Mr. Donald E. Haepp, III, was the last witness to testify on behalf of the Petitioner. Petitioner testified that he has worked for Respondent as a carpenter since 1999. Petitioner testified to his past medical history, mechanisms of injuries, restrictions in result of the injuries, courses of medical treatment and current subjective complaints in all of his consolidates cases (10WC25879, 11WC17266, 14WC24735 and 15WC1963). In addition, Petitioner testified to the unpaid medical bills he claims Respondent is liable for in each case.

At hearing, the Respondent had one witness testify on behalf of Respondent, Mr. Elgin Swanigan, General Foreman of Trades for the Department of Fleet and Facility Management. Mr. Swanigan testified that he supervised Petitioner's immediate supervisor, David Gin. Mr. Swanigan testified that, approximately two to

three times each week, he observes Petitioner perform his job duties as a Carpenter. Mr. Swanigan also testified that he has supervised Petitioner's work as a Carpenter since Petitioner returned to work in early 2016.

Mr. Swanigan testified to the quality of Petitioner's current work as a Carpenter. Mr. Swanigan testified that there are many tasks of a Carpenter that do not require kneeling or stooping, and that Petitioner consistently and competently performs these tasks for his Department. Mr. Swanigan reviewed the essential duties of a Carpenter and stated that Petitioner had demonstrated he was capable of performing all the listed functions within his restrictions. Mr. Swanigan reviewed the physical requirements for a Carpenter and noted that, of the seven physical requirements listed, only two were impacted by Petitioner's restrictions. In addition, he testified Petitioner performs valuable work for the Department. Mr. Swanigan testified that he supervises other Carpenters who perform work with restrictions and that, even amongst the Carpenters with no restrictions, many specialize in specific tasks. Mr. Swanigan testified that Petitioner works the same number of hours and days per week as other Carpenters within the Department. Mr. Swanigan testified that, if Petitioner was no longer employed by the Department, the Department would be forced to hire another Carpenter to replace Petitioner and perform his duties.

With respect to issue (F) whether the Petitioner's current condition of ill-being is causally related to the Injury, the Arbitrator finds as follows:

May 4, 2010 accident – 10WC25879

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that Petitioner did prove by a preponderance of the evidence that his current condition of ill-being is causally connected to his work accident on May 4, 2010.

In the prior 19(b) Decision, Arbitrator Prieto found that there was a causal relationship between Petitioner's work accident of May 4, 2010 and Petitioner's lateral meniscus tear of his left knee. This Decision was subsequently affirmed by the Commission on November 21, 2011. The Commission decision was not appealed by either party and became final after the expiration of the time for filing a written summons to the Circuit Court. The law of the case doctrine applies to matters before the Workers' Compensation Commission where a court's unreversed decision on an issue that has been litigated and decided settles the question for all subsequent stages of the action. *Help at Home v. Ill. Workers' Comp. Comm'n*, 305 Ill.App.3d 1150, 1151 (4th Dist. 2010). Here, a Decision was filed on March 7, 2011, appealed and subsequently affirmed by the Commission on November 21, 2011. Therefore, based on the law of the case doctrine, Petitioner's lateral meniscus tear of his left knee is deemed causally related to the accident of May 4, 2010.

January 26, 2011 accident – 11WC17266

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that Petitioner did prove by a preponderance of the evidence that his current condition of ill-being is causally connected to his work accident on January 26, 2011.

In the prior 19(b) Decision, Arbitrator Kelmanson found that there was a causal relationship between Petitioner's work accident of January 26, 2011 and the additional lateral meniscus tear of his left knee. This Decision was subsequently affirmed and modified by the Commission on September 24, 2012. The Commission decision was not appealed by either party and became final after the expiration of the time for

filing a written summons to the Circuit Court. The law of the case doctrine applies to matters before the Workers' Compensation Commission where a court's unreversed decision on an issue that has been litigated and decided settles the question for all subsequent stages of the action. *Help at Home v. Ill. Workers' Comp. Comm'n*, 305 Ill.App.3d 1150, 1151 (4th Dist. 2010). Here, a Decision was filed on January 3, 2012, appealed and subsequently affirmed/modified by the Commission on September 24, 2012. Therefore, based on the law of the case doctrine, Petitioner's additional meniscus tear of his left knee is deemed causally related to the accident of January 26, 2011.

The Arbitrator also finds that Petitioner did prove by a preponderance of the evidence that there is a causal relationship between the work accident of January 26, 2011 and Petitioner's subsequent total knee replacement on June 1, 2015. Dr. Cole, Respondent's IME examiner, agreed with Dr. Bowen that the total knee replacement was necessary. In addition, Dr. Cole stated in his report that all of the treatment to date was reasonable, necessary and related to Petitioner's January 26, 2011 injury. (PX25) Therefore, the Arbitrator finds that the Petitioner's total knee replacement is causally related to his work injury on January 26, 2011.

June 27, 2014 accident – 14WC24735

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that Petitioner did prove by a preponderance of the evidence that his current condition of ill-being is causally connected to his work accident on June 27, 2014. The Petitioner testified, the parties stipulated, that on June 27, 2014 Petitioner sustained a compensable injury while working for the Respondent. On the date of the accident Petitioner was lifting drywall and felt a twinge in his stomach area. (PX1) Petitioner testified that he reported the accident to the Respondent the same day, June 27, 2014. Petitioner sought medical attention the same day at the Respondent's occupational clinic, Mercy Works, with Dr. Diadula. (PX1) Dr. Diadula diagnosed Petitioner with an umbilical hernia and ordered him off work due to a "work-related condition". (PX1) On July 24, 2014, Dr. Fiorucci performed an umbilical hernia repair with mesh. (PX6) Petitioner was discharged from the hospital with the restriction of no lifting over 15lbs. There was no evidence produced suggesting any other causes or prior injuries or treatment related to a hernia. Therefore, the Arbitrator finds that Petitioner's condition of ill-being is causally related to his work injury of June 27, 2014.

December 15, 2014 accident – 15WC1963

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that Petitioner did prove by a preponderance of the evidence that his current condition of ill-being is causally connected to his work accident on December 15, 2014. The Petitioner testified, the parties stipulated, that on December 15, 2014 Petitioner sustained a compensable injury while working for the Respondent. On the date of the accident Petitioner was hanging drywall overhead, and began to experience pain in his right shoulder. Petitioner reported the incident to the Respondent the next morning, December 16, 2014. On December 16, 2014, Petitioner sought treatment at Mercyworks with Dr. Diadula. Dr. Diadula diagnosed the Petitioner with a right shoulder strain/sprain, right cervical sprain and right shoulder rule out labrum tear. (PX1) On December 22, 2014, Petitioner returned to Mercy Works with complaints of pain. (PX1) Physical therapy and medication was prescribed and Petitioner was instructed to remain off work. (PX1). On January 19, 2015, Petitioner saw Dr. Mark Bowen (hereinafter "Dr. Bowen") of Northshore Orthopedics, who found no significant atrophy, asymmetry or swelling. (PX10) Dr. Bowen noted, after review of his MRI, that there was some strain pattern in the muscle, probable slight tendinopathy but no evidence of a full-thickness tear. Dr. Bowen's final impression was that there was a rotator cuff strain and recommended he undergo a course of physical therapy. (PX10) On January 6, 2016, Petitioner returned to Dr. Bowen, who authorized Petitioner to return to work with

no restrictions concerning his right shoulder effective January 7, 2016. There was no evidence produced suggesting any other causes, prior shoulder injuries or treatment related to Petitioner's right shoulder. Therefore, the Arbitrator finds that Petitioner's condition of ill-being is causally related to his work injury of December 15, 2014.

With respect to issue (J), whether the Respondent paid for all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

May 4, 2010 accident – 10WC25879

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that the medical services provided to the Petitioner were reasonable and necessary to cure his condition of ill-being causally connected to his accident on May 4, 2010. Petitioner submitted into evidence a medical bill from Radiological Physicians in the amount of $46.00 (PX12), for x-rays prescribed by Respondent's occupational clinic MercyWorks on May 11, 2010. Corresponding medical records received into evidence confirm that Petitioner was evaluated at MercyWorks on May 11, 2010 and x-rays were performed. (PX1). This bill was not paid by Respondent and was sent to collections. (PX12). The Arbitrator finds that the aforementioned service was reasonably required to diagnose, treat, cure and relieve Petitioner from the effects of the injury. Additionally, the Arbitrator finds that the service was causally related to Petitioner's work injury. Therefore, the Arbitrator awards the remaining unpaid balance of $46.00 pursuant to the fee schedule.

January 26, 2011 accident – 11WC17266

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that the medical services provided to the Petitioner were reasonable and necessary to cure his condition of ill-being causally connected to his accident on January 26, 2011. Petitioner submitted into evidence a medical bill in the amount of $65,303.09 from Northshore Health for services related to Petitioner's left knee replacement on June 1, 2015. (P.X18) A review of those charges reveal Respondent paid this bill in full on January 10, 2017. (PX18) Additionally, Petitioner submitted into evidence out-of-pocket expenses regarding prescriptions and parking expenses totaling $282.01. (PX23) The Arbitrator finds that the aforementioned expenses were reasonably required to treat, cure and relieve Petitioner from the effects of the injury. Additionally, the Arbitrator finds that the service was causally related to Petitioner's work injury. Therefore, having determined that the Petitioner's condition of ill being is relative to his work injury, the Arbitrator awards and orders Respondent to reimburse the Petitioner for the out-of-pocket expenses in the amount of $282.01.

June 27, 2014 accident – 14WC24735

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that the medical services provided to the Petitioner were reasonable and necessary to cure his condition of ill-being causally connected to his accident on June 27, 2014. Petitioner submitted into evidence a medical bill in the amount of $11, 685.69 from Little Company for services related to Petitioner's hospitalization on July 26-28, 2014 due to complications from the original July 24, 2014 umbilical hernia surgery. Respondent furnished payment for these services on November 9, 2015. (PX14) Petitioner submitted into evidence a bill from Dr. Kacey in the amount of $327.00 for an office consultation regarding the performance of his umbilical hernia surgery. (PX13) The Arbitrator finds that the aforementioned expense was

reasonably required to treat, cure and relieve Petitioner from the effects of the injury. Additionally, the Arbitrator finds that the service was causally related to Petitioner's work injury. The Arbitrator finds the Respondent responsible for this bill.

Petitioner submitted into evidence charges from Evergreen Emergency Services in the amount of $540.00 for emergency room services on July 26, 2014 when the Petitioner returned post-surgery for complications. (PX15) Additionally, Petitioner had a CT scan performed on him when he returned to the Emergency Room on July 26, 2014 in order to diagnose his complaints of abdominal pain. Petitioner submitted into evidence a bill in the amount of $686.00 for the CT scan performed on July 26, 2014 during his hospitalization. (PX16) The Arbitrator finds that the aforementioned expenses were reasonably required to treat, cure and relieve Petitioner from the effects of the injury. Additionally, the Arbitrator finds that the services were causally related to Petitioner's work injury. The Arbitrator finds the Respondent responsible for the aforementioned bills pursuant to the fee schedule.

December 15, 2014 accident – 15WC1963

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that the medical services provided to the Petitioner were reasonable and necessary to cure his condition of ill-being causally connected to his accident on December 15, 2014. Petitioner submitted into evidence a medical bill in the amount of $57,802.00 from Athletico for physical therapy services prescribed by Petitioner's treating physician, Dr. Mark Bowen, related to Petitioner's right shoulder injury. (PX17) A review of those charges reveals that while Respondent has made payments towards this bill, there remains an outstanding balance of $8,995.32. (PX17) Based on the above findings, the Arbitrator finds Respondent is responsible for remaining balance of this bill. Additionally, Petitioner submitted into evidence a bill from Advanced Medical Imaging Center, for an MRI prescribed by Dr. Bowen in the amount of $1,468.00. (PX19) Based on the above findings, the Arbitrator finds the Respondent responsible for the aforementioned bills pursuant to the fee schedule.

With respect to issue (L), what is the Nature and Extent of the injury, the Arbitrator finds as follows:

May 4, 2010 accident – 10WC25879

The Arbitrator finds that since the Petitioner re-injured his left knee after resuming full duty work in January of 2011 and filed a subsequent, consolidated claim 11 WC 17266, the Arbitrator has merged the awards and will address permanency for both claims on the later filing.

January 26, 2011 accident – 11WC17266

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Petitioner made the argument that he should receive a wage differential award under §8(d)1 of the Act because he sustained an impairment of his earning capacity due to the injury that occurred on January 26, 2011 (11WC17266). Specifically, evidence and testimony were introduced at trial regarding Petitioner's current post-injury employment in comparison to his potential wages if the Petitioner were to work in a competitive job market. In this case, Petitioner testified, in February 2016, he returned to work as a Carpenter for the Department of Fleet and Facility management despite his permanent restrictions of no kneeling or squatting.

Petitioner testified that he has worked continuously in this capacity since February of 2016. Additionally, Petitioner testified that he currently earns $46.35 per hour, which is the same wage as the other Carpenters he works with and is a pay increase from the wage he earned prior to his January 26, 2011 accident. Therefore, the Arbitrator finds that the evidence does not support a wage differential award under §8(d)1 of the Act.

The Petitioner testified, and the parties stipulated, that on May 4, 2010, he had been employed by Respondent as a carpenter in the Department of Fleet and Facility Management since 1999. Petitioner testified that on May 4, 2010 he was on duty and sustained an accidental injury to his left knee when he stepped in a hole while carrying a ladder. Additionally, the Petitioner testified that on January 26, 2011, he was on duty when he was entering an elevator with tools in his hands. Petitioner testified that the elevator floor was raised approximately 6 to 8 inches above the lobby floor. As Petitioner attempted to enter the elevator, he tripped and fell into the elevator. Petitioner's fall resulted in him re-injuring his left knee. The Arbitrator finds that since the Petitioner re-injured his left knee and filed a subsequent, consolidated claim 11 WC 17266, the Arbitrator has merged the awards and will address permanency for both claims below. The Arbitrator finds that the Petitioner reached MMI for his May 4, 2010 accident on January 10, 2011 and MMI for his January 26, 2011 accident on December 1, 2015. Therefore, his claim for any permanent partial disability is ripe for adjudication for both claims.

For injuries that occur before September 1, 2011, the Commission evaluates the physical impairment and the effect of the disability on the injured employee's life. Factors that may be considered include the individual's age, skill, occupation, training, inability to engage in certain kinds of activities, pain, stiffness or limitation of motion.

With regard to the Petitioner's age, he was 55 years old at the time of his work-related injury on May 4, 2010 and 56 years old at the time of his January 10, 2011 accident. On the date of hearing the Petitioner testified to being 63 years old. The Petitioner testified that he was returned to work full duty without restrictions after his May 4, 2010 accident. However, after his January 10, 2011 accident he returned to work with permanent restrictions of no kneeling or squatting with Respondent. The Petitioner testified that he is still working in his occupation as a Carpenter but explained that he is only given assignments that do not require kneeling or squatting. Nevertheless, he still has difficulty and pain in the left leg and still takes prescription medication for pain. Petitioner's advanced age also suggests a shorter life expectancy and that the symptoms will likely slow the Petitioner down in comparison to younger, healthier workers not experiencing the same symptoms. Therefore, the Arbitrator gives some weight to this factor.

With regard to the Petitioner's skill, occupation, and training, the Arbitrator notes that the Petitioner testified that he has been a Carpenter with the Respondent since 1999. Petitioner testified that he was able to return to work to the same position, with the same title, and same pay. Petitioner has continued working for the Respondent in the same position he held prior to his May 4, 2010 and January 10, 2011 accidents. However, after returning from his January 10, 2011 accident Petitioner was returned to work with permanent restrictions of no kneeling or squatting. Mr. Edmund Sexton testified that Petitioner would not be able to be placed for work as a carpenter in a competitive labor marker given his restrictions. Mr. Sexton testified, if one cannot kneel or squat, he cannot perform the duties of a carpenter and would not be able to find a job as a carpenter. Respondent's representative, Mr. Elgin Swanigan, also testified that Petitioner could not perform the full functions of a carpenter. On June 20, 2017, Mr. Steven Blumenthal, the vocational rehabilitation counselor who evaluated Petitioner, issued a report stating that "but for his accommodated duty by the City of Chicago, Mr. Haepp would not otherwise be qualified to perform work as a journeyman carpenter." (PX20) Therefore, the Arbitrator gives significant weight to this factor.

With regard to the Petitioner's inability to engage in certain kinds of activities, pain, stiffness or limitation of motion the Petitioner testified that today he still has the permanent restrictions of no kneeling or squatting while at work. Petitioner testified that his left knee still feels numb in the front, in some positions if he moves it a certain way it gets stuck in place and he has to help move his knee. Accordingly, the Arbitrator gives significant weight to this factor in determining the Petitioner's permanent partial disability.

Due to the evidence and testimony supporting the seriousness, permanency and injuries that partially incapacitate him from pursuing the duties of his usual and customary line of employment but have not resulted in impairment in his earning capacity the Arbitrator is awarding compensation under §8(d)2 (person as a whole) of the Act. In a May of 2015 settlement for claims 00 WC 64646 and 00 WC 64647 the Petitioner was awarded 22.5% of his left leg, the same body part at issue in Petitioner's 10WC25879 and 11WC17266 cases. (R.X1) Due to the Arbitrator awarding the Petitioner compensation under §8(d)2 of the Act, credit for the Respondent from Petitioner's 2000 settlement is not relevant here.

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 20 % loss of use of a man-as-a-whole pursuant to §8(d)2 of the Act.

June 27, 2014 accident – 14WC24735

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Petitioner testified, and the parties stipulated, that while working for the Respondent on June 27, 2014 he sustained an injury that resulted in an umbilical hernia. (PX1) On August 25, 2014 Petitioner returned back to work full duty with no restrictions concerning his umbilical hernia. The Arbitrator finds that on August 25, 2014 the Petitioner reached MMI and therefore the claim for any permanent partial disability is ripe for adjudication.

For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the Section 8.1b of the Illinois Workers' Compensation Act. Here, the accident occurred on June 27, 2014 making section 8.1b applicable. With regard to subsection (i) of §8.1b(b), the Arbitrator notes that there was not a permanent partial disability impairment report and/or opinion submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b, the occupation of the employee, the Arbitrator notes that that record reveals that the Petitioner was employed as a Carpenter for the Department of Fleet and Facility Management for the Respondent. Petitioner was able to return to work, full duty without restrictions, in his prior capacity on August 26, 2014. Petitioner testified that he still experiences "twinges now and then" but he mainly just tries not to pick up heavy stuff. He testified that he still experiences some discomfort but it is better that it was. The Arbitrator concludes that the Petitioner's ability to perform work will be adversely affected by his injury if he is required to lift heavy objects in the performance of his duties. The Arbitrator therefore gives some weight to this factor.

With regard to subsection (iii) of §8.1b, the Arbitrator notes that Petitioner was 59 years old at the time of the accident. The Petitioner's permanent partial disability with regard to his injury will be something that could potentially slow the Petitioner down in comparison to younger, healthier workers not experiencing the same symptoms. Therefore, the Arbitrator gives some weight to this factor.

With respect to subsection (iv) of §8.1b, Petitioner's future earning capacity appears to be undiminished as a result of his injuries because he was returned back to work, full-time, in his prior position with his compensation unaffected. At hearing, Petitioner testified that he currently earns $46.35 per hour, which is the current union rate for all Carpenters employed by Respondent. The Arbitrator concludes that there was no evidence suggesting the injury has had any effect on Petitioner's future earning capacity and therefore gives little weight to this factor.

With respect to subsection (v) of §8.1b, evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner's injury is clearly delineated with medical records submitted into evidence and further corroborated by his testimony on March 26, 2018. The Petitioner testified that today he still feels twinges now and then, he tries not to pick up heavy items, and still experiences discomfort with the mesh but that its better than the discomfort he had. Petitioners' original complaints and symptoms regarding his hernia at trial coincide with his complaints to the physicians he was seen by. The Arbitrator concludes that the evidence demonstrates that the Petitioner sustained permanent partial disability regarding the complaints of pain and places some weight on the foregoing 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 of loss use of a person as a whole as a result of his work-related accident.

December 15, 2014 accident – 15WC1963

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Petitioner testified, and the parties stipulated, that while working for the Respondent on December 15, 2014 he sustained an injury that resulted in a rotator cuff strain to Petitioner's right shoulder with a course of physical therapy. (PX10) On January 6, 2016, Dr. Bowen, authorized Petitioner to return to work without restrictions concerning his right shoulder. The Arbitrator finds that on January 6, 2016 the Petitioner reached MMI and therefore the claim for any permanent partial disability is ripe for adjudication. (PX28)

For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the Section 8.1b of the Illinois Workers' Compensation Act. Here, the accident occurred on December 15, 2014 making section 8.1b applicable. With regard to subsection (i) of §8.1b(b), the Arbitrator notes that there was not a permanent partial disability impairment report and/or opinion submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b, the occupation of the employee, the Arbitrator notes that that record reveals that the Petitioner was employed as a Carpenter for the Department of Fleet and Facility Management for the Respondent. Petitioner was able to return to work, full duty without restrictions, in his prior capacity on January 6, 2016. Petitioner testified that he still experiences pain, soreness and limited range of motion in his shoulder. He has noticed that overhead work is harder because he has problems keeping his arms in the air as long. However, he testified that he can still do the overhead work. He testified that he has to take a break to let the pain "die down". The Petitioner's shoulder injury may make performing overhead work harder in the future. The Arbitrator concludes that the Petitioner's ability to perform work will be adversely affected by

his injury if he is required to use his right shoulder in the performance of his duties. The Arbitrator therefore gives some weight to this factor.

With regard to subsection (iii) of §8.1b, the Arbitrator notes that Petitioner was 60 years old at the time of the accident. The Petitioner's permanent partial disability with regard to his left shoulder will be something that could potentially slow the Petitioner down in comparison to younger, healthier workers not experiencing the same symptoms. Therefore, the Arbitrator gives some weight to this factor.

With respect to subsection (iv) of §8.1b, Petitioner's future earning capacity appears to be undiminished as a result of his shoulder injury because he was returned back to work, full-time, in his prior position with his compensation unaffected. At hearing, Petitioner testified that he currently earns $46.35 per hour, which is the current union rate for all Carpenters employed by Respondent and is a higher wage than Petitioner earned at the time of his accident. The Arbitrator concludes that there was no evidence suggesting the injury has had any effect on Petitioner's future earning capacity and therefore gives little weight to this factor.

With respect to subsection (v) of §8.1b, evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner's injury to his right shoulder is clearly delineated with medical records submitted into evidence and further corroborated by his testimony on March 26, 2018. The Petitioner testified at trial that today getting out of cars is difficult, overhead work is harder, at times he has to pick his arm up and move it, and he still experiences numbness. Petitioner testified that he takes Tramidol to "take edge of the pain away." Petitioners' original complaints and symptoms regarding his left shoulder at trial coincide with his complaints to the physicians he was seen by. The Arbitrator concludes that the evidence demonstrates that the Petitioner sustained permanent partial disability regarding the complaints of pain and places significant weight on the foregoing 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 7.5 % loss of loss use of a person as a whole as a result of his work-related accident.

With respect to issue (M), whether the Petitioner is entitled to penalties/attorney's fees under §19(k), §19(l) and §16, the Arbitrator finds as follows:

May 4, 2010 accident – 10WC25879

The Petitioner submitted into evidence a medical bill from Radiological Physicians in the amount of $46.00 (PX12), for x-rays prescribed by Respondent's occupational clinic Mercy Works on May 11, 2010. Corresponding medical records received into evidence confirm that Petitioner was evaluated at Mercy Works on May 11, 2010 and x-rays were performed. (PX1) This bill was not paid by Respondent and was sent to collections. (PX12) The Arbitrator awards the remaining unpaid balance of $46.00 pursuant to the fee schedule. However, after review of the totality of the evidence, the Arbitrator finds no penalties or fees shall be imposed.

January 26, 2011 accident – 11WC17266

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. Section 19(l) of the Act states that "(i)f the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In case the employer or his or her insurance carrier shall without good and just cause

fail, neglect, refuse or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30.00 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000.00. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay.

On November 20, 2014, Respondent had an IME completed on Petitioner with Dr. Brian Cole at Midwest Orthopedics. During this visit Dr. Cole noted that Petitioner saw Dr. Mark Bowen 2 months prior, for a second opinion, and was told he needed a total knee replacement. (PX25) After examination, Dr. Cole concurred that Petitioner needed to undergo total knee replacement for his left knee. Dr. Cole stated that this would be "his only means of definitive management to garner relief of his left knee pain." (P.X25) Additionally he opined that "treatment to date has been reasonable, necessary, and related to the injury date in question." (PX25) Petitioner submitted into evidence a medical bill in the amount of $65,303.09 from Northshore Health for services related to Petitioner's left knee replacement on June 1, 2015. (PX18) A review of those charges reveal Respondent did not pay this bill until January 10, 2017, over a year and a half from the date of service. (PX18)

The Respondent failed to present any evidence to justify its failure to pay the outstanding medical bill for treatment prescribed by its own occupational physician. (PX25) Respondent has an affirmative burden to rebut the presumption that a delay of 14 days is unreasonable. Respondent failed to present any evidence to rebut that presumption. The Arbitrator finds the failure to provide benefits under the Act to be unreasonable and orders penalties pursuant to Section 19(l) of the Act in the maximum amount of $10,000.00.

June 27, 2014 accident – 14WC24735

The Petitioner submitted into evidence a medical bill in the amount of $11, 685.69 from Little Company for services related to Petitioner's hospitalization on July 26-28, 2014 due to complications from the original July 24, 2014 umbilical hernia surgery. Respondent furnished payment for these services on November 9, 2015. (PX14) After review of the totality of the evidence, the Arbitrator finds that no penalties or fees shall be imposed.

December 15, 2014 accident – 15WC1963

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. Section 19(l) of the Act states that "(i)f the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30.00 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000.00. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay.

The Petitioner submitted into evidence a medical bill in the amount of $57,802.00 from Athletico Physical Therapy for physical therapy services prescribed by Petitioner's treating physician, Dr. Mark Bowen, related to Petitioner's right shoulder injury. (PX17) The first PT encounter was on January 20, 2015 and the last on November 23, 2015. (PX17) A review of those charges reveals that while Respondent has made payments towards this bill, there remains an outstanding balance of $8,995.32. (PX17) Additionally, Petitioner submitted into evidence a bill from Advanced Medical Imaging Center, for an MRI prescribed by Dr. Bowen and completed on December 16, 2015 in the amount of $1,468.00. (PX19)

The Respondent failed to present any evidence to justify its failure to pay the outstanding medical bills. Respondent has an affirmative burden to rebut the presumption that a delay of 14 days is unreasonable. Respondent failed to present any evidence to rebut that presumption. Therefore, the Arbitrator finds the failure to provide benefits under the Act to be vexatious and unreasonable and orders penalties pursuant to Section 19(k) of the Act in the amount of $5,231.66 (50% of outstanding medical of $10,463.32 ($8,995.32 + $1468.00 = $10,463.32). Pursuant to Section 19(l), the Arbitrator further awards penalties in the amount of $10,000.00. Finally, the Arbitrator awards attorneys' fees pursuant to Section 16 of the Act in the amount of $2,092.66.

With respect to issue (N), whether the Respondent is due any credit pursuant to §8j of the Act, the Arbitrator finds as follows:

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Respondent claims that it is entitled to a credit pursuant to 820 ILCS 305/8(j). §8(j) states Respondent is entitled to a credit "in the event the injured employee receives benefits, including medical, surgical or hospital benefits under any group plan covering non-occupational disabilities contributed to wholly or partially by the employer, which benefits should not have been payable if any rights of recovery existed under the Act." However, an employer has the burden to establish its entitlement to a §8(j) credit. *Elgin Board of Education School District U-46 v. Illinois Workers' Compensation Commission*, 949 N.E.2d 198, 350 Ill.Dec. 710 (1st Dist. 2011). During the trial, Respondent failed to present any evidence that it contributed wholly or partially to a group plan or that payments would have been payable irrespective of an accidental injury under the Act. At the end of trial, during the admission of evidence, the Respondent attempted to present into evidence a printout of an itemization of benefits and payments made by the City of Chicago Medical Care Plan dating from July 2, 2013 until May 21, 2016. (RX3). However, the Petitioner objected to its admission based on the fact that there was no testimony laying foundation for this exhibit to address Petitioner's objections. The Arbitrator reserved her ruling and at this time is sustaining the Petitioner's objection and not receiving the Respondent's exhibit into evidence. Therefore, the Arbitrator finds that Respondent has not met its burden of proof establishing entitlement to a §8(j) credit for benefits extended by Petitioner's health plan.

With respect to the objections by Petitioner regarding Respondent's Exhibits #3, #5, and #6, the Arbitrator finds as follows:

Respondent Exhibit #3: Itemization of benefits paid by the city of Chicago Medical Care Plan

At the end of the trial, during the admission of evidence, the Respondent attempted to enter into evidence Respondent's Exhibit #3 -a printout of an itemization of benefits and payments made by the City of Chicago Medical Care Plan dating from July 2, 2013 until May 21, 2016. (RX3) The Petitioner objected to the admission of the itemization of benefits because no foundation was provided for this exhibit to address Petitioner's objections. The Arbitrator sustains the Petitioner's objection based upon a lack of foundation being provided for the exhibit and it is not received into evidence. The Arbitrator gives no consideration to Respondent's exhibit 3.

Respondent Exhibit #5: Work Order Assignments Report (Form 2FM)

At the end of the trial, during the admission of evidence, the Respondent attempted to enter into evidence exhibit #5- 2 FM Work Order Assignments Report for the Petitioner. The report was introduced during the

direct examination of Respondent's witness, Mr. Swanigan. Mr. Swanigan testified that the report was a print out of Petitioner's work order assignments that Petitioner has been assigned and completed from the beginning of 2018 through the date of hearing. (RX5)

The Petitioner objected to the admission of exhibit #5 based upon its relevance and the doctrine of completeness for it only being a "snapshot" of Petitioner's work and not reflecting all of the work that he does. The Arbitrator overrules the Petitioner's objection based upon relevance. However, the Arbitrator sustains the Petitioner's objection based upon the doctrine of completeness. Therefore, exhibit #5 – the work order assignment will not be received into evidence. The Arbitrator gives no consideration to Respondent's exhibit 5.

Respondent Exhibit #6: Petitioner's Performance Evaluation issues on June 30, 2017

At the end of the trial, during the admission of evidence, the Respondent attempted to enter into evidence Exhibit #6 a performance evaluation completed on the Petitioner. The evaluation was introduced during the direct examination of Respondent's witness, Mr. Swanigan. Mr. Swanigan testified that Petitioner's Performance Evaluation Form was issued on June 30, 2017 and had been completed by Petitioner's immediate supervisor, Mr. Gin. Additionally, Mr. Swanigan testified that the evaluation covered Petitioner's work for the one year period from July 2016 through July 2017. (RX6)

The Petitioner objected to the admission of the Petitioner's performance evaluation/ Respondent's exhibit #6 based upon the doctrine of completeness. The Petitioner pointed out through testimony from Mr. Swanigan, there was a Part I and Part II of the document that was not offered to be admitted into evidence with Exhibit #6. The Arbitrator sustains the Petitioner's objection based upon the doctrine of completeness and the performance evaluation will not be received into evidence. The Arbitrator gives no consideration to Respondent's exhibit 6.

Tiffany Kay	8/7/18
Signature of Arbitrator	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	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DONALD E. HAEPP, III

Petitioner,

vs.

NO: 11 WC 17266
(Consolidated with: 10 WC 25879,
14 WC 24735, and 15 WC 1963)

CITY OF CHICAGO,

Respondent.

19IWCC0504

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 permanent partial disability (PPD) benefits and penalties and attorney's fees, and being advised of the facts and law, affirms and adopts the Arbitrator's Decision, which is attached hereto and made a part hereof. The Commission only writes to provide additional analysis on the issue of permanency. Separate Decisions have been issued for case numbers 10 WC 25879, 14 WC 24735, and 15 WC 1963.

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. 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 (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).

Petitioner sustained two work-related injuries to his left knee in two separate accidents. The first accident occurred on May 4, 2010, wherein Petitioner sustained a flap tear of the posterior

horn of the lateral meniscus in the left knee. Petitioner underwent a left knee arthroscopy, partial medial and lateral meniscectomies, and excision of plica. Petitioner's post-operative diagnosis was left knee lateral meniscal tear with medial meniscal tear and large fibrotic medial plica. (PX2; PX4). Petitioner was eventually discharged from MercyWorks on January 7, 2011. (PX1). He was allowed to return to full duty work on January 10, 2011. (T.74; PX1). Petitioner returned to his regular duties with Respondent.

Petitioner then re-injured his left knee in another work-related accident on January 26, 2011. The Arbitrator had relied on the findings of Petitioner's treating orthopedic surgeon, Dr. Michael Maday. Dr. Maday had ordered and Petitioner completed an MRI of the left knee on March 19, 2011, which revealed a moderate-sized radial free edge tear of the lateral meniscus. Dr. Maday compared the previous arthroscopic pictures to the new MRI and noted that this was a new tear. On September 8, 2011, Dr. Maday performed a left knee arthroscopy, chondroplasty of the patellofemoral joint and medial femoral condyle, partial lateral meniscectomy, removal of loose bodies, extensive debridement, and an injection into the iliotibial band. Petitioner's post-operative diagnosis was lateral meniscal tear with chondrosis and fibrotic scar tissue with loose bodies. (PX27). Petitioner eventually underwent a left knee total replacement on June 1, 2015. (T.94; PX9; PX11).

As to permanency, the Arbitrator ordered one award for both the May 4, 2010 accident [10 WC 25879] and the January 26, 2011 accident [11 WC 17266]. The Arbitrator first denied Petitioner's request for a wage differential award. The Arbitrator noted that Petitioner testified to earning $46.35 per hour, which is equivalent to what other carpenters he worked with earned. The Arbitrator further noted that this wage was an increase from what Petitioner previously earned prior to the January 26, 2011 accident. The Arbitrator found that the evidence did not support a wage differential award under Section 8(d)1 of the Act.

The Arbitrator next considered an award under Section 8(d)2 of the Act. The Arbitrator determined that twenty percent (20%) loss of use of the person as a whole was proper as the evidence demonstrated that Petitioner was partially incapacitated from pursuing the duties of his usual and customary line of employment, but that he had suffered no impairment in earning capacity. The Arbitrator based her Decision on the fact that Petitioner was 55 and 56 years old for each accident, respectively. Petitioner returned to work full duty after treating for the May 4, 2010 accident, but was given permanent restrictions of no kneeling or squatting following his discharge from treatment for the January 26, 2011 accident. Notwithstanding the work restriction, Petitioner returned to the same position with Respondent, with the same title and same pay. Petitioner testified that he is only given assignments that do not require kneeling or squatting. The Arbitrator considered the testimony of Edmund Sexton and Respondent's representative, Elgin Swanigan, who both stated that Petitioner would not be able to be placed for work as a carpenter in a competitive labor market given his restrictions. Petitioner's vocational rehabilitation counselor, Steven Blumenthal, agreed that but for Petitioner's accommodated position with Respondent, Petitioner would not otherwise be qualified to perform work as a journeyman carpenter. As to Petitioner's current complaints, Petitioner testified to continued numbness in the front of his left knee, and that his knee would become "stuck" in certain positions.

Under a separate Decision specific to 10 WC 25879, the Commission determined that separate awards for PPD benefits were warranted. Accordingly, the Commission awarded Petitioner a total of twenty-five percent (25%) loss of use of the left leg under Section 8(e) of the Act for the May 4, 2010 accident [10 WC 25879]. This award is subject to a credit of twenty-two-and-a half percent (22.5%) loss of use of the left leg which had been previously awarded.

As to this claim, the January 26, 2011 accident [11 WC 17266], the Commission affirms the Arbitrator's award of twenty percent (20%) loss of use of the person as a whole under Section 8(d)2 of the Act.

Petitioner takes exception to the Arbitrator's PPD award under Section 8(d)2 and cites *Jackson Park Hosp. v. Ill. Workers' Comp. Comm'n*, 2016 IL App (1st) 142431WC, for the proposition that a wage differential award cannot be determined simply by comparing pre- and post-injury income. (Petitioner's Brief, pg. 23). Petitioner argues that based on the evidence, Petitioner's earning capacity as a result of his left knee injury is $12/hr in a stable market. (Petitioner's Brief, pg. 23). Respondent correctly notes that the claimant in *Jackson Park Hosp.* was not similarly situated as Petitioner Haepp. The claimant in *Jackson Park Hosp.* was a stationary engineer for Respondent. Following the claimant's work-related accident, she could no longer perform the job duties of a stationary engineer. *Jackson Park Hosp. v. Ill. Workers' Comp. Comm'n*, 2016 IL App (1st) 142431WC, ¶ 1. Respondent therefore accommodated the claimant by giving her a new position, that of a public safety officer, and paid the claimant the same wage she would have earned in her pre-injury job. *Id.* at ¶ 3. As a result, the Commission concluded that the claimant was not entitled to a wage differential award because she had not suffered any wage loss. *Id.* The Appellate Court identified the crux of Section 8(d)1 versus 8(d)2, and emphasized that the crucial issue "in determining which type of PPD award is appropriate is whether the claimant has suffered an impairment of her 'earning capacity.'" *Jackson Park Hosp. v. Ill. Workers' Comp. Comm'n*, 2016 IL App (1st) 142431WC, ¶ 42. The Appellate Court found that the Commission did not evaluate the claimant's earning capacity, but simply compared pre- and post-injury earnings:

> The Commission did not conduct any analysis to determine whether the claimant's post-injury wages reflected her true earning capacity in a competitive job market. On the contrary, at the arbitration hearing, the claimant attempted to present evidence that her income as a public safety officer was not a true representation of her earning capacity, but the Commission refused to consider the evidence. The claimant presented evidence, by way of the stipulation, that although she was earning $23.61 per hour as a safety officer for the employer, all of the employer's other safety officers earned between $8 and $10 per hour. The Commission refused to admit this stipulation for purposes relevant to the claimant's request for a wage differential award. It admitted the stipulation 'only as far as an [8(d)(2)] award.' *Id.* at 46, 47.

The Appellate Court found that the Commission abused its discretion in limiting the admission of the stipulation, and remanded the case for further hearings on the issue of the claimant's request for a wage differential award. *Id.* at 47, 62.

Here, the Arbitrator's ultimate conclusion was correct – Petitioner was partially incapacitated from pursuing the duties of his usual and customary line of employment, but did not suffer an impairment of earning capacity. There is no dispute that Petitioner would not be able to be placed for work as a carpenter in a competitive labor market given his restrictions. However, in considering the evidence simply beyond pre- and post-injury earnings, Petitioner has not demonstrated an impairment of earning capacity. First, Petitioner here is not similarly situated as the claimant in *Jackson Park Hosp.* Petitioner was a union carpenter prior to and subsequent to the January 26, 2011 work-related accident. He testified to earning the same wages as the other union carpenters he worked with. These facts are distinguishable from the facts in *Jackson Park Hosp.*

Additionally, there is no evidence of Respondent offering Petitioner a sham position. Mr. Sexton had testified that he was familiar with the job duties of a carpenter working for Respondent: "Carpenters work all different aspects of building, concrete, form work, metal studs, drywall, trim, setting of these desks here and chairs." (T.23-24). Petitioner corroborated this testimony, stating that his job duties since returning to work for Respondent were: "Put on door closers, work on locks, do a lot of ceiling work, patch holes in drywall, replace doors, put on new hinges, building some wooden structures, platforms, decks for trailers." (T.129-130). Petitioner has been consistently performing these job duties since he returned to work in 2015 – nearly three years prior to arbitration. (T.31-32). Mr. Swanigan further confirmed that the Department had been able to accommodate Petitioner's restrictions and he described Petitioner's duties: "Installing ceilings, installing doors, door hardware, hanging drywall, framing, kind of a multiple list of things that doesn't require him to actually bend or squat." (T.143). Mr. Swanigan confirmed that these tasks were a regular part of the projects that the Department handled. (T.143). Mr. Swanigan also testified as to Petitioner's Exhibit 21. Mr. Swanigan agreed that it was a fair and accurate list of the essential duties that a carpenter would perform in his department, and that Petitioner currently performed most of these tasks for Respondent. (T.144-145). Mr. Swanigan next testified as to Respondent's Exhibit 5, which was a log of work assignments that he had generated and that reflected Petitioner's work assignments from October 2017 to March 2018. (T.147; T.151; RX5). Mr. Swanigan stated that Petitioner's productivity as documented in the report was typical of the work that a lot of other carpenters performed, and the volume of work assignment was average compared to the other carpenters he oversaw. (T.152).

Thus, unlike the claimant in *Jackson Park Hosp.*, Petitioner Haepp was not paid to perform job duties he was not qualified to perform or paid a wage above what was normally paid for such services. *Jackson Park Hosp. v. Ill. Workers' Comp. Comm'n*, 2016 IL App (1st) 142431WC, ¶ 55.

The Commission next addresses Petitioner's argument that his current earning capacity as a result of his left knee injury is $12/hr in a stable market. (Petitioner's Brief, pg. 23). This wage is based off of Mr. Blumenthal's report and testimony, which identified some transferable skills that Petitioner could use to find another position within the competitive labor market.

> [B]ased on his overall aptitude profile, even though he has never performed these specific jobs in the past, he has the physical ability and he has the aptitude profile to be able to perform these jobs. These are jobs that I know exist in a stable labor market in the Chicago metropolitan area. Those were the jobs of retail salespersons and security guards. In this case, unarmed security guards. (T.56).

Mr. Blumenthal testified that Petitioner could earn $11.00 per hour as a retail salesperson, and $11.00 to $12.00 per hour as an entry-level, unarmed security guard. (T.57; PX20). Even if the Commission were to accept this evidence as true, *Crittenden v. Ill. Workers' Comp. Comm'n*, 2017 IL App (1st) 160002WC, instructs as follows:

> In making the calculation of a wage differential under section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2012)), the Commission must determine 'the average amount which [the claimant] is able to earn in some suitable employment or business after the accident.' In calculating this average amount, if the claimant is working at the time of the calculation, the claimant must prove his actual earnings for a substantial period after he returns to work, and the Commission may apply his then current average weekly wage to the calculation. See *Gallianetti*, 315 Ill. App. 3d at 730; see also, *Levato v. Workers' Comp. Comm'n*, 2014 IL App (1st) 130297WC ¶ 29-¶ 30. However, as in the case at bar, if the claimant is not working at the time of the calculation, the Commission must rely on functional and vocational expert evidence. See *Gallianetti*, 315 Ill. App. 3d at 730 (labor market survey); *Levato*, 2014 IL App (1st) 130297WC at ¶ 12-¶ 13 (vocational rehabilitation specialist and labor market survey); *United Airlines, Inc. v. Ill. Workers' Comp. Comm'n*, 2013 IL App (1st) 121136WC ¶ 4-¶ 7 (vocational rehabilitation specialists).

Crittenden further specifies:

> In addition, where the claimant is not working at the time of the hearing, it is important to note that section 8(d)(1) requires that an average wage be derived from suitable employment for the claimant. Suitable employment is employment in which the claimant is both able and qualified to perform . . . For all of these reasons, we hold that in order to calculate a wage differential award, the Commission must identify, based on the evidence in the record, an occupation that the claimant is able and qualified to perform, and apply the average wage for that occupation to the wage differential calculation. As a corollary to this holding, the claimant is required to introduce evidence sufficient for the Commission to identify an occupation that the claimant is able and qualified to perform, and

> the average wage for that occupation. 2017 IL App (1st) 160002WC ¶ 24.

Here, the record demonstrates that the vocational counselor selected one of two jobs he believed was suitable for Petitioner, namely the entry-level, unarmed security guard position earning $12.00 per hour. The vocational counselor admitted that Petitioner had never performed this specific job. This evidence does not demonstrate an occupation that Petitioner is able and qualified to perform; the Commission cannot and will not consider speculative evidence. *United Airlines, Inc. v. Ill. Workers' Comp. Comm'n*, 2013 IL App (1st) 121136WC ¶ 17, ¶ 29.

Thus, the Arbitrator's conclusion to award twenty percent (20%) loss of use of the person as a whole under Section 8(d)2 is supported by the record. Petitioner's injury following the January 26, 2011 accident required medication, three injections, two surgeries, including a left knee total replacement, and therapy. Petitioner was given permanent restrictions and has continued complaints as noted by the Arbitrator. The evidence further demonstrates that Petitioner would not be able to be placed for work as a carpenter in a competitive labor market given his restrictions. However, an analysis of Petitioner's post-injury wages does not support a finding of any impairment in earning capacity. Petitioner's current wage of $46.35 per hour reflects his true earning capacity earned in employment suitable for Petitioner; this wage was an increase from what Petitioner previously earned prior to the January 26, 2011 accident.

Accordingly, the Commission affirms the Arbitrator's award of twenty percent (20%) loss of use of the person as a whole as Petitioner was partially incapacitated from pursuing the duties of his usual and customary line of employment, but did not suffer an impairment of earning capacity.

The Commission further agrees with the Arbitrator's $10,000.00 award in Section 19(l) penalties for Respondent's failure to timely pay the medical charges associated with Petitioner's left knee total replacement. The Arbitrator stated that on November 20, 2014, Respondent's Section 12 examiner, Dr. Brian Cole, had provided causal connection for Petitioner's left knee condition following the January 26, 2011 accident and provided causal connection for the knee replacement. Petitioner underwent that surgery on June 1, 2015. The Arbitrator stated that Petitioner had submitted evidence of a medical bill totaling $65,303.09 from Northshore University Health System related to the June 1, 2015 knee replacement. (PX18). The Arbitrator noted that Respondent had not paid this bill until January 10, 2017, more than a year and a half from the service date. Section 19(l) of the Act states that a delay of 14 days or more shall create a rebuttable presumption of unreasonable delay. 820 ILCS 305/19(l). Accordingly, we affirm the Arbitrator's Decision to award $10,000.00 in penalties under Section 19(l) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed August 7, 2018, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the reasonable and necessary out-of-pocket expenses of $282.01, pursuant to Section 8(a) of the Act and to be adjusted in accord with the medical fee schedule provided in Section 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall receive credit for medical bills paid through its group medical plan as provided in 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.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given a credit of $52,188.00 for temporary total disability benefits that have been paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $669.64 per week for a period of 100 weeks, as provided in Section 8(d)2 of the Act, for the reason that the injuries sustained caused twenty percent (20%) loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner penalties of $10,000.00, as provided in Section 19(l) of the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all other 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 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: SEP 1 6 2019

DDM/pm
O: 7-17-19
052

D. Douglas McCarthy

Stephen Mathis

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HAEPP III, DONALD E
Employee/Petitioner

Case# **11WC017266**

10WC025879
14WC024735
15WC001963

CITY OF CHICAGO
Employer/Respondent

19IWCC0504

On 8/7/2018, 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 2.18% 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:

0391 HEALY SCANLON
KEVIN T VEUGELER
111 W WASHINGTON ST STE 1425
CHICAGO, IL 60602

0010 CITY OF CHICAGO
D TAYLOR CHITTICK
30 N LASALLE ST 8TH FLR
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

Donald E. Haepp, III
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **11** WC **17266**

Consolidated cases: **10 WC 25879, 14 WC 24735, 15 WC 1963**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Tiffany Kay**, Arbitrator of the Commission, in the city of **Chicago**, on **March 26, 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. [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. [x] Should penalties or fees be imposed upon Respondent?
N. [x] Is Respondent due any credit?
O. [x] Other **Wage Differential**

FINDINGS

On **January 26, 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 $**84,801.60**; the average weekly wage was $**1,630.80**.

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

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

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

Respondent shall be given a credit of $**52,188.00** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**52,188.00**.

ORDER

Medical benefits
Respondent shall pay reasonable and necessary out of pocket expenses of **$282.01**.

Nature and Extent
Respondent shall pay Petitioner permanent partial disability benefits of **$669.64/week** for **100 weeks**, because the injuries sustained caused **20 % loss** of the person as a whole, as provided in Section 8(d)2 of the Act.

Penalties
Respondent shall pay to Petitioner penalties of **$10,000.00**, as provided in Section 19(l) of the Act.

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

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

Signature of Arbitrator

8/7/18
Date

AUG 7 - 2018

PROCEDURAL HISTORY

This matter was originally scheduled to be heard before Arbitrator Douglas Steffenson (hereinafter "Arbitrator Steffenson") on March 26, 2018 in Chicago, Illinois. However, Arbitrator Tiffany Kay (hereinafter "Arbitrator Kay") covered Arbitrator Steffenson's trial call on March 26, 2018. Therefore, by agreement of both parties, this matter was tried before Arbitrator Kay and the decision rendered by Arbitrator Kay. Arbitrator Kay has examined the submitted records.

This case has been consolidated with the following cases: #10WC25879, 14WC24735 and 15WC1963.

SUMMARY OF FACTS AND EVIDENCE

May 4, 2010 accident – 10WC25879

The parties proceeded to hearing on March 26, 2018, with disputed issues as to whether the current condition of ill-being is causally connected to Mr. Donald Haepp's (hereinafter "Petitioner") injury, whether the City of Chicago (hereinafter "Respondent") is liable for unpaid medical bills, whether the Respondent is entitled to credit in accordance to §8(j) of the Act, the nature and extent of the injuries that occurred, whether the Petitioner is entitled to penalties under §19(k), §19(l) and attorney fees pursuant to §16, and whether the Petitioner is entitled to a wage differential. (ArbX1)

The parties stipulated that Respondent was operating under the Act on May 4, 2010. (Arb. X1) The parties stipulated that the date of the accident was May 4, 2010 and that the Petitioner and Respondent had a relationship of employer and employee, and that the accident arose out of during the course of employment. (ArbX1) The parties also stipulated that the Petitioner worked for the Respondent as a Carpenter, notice of the accident was given within the time limits stated in the Act, Petitioner was 55 years of age on the date of the accident, and married with 0 dependent children. (Arb.X1) The stipulated average weekly wage, calculated pursuant to Section 10 of the Act, was $1620.40. (Arb.X1)

The Petitioner testified that on May 4, 2010, he had been employed by Respondent as a carpenter in the Department of Fleet and Facility Management since 1999. Petitioner testified that on May 4, 2010 he was on duty and sustained an accidental injury to his left knee when he stepped in a hole while carrying a ladder. The Petitioner was directed to the Respondent's occupational clinic, Mercy Works. A May 27, 2010 MRI revealed a tear of the posterior horn of the lateral meniscus. Petitioner was referred to see Dr. Michael Maday at Midland Orthopedics by the Respondent and underwent left knee arthroscopic surgery on September 20, 2010. (PX2) The surgery revealed that the Petitioner had a flap tear in the posterior horn of the lateral meniscus. After the surgery the Petitioner underwent a regimen of post-operative physical therapy and continued to follow-up with Dr. Maday. (P.X2) On January 10, 2011 Petitioner returned to work full duty per Dr. Maday's release.

January 26, 2011 accident – 11WC17266

The parties proceeded to hearing on March 26, 2018, with disputed issues as to whether the current condition of ill-being is causally connected to Mr. Donald Haepp's (hereinafter "Petitioner") injury, whether the City of Chicago (hereinafter "Respondent") is liable for unpaid medical bills, whether the Respondent is entitled to credit in accordance to §8(j) of the Act, the nature and extent of the injury that occurred, whether the Petitioner is entitled to penalties under §19(k), §19(l) and attorney fees pursuant to §16, and whether the Petitioner is entitled to a wage differential. (ArbX2)

The parties stipulated that Respondent was operating under the Act on January 26, 2011. (Arb. X2) The parties stipulated that the date of the accident was January 26, 2011 and that the Petitioner and Respondent had a relationship of employer and employee, and that the accident arose out of and during the course of employment. (ArbX2) The parties also stipulated that the Petitioner worked for the Respondent as a Carpenter, notice of the accident was given within the time limits stated in the Act, Petitioner was 56 years of age on the date of the accident, and married with 0 dependent children. (Arb.X2) The stipulated average weekly wage, calculated pursuant to Section 10 of the Act, was $1630.80. (Arb.X2)

On January 26, 2011, Petitioner was on duty when he was entering an elevator with tools in his hands. Petitioner testified that the elevator floor was raised approximately 6 to 8 inches above the lobby floor. As Petitioner attempted to enter the elevator, he tripped and fell into the elevator. Petitioner's fall resulted in him re-injuring his left knee. On February 9, 2011, following this incident, Petitioner returned to see Dr. Michael Maday, at Midland Orthopedics for treatment. (P.X2) At this visit Petitioner reported doing well until he reinjured his knee. (P.X2) Prior to the re-injury he reported doing well and had returned to work. Dr. Maday diagnosed the Petitioner with "a new injury, not related to his previous injury and he would need him to report this as such." (P.X2) However, he instructed the Petitioner to continue his full unrestricted activities. On February 23, 2011, Petitioner returned to see Dr. Maday and reported increased pain in the iliotibial band area. Dr. Maday assessed him with iliotibial band pain following his injury. At Petitioner's request, he received a left knee injection of Depomedrol and lidocaine to relieve his symptoms. On March 19, 2011, Petitioner underwent an MRI at MRI of River North. On April 6, 2011, Dr. Maday reviewed the MRI and assessed a moderate size radial free edge tear of the lateral meniscus that appeared to be a new tear in an area where there was previously not a tear. Dr. Maday opined that it appeared to be a new injury related to his injury with the elevator. Dr. Maday recommended the Petitioner have surgery to address the meniscal pathology. The Petitioner continued to work full duty while awaiting Worker's Compensation approval. (P.X2)

On September 8, 2011, Dr. Maday performed a left knee arthroscopy on Petitioner. (P.X2) The surgery also consisted of chondroplasty, patellofemoral joint and medial femoral condyle with partial lateral meniscectomy, removal of loose bodies, extensive debridement and injection of the iliotibial band performed by Dr. Maday (P.X2). After surgery, the Petitioner remained off work and began a new course of physical therapy. On November 23, 2011, Petitioner returned to see Dr. Maday. Petitioner reported still having difficulty with stairs, squatting and kneeling. Dr. Maday planned on allowing the Petitioner to return to work full duty as of December 1, 2011. (P.X2) Therapy notes confirm that Petitioner was instructed to avoid kneeling activities and excessive squatting. (PX4). On December 5, 2011, Petitioner was also evaluated at Advocate Occupational Clinic at the request of Respondent. (PX3). Respondent's physicians released Petitioner back to work with restrictions of no kneeling along with the medications Vicodin and Tramadol. (PX3).

Petitioner testified that Respondent accommodated his restrictions. However, he continued to experience difficulty with his left knee. On January 25, 2012, Petitioner returned to Dr. Maday complaining of continued pain in his left knee. (PX2). Dr. Maday recommended a repeat MRI. (PX2) A February 7, 2012 MRI revealed joint effusion of the left knee. (PX2) After reviewing the results of the MRI, Dr. Maday referred Petitioner to Dr. Robert Strugala for platelet rich plasma injections. (PX2) The first injection was completed on March 8, 2012, and a second injection was prescribed on April 12, 2012. (PX2) At that April 12, 2012 visit, Dr. Strugala noted residual symptoms in the left knee, recommended a home exercise program, and requested authorization for an additional injection. (PX2) No additional authorization for further treatment was provided by Respondent.

On July 14, 2014, following a period of full duty work, Petitioner sought treatment for ongoing left knee symptoms with Dr. Mark Bowen of North Shore Orthopaedic Institute (PX28). Dr. Bowen noted that Petitioner has had three different surgeries in 2004, 2011 and 2012. (P.X10) He noted that Petitioner has restrictions in terms of squatting and twisting. Petitioner complained of only being able to walk one flight of stairs and then having to rest due to pain. (PX10) Dr. Bowen's physical exam revealed slight valgus alignment, palpable osteophytes and crepitation. Additionally, Dr. Bowen noted advanced lateral compartment degenerative arthritis and patellofemoral degenerative joint disease and referred Petitioner to Dr. Raju Ghate for consideration of a total knee replacement. (PX10)

On November 20, 2014, Petitioner attended an Independent Medical Examination (IME) with Dr. Brian Cole at Midwest Orthopedics. (PX25) Dr. Cole noted that Petitioner stated he had a work-related injury in 2003 and had a left knee arthroscopy. He noted that Petitioner told him he made a full recovery from that with no sequalae. Since the 2011 injury, Petitioner stated he had two arthroscopic surgeries to his left knee with Dr. Maday, "first 2011 (he says he was worse and did not recover well), and a second in 2012, also saying he made no change or improvement after that." (PX25) Dr. Cole noted that Petitioner told him he saw Dr. Mark Bowen for a second opinion and was told he would need a total knee replacement. After examination, Dr. Cole noted an impression of advanced osteoarthritis, left knee, and unresolved-aggravation of pre-existing condition. Dr. Cole opined that Petitioner still maintained symptoms that remained a sequelae of a work-related injury of January 26, 2011. He further stated that he appeared to have had sustained an aggravation of a pre-existing condition that has not been brought to a stable endpoint of care and remains and on-going aggravation of a pre-existing condition. Additionally, Petitioner was pursuing further care and has never had a stationary endpoint to bring his period of causally-related treatment to an end. Dr. Cole prescribed a total knee replacement and recommended in the meantime, that Petitioner could work in a restricted duty job with limited squatting, kneeling, climbing and minimum bending and stooping. (PX25). Dr. Cole also confirmed that all treatment to date was reasonable, necessary and related to his January 26, 2011 injury. (PX25)

On January 27, 2015, Petitioner was evaluated by Dr. Raju S. Ghate for the left knee. (PX11). Dr. Ghate recommended a cortisone injection and consideration for a total knee replacement. A cortisone injection was done at that time. (PX11) On April 21, 2015, a utilization review report was issued on behalf of Respondent and it was determined that the prescribed left knee total knee arthroplasty and inpatient hospital stay for 3 nights was certified and medically necessary. (P.X24) On June 1, 2015, Petitioner underwent left total knee replacement surgery performed by Dr. Raju Ghate. (PX11)

On November 3, 2015, Dr. Ghate evaluated Petitioner and recommended a course of work hardening. (PX11) On November 24, 2015, Petitioner returned to Dr. Ghate. (PX11). Dr. Ghate noted Petitioner continued to take Tramadol for occasional knee pain. (PX11) Dr. Ghate noted a good recovery from the total knee replacement and recommended Petitioner return to work December 1, 2015 with restrictions of no kneeling or squatting and return for a follow up visit in six months. (PX11) On June 24, 2016, Petitioner returned to Dr. Ghate for his one year follow up. (PX11) Dr. Ghate noted a good recovery, but left knee pain with twisting/pivoting, pain with stairs, and difficulty bending to the floor. X-rays that were taken at that time showed joint effusion. (PX11) Petitioner was still taking Tramadol for pain, and Dr. Ghate ordered Petitioner's work restrictions permanent. (PX11).

June 27, 2014 accident – 14WC24735

The parties proceeded to hearing on March 26, 2018, with disputed issues as to whether the current condition of ill-being is causally connected to Mr. Donald Haepp's (hereinafter "Petitioner") injury, whether the City of Chicago (hereinafter "Respondent") is liable for unpaid medical bills, whether the Respondent is entitled to credit in accordance to §8(j) of the Act, the nature and extent of the injury that occurred, and whether the Petitioner is entitled to penalties under §19(k), §19(l) and attorney fees pursuant to §16. (ArbX3)

The parties stipulated that Respondent was operating under the Act on June 27, 2014. (ArbX3) The parties stipulated that the date of the accident was June 26, 2014 and that the Petitioner and Respondent had a relationship of employer and employee, and that the accident arose out of and during the course of employment. (ArbX3) The parties also stipulated that the Petitioner worked for the Respondent as a Carpenter, notice of the accident was given within the time limits stated in the Act, Petitioner was 59 years of age on the date of the accident, and married with 0 dependent children. (ArbX3) The stipulated average weekly wage, calculated pursuant to Section 10 of the Act, was $1699.16. (ArbX3)

Petitioner testified that while on duty, on June 27, 2014, he was lifting drywall with a co-worker and felt a twinge in his stomach area and noted a bump in his belly button. (PX1) Petitioner testified that he finished completing the work and then reported the incident. Following the incident, Petitioner was directed to go to the City of Chicago's occupational clinic, Mercy Works, where he was seen by Dr. Homer Diadula (hereinafter "Dr. Diadula"). (PX1) Dr. Diadula diagnosed Petitioner with an umbilical hernia, ordered Petitioner off of work due to a work-related condition, and referred him to see Dr. Daniel Kacey (hereinafter "Dr. Kacey) at Mercy Hospital and Medical Center. (PX1) On July 1, 2014, Petitioner was seen by Dr. Kacey who noted that Petitioner had an acute umbilical hernia. (PX5) Dr. Kacey recommended surgical repair with simple preperitoneal mesh. (PX5) Dr. Kacey noted that Petitioner's expected disability related to repair would be 4-6 weeks. (PX5) Petitioner was referred to his family doctor regarding his overall fitness for surgery.

On July 1, 2014, Petitioner sought additional consultation with his primary care physician, Dr. Timothy Wollner of Little Company of Mary Affiliated Services (hereinafter "Little Company"). (PX6) Dr. Wollner discussed with Petitioner his treatment options, and Petitioner elected to pursue surgical repair. Dr. Wollner referred Petitioner to Dr. Michael Fiorucci (hereinafter "Dr. Fiorucci") to perform the surgery. (PX6) On July 24, 2014, Dr. Fiorucci performed an umbilical hernia repair with mesh. (PX6) Petitioner was discharged from the hospital with the restriction of no lifting over 15lbs. (PX7) On July 26, 2014, Petitioner was re-admitted to Little Company with abdominal pain and swelling. (PX7) Petitioner was diagnosed with postoperative constipation due to the narcotic medication given at the time of surgery and obstruction of the intestine. (PX7) Petitioner was treated and released from the hospital on July 28, 2014. (PX7) On August 6, 2014, Dr. Fiorucci re-evaluated Petitioner and noted he was doing well post-surgery. (PX6). On August 25, 2014 Petitioner returned back to work full duty with no restrictions concerning his umbilical hernia.

December 15, 2014 accident – 15WC1963

The parties proceeded to hearing on March 26, 2018, with disputed issues as to whether the current condition of ill-being is causally connected to Mr. Donald Haepp's (hereinafter "Petitioner") injury, whether the City of Chicago (hereinafter "Respondent") is liable for unpaid medical bills, whether the Respondent is entitled

to credit in accordance to §8(j) of the Act, the nature and extent of the injury that occurred, and whether the Petitioner is entitled to penalties under §19(k), §19(l) and attorney fees pursuant to §16. (ArbX4)

The parties stipulated that Respondent was operating under the Act on December 15, 2014. (Arb. X4) The parties stipulated that the date of the accident was December 15, 2014 and that the Petitioner and Respondent had a relationship of employer and employee, and that the accident arose out of and during the course of employment. (ArbX4) The parties also stipulated that the Petitioner worked for the Respondent as a Carpenter, notice of the accident was given within the time limits stated in the Act, Petitioner was 60 years of age on the date of the accident, and married with 0 dependent children. (Arb.X4) The stipulated average weekly wage, calculated pursuant to Section 10 of the Act, was $1714.72. (Arb.X4)

Petitioner testified that while on duty, December 15, 2014, he was hanging dry wall overhead and began to experience pain in his right shoulder. Petitioner reported the incident to the Respondent the next morning, December 16, 2014. On December 16, 2014, Petitioner sought treatment at Mercyworks with Dr. Diadula. Petitioner complained of difficulty raising his arm up and had pain in his neck and right shoulder. (PX1) Dr. Diadula diagnosed Petitioner with a right shoulder strain/sprain, right cervical sprain and right shoulder rule out labrum tear. (PX1) Dr. Diadula instructed the Petitioner to use over the counter Tylenol for pain and an MRI was ordered of the right shoulder to rule out glenoid or labrum tear. (PX1) Dr. Diadula ordered the Petitioner off work. (PX1)

On December 22, 2014, Petitioner returned to Mercy Works with complaints of pain. (PX1). Physical therapy and medication was prescribed and Petitioner was instructed to remain off work. (PX1). On December 29, 2014, Petitioner was re- examined and the Dr. found decreased range of motion and difficulty in lifting the right arm without pain. (PX1) On January 6, 2015, an MRI was approved and performed showing results positive for supraspinatus tendinopathy. (PX10) On January 8, 2015, a MercyWorks physician reviewed the MRI results, noted the supraspinatus defect, and recommended Petitioner see an orthopedic shoulder specialist, prescribed medication and instructed Petitioner to remain off work. (PX1) On January 19, 2015, Petitioner saw Dr. Mark Bowen (hereinafter "Dr. Bowen") of Northshore Orthopedics, who found no significant atrophy, asymmetry or swelling. (PX10) Dr. Bowen noted, after review of his MRI, that there was some strain pattern in the muscle, probable slight tendinopathy but no evidence of a full-thickness tear. Dr. Bowen's final impression was that there was a rotator cuff strain and recommended a course of physical therapy. (PX10) On March 18, 2015, Petitioner returned to Dr. Bowen with noted improvement but persistent signs of impingement. Petitioner was given a cortisone injection, instructed to continue physical therapy and to remain off work. (PX10) On April 29, 2015, Petitioner returned to Dr. Bowen complaining of pain and cracking with overhead lifting. (PX10) An exam on that date was again positive for impingement. (PX10) Dr. Bowen recommended a surgical decompression of the right shoulder after the completion of knee surgery and prescribed continued physical therapy and continued off work. (PX10)

On December 9, 2015, following the total knee replacement surgery, Petitioner returned to Dr. Bowen for his right shoulder (PX10). During his visit, Petitioner reported to Dr. Bowen that his right shoulder was not bothering him that much from a pain perspective but he still noticed some crepitation or noise through range of motion. (PX28) Petitioner also complained of numbness and tingling in both hands that radiated down his arm. (PX28) Dr. Bowen suggested an MRI and EMG results to evaluate Petitioner's cervical symptoms and ordered him off work. (PX28) On January 6, 2016, Petitioner returned to Dr. Bowen, who authorized Petitioner to return to work with no restrictions concerning his right shoulder effective January 7, 2016.

On April 17, 2017, Petitioner attended a vocational rehabilitation interview with Steven Blumenthal of Blumenthal Associates. (PX20) Mr. Blumenthal issued a report on June 20, 2017 based on his interview with the Petitioner.

CONCLUSIONS OF LAW

Arbitrator's Credibility Assessment/Summary of Testimony:

At hearing, the Petitioner had three witnesses testify, Mr. Edmund Sexton, Mr. Steven Blumenthol and the Petitioner. The Respondent had one witness testify, Mr. Elgin Swanigan. Overall the Arbitrator found the testimony of all of the witnesses to be truthful, credible and otherwise unrebutted.

Mr. Edmund Sexton, a business representative for the Carpenter's Union, was called to testify on behalf of Petitioner. Mr. Sexton testified that he has been in the Union for 13 years and as Union representative he represents all carpenters that work for Respondent. He also testified that he has been a carpenter for 25 years. Mr. Sexton testified to Petitioner's permanent restrictions of no kneeling or squatting that resulted from his 2011WC17266 injury. He testified that the restrictions of no kneeling or squatting for a carpenter would impact a majority of the jobs a carpenter would need to do. Additionally, he testified that if Petitioner was fired from working for the Respondent it would be difficult to place someone with his restrictions in another position as a carpenter elsewhere. However, he acknowledged after review of Petitioner's job duties, some of the duties could be completed without kneeling or bending. On cross-examination, Mr. Sexton testified that he had never observed Petitioner in the performance of his job duties as a Carpenter. Mr. Sexton acknowledged Petitioner's age of 63, and stated that there had been no grievances filed with the union regarding Petitioner's performance of his job duties.

Mr. Steven Blumenthal, a certified vocational rehabilitation counselor with Blumenthal Associates, was called to testify on behalf of Petitioner. On April 17, 2017, Petitioner attended a vocational rehabilitation interview with Mr. Blumenthal. (PX20) Mr. Blumenthal testified that he has been in his field for 38 years and had his practice for 16 years. (PX29) Mr. Blumenthal issued a vocational assessment of Petitioner in a report he issued on June 20, 2017. Mr. Blumenthal's testimony was consistent with his report. On cross-examination, Mr. Blumenthal acknowledged that his April 17, 2017 vocational rehabilitation interview with Petitioner lasted approximately an hour and a half. Mr. Blumenthal testified that the interview was the only meeting he attended with Petitioner. Mr. Blumenthal also testified that he spent less than an hour reviewing Petitioner's records prior to issuing his June 20, 2017 report. Mr. Blumenthal testified that he was aware that Petitioner works as a Carpenter for Respondent and has done so consistently since early 2016.

The Petitioner, Mr. Donald E. Haepp, III, was the last witness to testify on behalf of the Petitioner. Petitioner testified that he has worked for Respondent as a carpenter since 1999. Petitioner testified to his past medical history, mechanisms of injuries, restrictions in result of the injuries, courses of medical treatment and current subjective complaints in all of his consolidates cases (10WC25879, 11WC17266, 14WC24735 and 15WC1963). In addition, Petitioner testified to the unpaid medical bills he claims Respondent is liable for in each case.

At hearing, the Respondent had one witness testify on behalf of Respondent, Mr. Elgin Swanigan, General Foreman of Trades for the Department of Fleet and Facility Management. Mr. Swanigan testified that he supervised Petitioner's immediate supervisor, David Gin. Mr. Swanigan testified that, approximately two to

three times each week, he observes Petitioner perform his job duties as a Carpenter. Mr. Swanigan also testified that he has supervised Petitioner's work as a Carpenter since Petitioner returned to work in early 2016.

Mr. Swanigan testified to the quality of Petitioner's current work as a Carpenter. Mr. Swanigan testified that there are many tasks of a Carpenter that do not require kneeling or stooping, and that Petitioner consistently and competently performs these tasks for his Department. Mr. Swanigan reviewed the essential duties of a Carpenter and stated that Petitioner had demonstrated he was capable of performing all the listed functions within his restrictions. Mr. Swanigan reviewed the physical requirements for a Carpenter and noted that, of the seven physical requirements listed, only two were impacted by Petitioner's restrictions. In addition, he testified Petitioner performs valuable work for the Department. Mr. Swanigan testified that he supervises other Carpenters who perform work with restrictions and that, even amongst the Carpenters with no restrictions, many specialize in specific tasks. Mr. Swanigan testified that Petitioner works the same number of hours and days per week as other Carpenters within the Department. Mr. Swanigan testified that, if Petitioner was no longer employed by the Department, the Department would be forced to hire another Carpenter to replace Petitioner and perform his duties.

With respect to issue (F) whether the Petitioner's current condition of ill-being is causally related to the Injury, the Arbitrator finds as follows:

May 4, 2010 accident – 10WC25879

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that Petitioner did prove by a preponderance of the evidence that his current condition of ill-being is causally connected to his work accident on May 4, 2010.

In the prior 19(b) Decision, Arbitrator Prieto found that there was a causal relationship between Petitioner's work accident of May 4, 2010 and Petitioner's lateral meniscus tear of his left knee. This Decision was subsequently affirmed by the Commission on November 21, 2011. The Commission decision was not appealed by either party and became final after the expiration of the time for filing a written summons to the Circuit Court. The law of the case doctrine applies to matters before the Workers' Compensation Commission where a court's unreversed decision on an issue that has been litigated and decided settles the question for all subsequent stages of the action. *Help at Home v. Ill. Workers' Comp. Comm'n*, 305 Ill.App.3d 1150, 1151 (4th Dist. 2010). Here, a Decision was filed on March 7, 2011, appealed and subsequently affirmed by the Commission on November 21, 2011. Therefore, based on the law of the case doctrine, Petitioner's lateral meniscus tear of his left knee is deemed causally related to the accident of May 4, 2010.

January 26, 2011 accident – 11WC17266

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that Petitioner did prove by a preponderance of the evidence that his current condition of ill-being is causally connected to his work accident on January 26, 2011.

In the prior 19(b) Decision, Arbitrator Kelmanson found that there was a causal relationship between Petitioner's work accident of January 26, 2011 and the additional lateral meniscus tear of his left knee. This Decision was subsequently affirmed and modified by the Commission on September 24, 2012. The Commission decision was not appealed by either party and became final after the expiration of the time for

filing a written summons to the Circuit Court. The law of the case doctrine applies to matters before the Workers' Compensation Commission where a court's unreversed decision on an issue that has been litigated and decided settles the question for all subsequent stages of the action. *Help at Home v. Ill. Workers' Comp. Comm'n*, 305 Ill.App.3d 1150, 1151 (4th Dist. 2010). Here, a Decision was filed on January 3, 2012, appealed and subsequently affirmed/modified by the Commission on September 24, 2012. Therefore, based on the law of the case doctrine, Petitioner's additional meniscus tear of his left knee is deemed causally related to the accident of January 26, 2011.

The Arbitrator also finds that Petitioner did prove by a preponderance of the evidence that there is a causal relationship between the work accident of January 26, 2011 and Petitioner's subsequent total knee replacement on June 1, 2015. Dr. Cole, Respondent's IME examiner, agreed with Dr. Bowen that the total knee replacement was necessary. In addition, Dr. Cole stated in his report that all of the treatment to date was reasonable, necessary and related to Petitioner's January 26, 2011 injury. (PX25) Therefore, the Arbitrator finds that the Petitioner's total knee replacement is causally related to his work injury on January 26, 2011.

June 27, 2014 accident – 14WC24735

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that Petitioner did prove by a preponderance of the evidence that his current condition of ill-being is causally connected to his work accident on June 27, 2014. The Petitioner testified, the parties stipulated, that on June 27, 2014 Petitioner sustained a compensable injury while working for the Respondent. On the date of the accident Petitioner was lifting drywall and felt a twinge in his stomach area. (PX1) Petitioner testified that he reported the accident to the Respondent the same day, June 27, 2014. Petitioner sought medical attention the same day at the Respondent's occupational clinic, Mercy Works, with Dr. Diadula. (PX1) Dr. Diadula diagnosed Petitioner with an umbilical hernia and ordered him off work due to a "work-related condition". (PX1) On July 24, 2014, Dr. Fiorucci performed an umbilical hernia repair with mesh. (PX6) Petitioner was discharged from the hospital with the restriction of no lifting over 15lbs. There was no evidence produced suggesting any other causes or prior injuries or treatment related to a hernia. Therefore, the Arbitrator finds that Petitioner's condition of ill-being is causally related to his work injury of June 27, 2014.

December 15, 2014 accident – 15WC1963

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that Petitioner did prove by a preponderance of the evidence that his current condition of ill-being is causally connected to his work accident on December 15, 2014. The Petitioner testified, the parties stipulated, that on December 15, 2014 Petitioner sustained a compensable injury while working for the Respondent. On the date of the accident Petitioner was hanging drywall overhead, and began to experience pain in his right shoulder. Petitioner reported the incident to the Respondent the next morning, December 16, 2014. On December 16, 2014, Petitioner sought treatment at Mercyworks with Dr. Diadula. Dr. Diadula diagnosed the Petitioner with a right shoulder strain/sprain, right cervical sprain and right shoulder rule out labrum tear. (PX1) On December 22, 2014, Petitioner returned to Mercy Works with complaints of pain. (PX1) Physical therapy and medication was prescribed and Petitioner was instructed to remain off work. (PX1). On January 19, 2015, Petitioner saw Dr. Mark Bowen (hereinafter "Dr. Bowen") of Northshore Orthopedics, who found no significant atrophy, asymmetry or swelling. (PX10) Dr. Bowen noted, after review of his MRI, that there was some strain pattern in the muscle, probable slight tendinopathy but no evidence of a full-thickness tear. Dr. Bowen's final impression was that there was a rotator cuff strain and recommended he undergo a course of physical therapy. (PX10) On January 6, 2016, Petitioner returned to Dr. Bowen, who authorized Petitioner to return to work with

no restrictions concerning his right shoulder effective January 7, 2016. There was no evidence produced suggesting any other causes, prior shoulder injuries or treatment related to Petitioner's right shoulder. Therefore, the Arbitrator finds that Petitioner's condition of ill-being is causally related to his work injury of December 15, 2014.

With respect to issue (J), whether the Respondent paid for all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

May 4, 2010 accident – 10WC25879

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that the medical services provided to the Petitioner were reasonable and necessary to cure his condition of ill-being causally connected to his accident on May 4, 2010. Petitioner submitted into evidence a medical bill from Radiological Physicians in the amount of $46.00 (PX12), for x-rays prescribed by Respondent's occupational clinic MercyWorks on May 11, 2010. Corresponding medical records received into evidence confirm that Petitioner was evaluated at MercyWorks on May 11, 2010 and x-rays were performed. (PX1). This bill was not paid by Respondent and was sent to collections. (PX12). The Arbitrator finds that the aforementioned service was reasonably required to diagnose, treat, cure and relieve Petitioner from the effects of the injury. Additionally, the Arbitrator finds that the service was causally related to Petitioner's work injury. Therefore, the Arbitrator awards the remaining unpaid balance of $46.00 pursuant to the fee schedule.

January 26, 2011 accident – 11WC17266

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that the medical services provided to the Petitioner were reasonable and necessary to cure his condition of ill-being causally connected to his accident on January 26, 2011. Petitioner submitted into evidence a medical bill in the amount of $65,303.09 from Northshore Health for services related to Petitioner's left knee replacement on June 1, 2015. (P.X18) A review of those charges reveal Respondent paid this bill in full on January 10, 2017. (PX18) Additionally, Petitioner submitted into evidence out-of-pocket expenses regarding prescriptions and parking expenses totaling $282.01. (PX23) The Arbitrator finds that the aforementioned expenses were reasonably required to treat, cure and relieve Petitioner from the effects of the injury. Additionally, the Arbitrator finds that the service was causally related to Petitioner's work injury. Therefore, having determined that the Petitioner's condition of ill being is relative to his work injury, the Arbitrator awards and orders Respondent to reimburse the Petitioner for the out-of-pocket expenses in the amount of $282.01.

June 27, 2014 accident – 14WC24735

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that the medical services provided to the Petitioner were reasonable and necessary to cure his condition of ill-being causally connected to his accident on June 27, 2014. Petitioner submitted into evidence a medical bill in the amount of $11, 685.69 from Little Company for services related to Petitioner's hospitalization on July 26-28, 2014 due to complications from the original July 24, 2014 umbilical hernia surgery. Respondent furnished payment for these services on November 9, 2015. (PX14) Petitioner submitted into evidence a bill from Dr. Kacey in the amount of $327.00 for an office consultation regarding the performance of his umbilical hernia surgery. (PX13) The Arbitrator finds that the aforementioned expense was

reasonably required to treat, cure and relieve Petitioner from the effects of the injury. Additionally, the Arbitrator finds that the service was causally related to Petitioner's work injury. The Arbitrator finds the Respondent responsible for this bill.

Petitioner submitted into evidence charges from Evergreen Emergency Services in the amount of $540.00 for emergency room services on July 26, 2014 when the Petitioner returned post-surgery for complications. (PX15) Additionally, Petitioner had a CT scan performed on him when he returned to the Emergency Room on July 26, 2014 in order to diagnose his complaints of abdominal pain. Petitioner submitted into evidence a bill in the amount of $686.00 for the CT scan performed on July 26, 2014 during his hospitalization. (PX16) The Arbitrator finds that the aforementioned expenses were reasonably required to treat, cure and relieve Petitioner from the effects of the injury. Additionally, the Arbitrator finds that the services were causally related to Petitioner's work injury. The Arbitrator finds the Respondent responsible for the aforementioned bills pursuant to the fee schedule.

December 15, 2014 accident – 15WC1963

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that the medical services provided to the Petitioner were reasonable and necessary to cure his condition of ill-being causally connected to his accident on December 15, 2014. Petitioner submitted into evidence a medical bill in the amount of $57,802.00 from Athletico for physical therapy services prescribed by Petitioner's treating physician, Dr. Mark Bowen, related to Petitioner's right shoulder injury. (PX17) A review of those charges reveals that while Respondent has made payments towards this bill, there remains an outstanding balance of $8,995.32. (PX17) Based on the above findings, the Arbitrator finds Respondent is responsible for remaining balance of this bill. Additionally, Petitioner submitted into evidence a bill from Advanced Medical Imaging Center, for an MRI prescribed by Dr. Bowen in the amount of $1,468.00. (PX19) Based on the above findings, the Arbitrator finds the Respondent responsible for the aforementioned bills pursuant to the fee schedule.

With respect to issue (L), what is the Nature and Extent of the injury, the Arbitrator finds as follows:

May 4, 2010 accident – 10WC25879

The Arbitrator finds that since the Petitioner re-injured his left knee after resuming full duty work in January of 2011 and filed a subsequent, consolidated claim 11 WC 17266, the Arbitrator has merged the awards and will address permanency for both claims on the later filing.

January 26, 2011 accident – 11WC17266

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Petitioner made the argument that he should receive a wage differential award under §8(d)1 of the Act because he sustained an impairment of his earning capacity due to the injury that occurred on January 26, 2011 (11WC17266). Specifically, evidence and testimony were introduced at trial regarding Petitioner's current post-injury employment in comparison to his potential wages if the Petitioner were to work in a competitive job market. In this case, Petitioner testified, in February 2016, he returned to work as a Carpenter for the Department of Fleet and Facility management despite his permanent restrictions of no kneeling or squatting.

Petitioner testified that he has worked continuously in this capacity since February of 2016. Additionally, Petitioner testified that he currently earns $46.35 per hour, which is the same wage as the other Carpenters he works with and is a pay increase from the wage he earned prior to his January 26, 2011 accident. Therefore, the Arbitrator finds that the evidence does not support a wage differential award under §8(d)1 of the Act.

The Petitioner testified, and the parties stipulated, that on May 4, 2010, he had been employed by Respondent as a carpenter in the Department of Fleet and Facility Management since 1999. Petitioner testified that on May 4, 2010 he was on duty and sustained an accidental injury to his left knee when he stepped in a hole while carrying a ladder. Additionally, the Petitioner testified that on January 26, 2011, he was on duty when he was entering an elevator with tools in his hands. Petitioner testified that the elevator floor was raised approximately 6 to 8 inches above the lobby floor. As Petitioner attempted to enter the elevator, he tripped and fell into the elevator. Petitioner's fall resulted in him re-injuring his left knee. The Arbitrator finds that since the Petitioner re-injured his left knee and filed a subsequent, consolidated claim 11 WC 17266, the Arbitrator has merged the awards and will address permanency for both claims below. The Arbitrator finds that the Petitioner reached MMI for his May 4, 2010 accident on January 10, 2011 and MMI for his January 26, 2011 accident on December 1, 2015. Therefore, his claim for any permanent partial disability is ripe for adjudication for both claims.

For injuries that occur before September 1, 2011, the Commission evaluates the physical impairment and the effect of the disability on the injured employee's life. Factors that may be considered include the individual's age, skill, occupation, training, inability to engage in certain kinds of activities, pain, stiffness or limitation of motion.

With regard to the Petitioner's age, he was 55 years old at the time of his work-related injury on May 4, 2010 and 56 years old at the time of his January 10, 2011 accident. On the date of hearing the Petitioner testified to being 63 years old. The Petitioner testified that he was returned to work full duty without restrictions after his May 4, 2010 accident. However, after his January 10, 2011 accident he returned to work with permanent restrictions of no kneeling or squatting with Respondent. The Petitioner testified that he is still working in his occupation as a Carpenter but explained that he is only given assignments that do not require kneeling or squatting. Nevertheless, he still has difficulty and pain in the left leg and still takes prescription medication for pain. Petitioner's advanced age also suggests a shorter life expectancy and that the symptoms will likely slow the Petitioner down in comparison to younger, healthier workers not experiencing the same symptoms. Therefore, the Arbitrator gives some weight to this factor.

With regard to the Petitioner's skill, occupation, and training, the Arbitrator notes that the Petitioner testified that he has been a Carpenter with the Respondent since 1999. Petitioner testified that he was able to return to work to the same position, with the same title, and same pay. Petitioner has continued working for the Respondent in the same position he held prior to his May 4, 2010 and January 10, 2011 accidents. However, after returning from his January 10, 2011 accident Petitioner was returned to work with permanent restrictions of no kneeling or squatting. Mr. Edmund Sexton testified that Petitioner would not be able to be placed for work as a carpenter in a competitive labor marker given his restrictions. Mr. Sexton testified, if one cannot kneel or squat, he cannot perform the duties of a carpenter and would not be able to find a job as a carpenter. Respondent's representative, Mr. Elgin Swanigan, also testified that Petitioner could not perform the full functions of a carpenter. On June 20, 2017, Mr. Steven Blumenthal, the vocational rehabilitation counselor who evaluated Petitioner, issued a report stating that "but for his accommodated duty by the City of Chicago, Mr. Haepp would not otherwise be qualified to perform work as a journeyman carpenter." (PX20) Therefore, the Arbitrator gives significant weight to this factor.

With regard to the Petitioner's inability to engage in certain kinds of activities, pain, stiffness or limitation of motion the Petitioner testified that today he still has the permanent restrictions of no kneeling or squatting while at work. Petitioner testified that his left knee still feels numb in the front, in some positions if he moves it a certain way it gets stuck in place and he has to help move his knee. Accordingly, the Arbitrator gives significant weight to this factor in determining the Petitioner's permanent partial disability.

Due to the evidence and testimony supporting the seriousness, permanency and injuries that partially incapacitate him from pursuing the duties of his usual and customary line of employment but have not resulted in impairment in his earning capacity the Arbitrator is awarding compensation under §8(d)2 (person as a whole) of the Act. In a May of 2015 settlement for claims 00 WC 64646 and 00 WC 64647 the Petitioner was awarded 22.5% of his left leg, the same body part at issue in Petitioner's 10WC25879 and 11WC17266 cases. (R.X1) Due to the Arbitrator awarding the Petitioner compensation under §8(d)2 of the Act, credit for the Respondent from Petitioner's 2000 settlement is not relevant here.

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 20 % loss of use of a man-as-a-whole pursuant to §8(d)2 of the Act.

June 27, 2014 accident – 14WC24735

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Petitioner testified, and the parties stipulated, that while working for the Respondent on June 27, 2014 he sustained an injury that resulted in an umbilical hernia. (PX1) On August 25, 2014 Petitioner returned back to work full duty with no restrictions concerning his umbilical hernia. The Arbitrator finds that on August 25, 2014 the Petitioner reached MMI and therefore the claim for any permanent partial disability is ripe for adjudication.

For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the Section 8.1b of the Illinois Workers' Compensation Act. Here, the accident occurred on June 27, 2014 making section 8.1b applicable. With regard to subsection (i) of §8.1b(b), the Arbitrator notes that there was not a permanent partial disability impairment report and/or opinion submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b, the occupation of the employee, the Arbitrator notes that that record reveals that the Petitioner was employed as a Carpenter for the Department of Fleet and Facility Management for the Respondent. Petitioner was able to return to work, full duty without restrictions, in his prior capacity on August 26, 2014. Petitioner testified that he still experiences "twinges now and then" but he mainly just tries not to pick up heavy stuff. He testified that he still experiences some discomfort but it is better that it was. The Arbitrator concludes that the Petitioner's ability to perform work will be adversely affected by his injury if he is required to lift heavy objects in the performance of his duties. The Arbitrator therefore gives some weight to this factor.

With regard to subsection (iii) of §8.1b, the Arbitrator notes that Petitioner was 59 years old at the time of the accident. The Petitioner's permanent partial disability with regard to his injury will be something that

could potentially slow the Petitioner down in comparison to younger, healthier workers not experiencing the same symptoms. Therefore, the Arbitrator gives some weight to this factor.

With respect to subsection (iv) of §8.1b, Petitioner's future earning capacity appears to be undiminished as a result of his injuries because he was returned back to work, full-time, in his prior position with his compensation unaffected. At hearing, Petitioner testified that he currently earns $46.35 per hour, which is the current union rate for all Carpenters employed by Respondent. The Arbitrator concludes that there was no evidence suggesting the injury has had any effect on Petitioner's future earning capacity and therefore gives little weight to this factor.

With respect to subsection (v) of §8.1b, evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner's injury is clearly delineated with medical records submitted into evidence and further corroborated by his testimony on March 26, 2018. The Petitioner testified that today he still feels twinges now and then, he tries not to pick up heavy items, and still experiences discomfort with the mesh but that its better than the discomfort he had. Petitioners' original complaints and symptoms regarding his hernia at trial coincide with his complaints to the physicians he was seen by. The Arbitrator concludes that the evidence demonstrates that the Petitioner sustained permanent partial disability regarding the complaints of pain and places some weight on the foregoing 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 of loss use of a person as a whole as a result of his work-related accident.

December 15, 2014 accident – 15WC1963

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Petitioner testified, and the parties stipulated, that while working for the Respondent on December 15, 2014 he sustained an injury that resulted in a rotator cuff strain to Petitioner's right shoulder with a course of physical therapy. (PX10) On January 6, 2016, Dr. Bowen, authorized Petitioner to return to work without restrictions concerning his right shoulder. The Arbitrator finds that on January 6, 2016 the Petitioner reached MMI and therefore the claim for any permanent partial disability is ripe for adjudication. (PX28)

For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the Section 8.1b of the Illinois Workers' Compensation Act. Here, the accident occurred on December 15, 2014 making section 8.1b applicable. With regard to subsection (i) of §8.1b(b), the Arbitrator notes that there was not a permanent partial disability impairment report and/or opinion submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b, the occupation of the employee, the Arbitrator notes that that record reveals that the Petitioner was employed as a Carpenter for the Department of Fleet and Facility Management for the Respondent. Petitioner was able to return to work, full duty without restrictions, in his prior capacity on January 6, 2016. Petitioner testified that he still experiences pain, soreness and limited range of motion in his shoulder. He has noticed that overhead work is harder because he has problems keeping his arms in the air as long. However, he testified that he can still do the overhead work. He testified that he has to take a

break to let the pain "die down". The Petitioner's shoulder injury may make performing overhead work harder in the future. The Arbitrator concludes that the Petitioner's ability to perform work will be adversely affected by his injury if he is required to use his right shoulder in the performance of his duties. The Arbitrator therefore gives some weight to this factor.

With regard to subsection (iii) of §8.1b, the Arbitrator notes that Petitioner was 60 years old at the time of the accident. The Petitioner's permanent partial disability with regard to his left shoulder will be something that could potentially slow the Petitioner down in comparison to younger, healthier workers not experiencing the same symptoms. Therefore, the Arbitrator gives some weight to this factor.

With respect to subsection (iv) of §8.1b, Petitioner's future earning capacity appears to be undiminished as a result of his shoulder injury because he was returned back to work, full-time, in his prior position with his compensation unaffected. At hearing, Petitioner testified that he currently earns $46.35 per hour, which is the current union rate for all Carpenters employed by Respondent and is a higher wage than Petitioner earned at the time of his accident. The Arbitrator concludes that there was no evidence suggesting the injury has had any effect on Petitioner's future earning capacity and therefore gives little weight to this factor.

With respect to subsection (v) of §8.1b, evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner's injury to his right shoulder is clearly delineated with medical records submitted into evidence and further corroborated by his testimony on March 26, 2018. The Petitioner testified at trial that today getting out of cars is difficult, overhead work is harder, at times he has to pick his arm up and move it, and he still experiences numbness. Petitioner testified that he takes Tramidol to "take edge of the pain away." Petitioners' original complaints and symptoms regarding his left shoulder at trial coincide with his complaints to the physicians he was seen by. The Arbitrator concludes that the evidence demonstrates that the Petitioner sustained permanent partial disability regarding the complaints of pain and places significant weight on the foregoing 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 7.5 % loss of loss use of a person as a whole as a result of his work-related accident.

With respect to issue (M), whether the Petitioner is entitled to penalties/attorney's fees under §19(k), §19(l) and §16, the Arbitrator finds as follows:

May 4, 2010 accident – 10WC25879

The Petitioner submitted into evidence a medical bill from Radiological Physicians in the amount of $46.00 (PX12), for x-rays prescribed by Respondent's occupational clinic Mercy Works on May 11, 2010. Corresponding medical records received into evidence confirm that Petitioner was evaluated at Mercy Works on May 11, 2010 and x-rays were performed. (PX1) This bill was not paid by Respondent and was sent to collections. (PX12) The Arbitrator awards the remaining unpaid balance of $46.00 pursuant to the fee schedule. However, after review of the totality of the evidence, the Arbitrator finds no penalties or fees shall be imposed.

January 26, 2011 accident – 11WC17266

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. Section 19(l) of the Act states that "(i)f the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30.00 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000.00. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay.

On November 20, 2014, Respondent had an IME completed on Petitioner with Dr. Brian Cole at Midwest Orthopedics. During this visit Dr. Cole noted that Petitioner saw Dr. Mark Bowen 2 months prior, for a second opinion, and was told he needed a total knee replacement. (PX25) After examination, Dr. Cole concurred that Petitioner needed to undergo total knee replacement for his left knee. Dr. Cole stated that this would be "his only means of definitive management to garner relief of his left knee pain." (P.X25) Additionally he opined that "treatment to date has been reasonable, necessary, and related to the injury date in question." (PX25) Petitioner submitted into evidence a medical bill in the amount of $65,303.09 from Northshore Health for services related to Petitioner's left knee replacement on June 1, 2015. (PX18) A review of those charges reveal Respondent did not pay this bill until January 10, 2017, over a year and a half from the date of service. (PX18)

The Respondent failed to present any evidence to justify its failure to pay the outstanding medical bill for treatment prescribed by its own occupational physician. (PX25) Respondent has an affirmative burden to rebut the presumption that a delay of 14 days is unreasonable. Respondent failed to present any evidence to rebut that presumption. The Arbitrator finds the failure to provide benefits under the Act to be unreasonable and orders penalties pursuant to Section 19(l) of the Act in the maximum amount of $10,000.00.

June 27, 2014 accident – 14WC24735

The Petitioner submitted into evidence a medical bill in the amount of $11, 685.69 from Little Company for services related to Petitioner's hospitalization on July 26-28, 2014 due to complications from the original July 24, 2014 umbilical hernia surgery. Respondent furnished payment for these services on November 9, 2015. (PX14) After review of the totality of the evidence, the Arbitrator finds that no penalties or fees shall be imposed.

December 15, 2014 accident – 15WC1963

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. Section 19(l) of the Act states that "(i)f the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30.00 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000.00. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay.

The Petitioner submitted into evidence a medical bill in the amount of $57,802.00 from Athletico Physical Therapy for physical therapy services prescribed by Petitioner's treating physician, Dr. Mark Bowen, related to Petitioner's right shoulder injury. (PX17) The first PT encounter was on January 20, 2015 and the last on November 23, 2015. (PX17) A review of those charges reveals that while Respondent has made payments towards this bill, there remains an outstanding balance of $8,995.32. (PX17) Additionally, Petitioner submitted into evidence a bill from Advanced Medical Imaging Center, for an MRI prescribed by Dr. Bowen and completed on December 16, 2015 in the amount of $1,468.00. (PX19)

The Respondent failed to present any evidence to justify its failure to pay the outstanding medical bills. Respondent has an affirmative burden to rebut the presumption that a delay of 14 days is unreasonable. Respondent failed to present any evidence to rebut that presumption. Therefore, the Arbitrator finds the failure to provide benefits under the Act to be vexatious and unreasonable and orders penalties pursuant to Section 19(k) of the Act in the amount of $5,231.66 (50% of outstanding medical of $10,463.32 ($8,995.32 + $1468.00 = $10,463.32). Pursuant to Section 19(l), the Arbitrator further awards penalties in the amount of $10,000.00. Finally, the Arbitrator awards attorneys' fees pursuant to Section 16 of the Act in the amount of $2,092.66.

With respect to issue (N), whether the Respondent is due any credit pursuant to §8j of the Act, the Arbitrator finds as follows:

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Respondent claims that it is entitled to a credit pursuant to 820 ILCS 305/8(j). §8(j) states Respondent is entitled to a credit "in the event the injured employee receives benefits, including medical, surgical or hospital benefits under any group plan covering non-occupational disabilities contributed to wholly or partially by the employer, which benefits should not have been payable if any rights of recovery existed under the Act." However, an employer has the burden to establish its entitlement to a §8(j) credit. *Elgin Board of Education School District U-46 v. Illinois Workers' Compensation Commission*, 949 N.E.2d 198, 350 Ill.Dec. 710 (1st Dist. 2011). During the trial, Respondent failed to present any evidence that it contributed wholly or partially to a group plan or that payments would have been payable irrespective of an accidental injury under the Act. At the end of trial, during the admission of evidence, the Respondent attempted to present into evidence a printout of an itemization of benefits and payments made by the City of Chicago Medical Care Plan dating from July 2, 2013 until May 21, 2016. (RX3). However, the Petitioner objected to its admission based on the fact that there was no testimony laying foundation for this exhibit to address Petitioner's objections. The Arbitrator reserved her ruling and at this time is sustaining the Petitioner's objection and not receiving the Respondent's exhibit into evidence. Therefore, the Arbitrator finds that Respondent has not met its burden of proof establishing entitlement to a §8(j) credit for benefits extended by Petitioner's health plan.

With respect to the objections by Petitioner regarding Respondent's Exhibits #3, #5, and #6, the Arbitrator finds as follows:

Respondent Exhibit #3: Itemization of benefits paid by the city of Chicago Medical Care Plan

At the end of the trial, during the admission of evidence, the Respondent attempted to enter into evidence Respondent's Exhibit #3 -a printout of an itemization of benefits and payments made by the City of Chicago Medical Care Plan dating from July 2, 2013 until May 21, 2016. (RX3) The Petitioner objected to the admission of the itemization of benefits because no foundation was provided for this exhibit to address Petitioner's objections. The Arbitrator sustains the Petitioner's objection based upon a lack of foundation being provided

for the exhibit and it is not received into evidence. The Arbitrator gives no consideration to Respondent's exhibit 3.

Respondent Exhibit #5: Work Order Assignments Report (Form 2FM)

At the end of the trial, during the admission of evidence, the Respondent attempted to enter into evidence exhibit #5- 2 FM Work Order Assignments Report for the Petitioner. The report was introduced during the direct examination of Respondent's witness, Mr. Swanigan. Mr. Swanigan testified that the report was a print out of Petitioner's work order assignments that Petitioner has been assigned and completed from the beginning of 2018 through the date of hearing. (RX5)

The Petitioner objected to the admission of exhibit #5 based upon its relevance and the doctrine of completeness for it only being a "snapshot" of Petitioner's work and not reflecting all of the work that he does. The Arbitrator overrules the Petitioner's objection based upon relevance. However, the Arbitrator sustains the Petitioner's objection based upon the doctrine of completeness. Therefore, exhibit #5 – the work order assignment will not be received into evidence. The Arbitrator gives no consideration to Respondent's exhibit 5.

Respondent Exhibit #6: Petitioner's Performance Evaluation issues on June 30, 2017

At the end of the trial, during the admission of evidence, the Respondent attempted to enter into evidence Exhibit #6 a performance evaluation completed on the Petitioner. The evaluation was introduced during the direct examination of Respondent's witness, Mr. Swanigan. Mr. Swanigan testified that Petitioner's Performance Evaluation Form was issued on June 30, 2017 and had been completed by Petitioner's immediate supervisor, Mr. Gin. Additionally, Mr. Swanigan testified that the evaluation covered Petitioner's work for the one year period from July 2016 through July 2017. (RX6)

The Petitioner objected to the admission of the Petitioner's performance evaluation/ Respondent's exhibit #6 based upon the doctrine of completeness. The Petitioner pointed out through testimony from Mr. Swanigan, there was a Part I and Part II of the document that was not offered to be admitted into evidence with Exhibit #6. The Arbitrator sustains the Petitioner's objection based upon the doctrine of completeness and the performance evaluation will not be received into evidence. The Arbitrator gives no consideration to Respondent's exhibit 6.

Tiffany Kay

Signature of Arbitrator

8/7/18

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	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DONALD E. HAEPP, III

Petitioner,

vs.

NO: 14 WC 24735
(Consolidated with: 10 WC 25879, 11 WC 17266, and 15 WC 1963)

CITY OF CHICAGO,

Respondent.

19IWCC0505

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 permanent partial disability (PPD) benefits and penalties and attorney's fees, and being advised of the facts and law, affirms and adopts the Arbitrator's Decision, which is attached hereto and made a part hereof. Separate Decisions have been issued for case numbers 10 WC 25879, 11 WC 17266, and 15 WC 1963.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed August 7, 2018, 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 other 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 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.

19IWCC0505

14 WC 24735
Page 2

DATED: SEP 16 2019

DDM/pm
O: 7-17-19
052

D. Douglas McCarthy

Stephen Mathis

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HAEPP III, DONALD E
Employee/Petitioner

Case# **14WC024735**

10WC025879
11WC017266
15WC001963

CITY OF CHICAGO
Employer/Respondent

19IWCC0505

On 8/7/2018, 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 2.18% 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:

0391 HEALY SCANLON
KEVIN T VEUGELER
111 W WASHINGTON ST STE 1425
CHICAGO, IL 60602

0010 CITY OF CHICAGO
D TAYLOR CHITTICK
30 N LASALLE ST 8TH FLR
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

Donald E. Haepp, III
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **14** WC **24735**

Consolidated cases: **10 WC 25879, 11 WC 17266, 15 WC 1963**

19IWCC0505

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Tiffany Kay** , Arbitrator of the Commission, in the city of **Chicago**, on **March 26, 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. [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. [x] Should penalties or fees be imposed upon Respondent?
N. [x] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **6/27/14**, 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 $**88,356.12**; the average weekly wage was $**1,699.16**.

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

Respondent shall be given a credit of $**9,548.14** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**9,548.14**.

ORDER

Medical benefits
Respondent shall pay reasonable and necessary medical services of **$1,553.00**, pursuant to the medical fee schedule as provided in Section 8(a) and 8.2 of the Act.

Nature and Extent
Respondent shall pay Petitioner permanent partial disability benefits of **$721.66**/week for **15** weeks because the injuries sustained caused the **3%** loss use of a man as a whole as provided in Section 8(d)2 of the Act.

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

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

Tiffany Kay

Signature of Arbitrator

8/7/18
Date

AUG 7 - 2018

PROCEDURAL HISTORY

This matter was originally scheduled to be heard before Arbitrator Douglas Steffenson (hereinafter "Arbitrator Steffenson") on March 26, 2018 in Chicago, Illinois. However, Arbitrator Tiffany Kay (hereinafter "Arbitrator Kay") covered Arbitrator Steffenson's trial call on March 26, 2018. Therefore, by agreement of both parties, this matter was tried before Arbitrator Kay and the decision rendered by Arbitrator Kay. Arbitrator Kay has examined the submitted records.

This case has been consolidated with the following cases: #10WC25879, 11WC17266 and 15WC1963.

SUMMARY OF FACTS AND EVIDENCE

May 4, 2010 accident – 10WC25879

The parties proceeded to hearing on March 26, 2018, with disputed issues as to whether the current condition of ill-being is causally connected to Mr. Donald Haepp's (hereinafter "Petitioner") injury, whether the City of Chicago (hereinafter "Respondent") is liable for unpaid medical bills, whether the Respondent is entitled to credit in accordance to §8(j) of the Act, the nature and extent of the injuries that occurred, whether the Petitioner is entitled to penalties under §19(k), §19(l) and attorney fees pursuant to §16, and whether the Petitioner is entitled to a wage differential. (ArbX1)

The parties stipulated that Respondent was operating under the Act on May 4, 2010. (Arb. X1) The parties stipulated that the date of the accident was May 4, 2010 and that the Petitioner and Respondent had a relationship of employer and employee, and that the accident arose out of during the course of employment. (ArbX1) The parties also stipulated that the Petitioner worked for the Respondent as a Carpenter, notice of the accident was given within the time limits stated in the Act, Petitioner was 55 years of age on the date of the accident, and married with 0 dependent children. (Arb.X1) The stipulated average weekly wage, calculated pursuant to Section 10 of the Act, was $1620.40. (Arb.X1)

The Petitioner testified that on May 4, 2010, he had been employed by Respondent as a carpenter in the Department of Fleet and Facility Management since 1999. Petitioner testified that on May 4, 2010 he was on duty and sustained an accidental injury to his left knee when he stepped in a hole while carrying a ladder. The Petitioner was directed to the Respondent's occupational clinic, Mercy Works. A May 27, 2010 MRI revealed a tear of the posterior horn of the lateral meniscus. Petitioner was referred to see Dr. Michael Maday at Midland Orthopedics by the Respondent and underwent left knee arthroscopic surgery on September 20, 2010. (PX2) The surgery revealed that the Petitioner had a flap tear in the posterior horn of the lateral meniscus. After the surgery the Petitioner underwent a regimen of post-operative physical therapy and continued to follow-up with Dr. Maday. (P.X2) On January 10, 2011 Petitioner returned to work full duty per Dr. Maday's release.

January 26, 2011 accident – 11WC17266

The parties proceeded to hearing on March 26, 2018, with disputed issues as to whether the current condition of ill-being is causally connected to Mr. Donald Haepp's (hereinafter "Petitioner") injury, whether the City of Chicago (hereinafter "Respondent") is liable for unpaid medical bills, whether the Respondent is entitled to credit in accordance to §8(j) of the Act, the nature and extent of the injury that occurred, whether the Petitioner is entitled to penalties under §19(k), §19(l) and attorney fees pursuant to §16, and whether the Petitioner is entitled to a wage differential. (ArbX2)

The parties stipulated that Respondent was operating under the Act on January 26, 2011. (Arb. X2) The parties stipulated that the date of the accident was January 26, 2011 and that the Petitioner and Respondent had a relationship of employer and employee, and that the accident arose out of and during the course of employment. (ArbX2) The parties also stipulated that the Petitioner worked for the Respondent as a Carpenter, notice of the accident was given within the time limits stated in the Act, Petitioner was 56 years of age on the date of the accident, and married with 0 dependent children. (Arb.X2) The stipulated average weekly wage, calculated pursuant to Section 10 of the Act, was $1630.80. (Arb.X2)

On January 26, 2011, Petitioner was on duty when he was entering an elevator with tools in his hands. Petitioner testified that the elevator floor was raised approximately 6 to 8 inches above the lobby floor. As Petitioner attempted to enter the elevator, he tripped and fell into the elevator. Petitioner's fall resulted in him re-injuring his left knee. On February 9, 2011, following this incident, Petitioner returned to see Dr. Michael Maday, at Midland Orthopedics for treatment. (P.X2) At this visit Petitioner reported doing well until he reinjured his knee. (P.X2) Prior to the re-injury he reported doing well and had returned to work. Dr. Maday diagnosed the Petitioner with "a new injury, not related to his previous injury and he would need him to report this as such." (P.X2) However, he instructed the Petitioner to continue his full unrestricted activities. On February 23, 2011, Petitioner returned to see Dr. Maday and reported increased pain in the iliotibial band area. Dr. Maday assessed him with iliotibial band pain following his injury. At Petitioner's request, he received a left knee injection of Depomedrol and lidocaine to relieve his symptoms. On March 19, 2011, Petitioner underwent an MRI at MRI of River North. On April 6, 2011, Dr. Maday reviewed the MRI and assessed a moderate size radial free edge tear of the lateral meniscus that appeared to be a new tear in an area where there was previously not a tear. Dr. Maday opined that it appeared to be a new injury related to his injury with the elevator. Dr. Maday recommended the Petitioner have surgery to address the meniscal pathology. The Petitioner continued to work full duty while awaiting Worker's Compensation approval. (P.X2)

On September 8, 2011, Dr. Maday performed a left knee arthroscopy on Petitioner. (P.X2) The surgery also consisted of chondroplasty, patellofemoral joint and medial femoral condyle with partial lateral meniscectomy, removal of loose bodies, extensive debridement and injection of the iliotibial band performed by Dr. Maday (P.X2). After surgery, the Petitioner remained off work and began a new course of physical therapy. On November 23, 2011, Petitioner returned to see Dr. Maday. Petitioner reported still having difficulty with stairs, squatting and kneeling. Dr. Maday planned on allowing the Petitioner to return to work full duty as of December 1, 2011. (P.X2) Therapy notes confirm that Petitioner was instructed to avoid kneeling activities and excessive squatting. (PX4). On December 5, 2011, Petitioner was also evaluated at Advocate Occupational Clinic at the request of Respondent. (PX3). Respondent's physicians released Petitioner back to work with restrictions of no kneeling along with the medications Vicodin and Tramadol. (PX3).

Petitioner testified that Respondent accommodated his restrictions. However, he continued to experience difficulty with his left knee. On January 25, 2012, Petitioner returned to Dr. Maday complaining of continued pain in his left knee. (PX2). Dr. Maday recommended a repeat MRI. (PX2) A February 7, 2012 MRI revealed joint effusion of the left knee. (PX2) After reviewing the results of the MRI, Dr. Maday referred Petitioner to Dr. Robert Strugala for platelet rich plasma injections. (PX2) The first injection was completed on March 8, 2012, and a second injection was prescribed on April 12, 2012. (PX2) At that April 12, 2012 visit, Dr. Strugala noted residual symptoms in the left knee, recommended a home exercise program, and requested authorization for an additional injection. (PX2) No additional authorization for further treatment was provided by Respondent.

On July 14, 2014, following a period of full duty work, Petitioner sought treatment for ongoing left knee symptoms with Dr. Mark Bowen of North Shore Orthopaedic Institute (PX28). Dr. Bowen noted that Petitioner has had three different surgeries in 2004, 2011 and 2012. (P.X10) He noted that Petitioner has restrictions in terms of squatting and twisting. Petitioner complained of only being able to walk one flight of stairs and then having to rest due to pain. (PX10) Dr. Bowen's physical exam revealed slight valgus alignment, palpable osteophytes and crepitation. Additionally, Dr. Bowen noted advanced lateral compartment degenerative arthritis and patellofemoral degenerative joint disease and referred Petitioner to Dr. Raju Ghate for consideration of a total knee replacement. (PX10)

On November 20, 2014, Petitioner attended an Independent Medical Examination (IME) with Dr. Brian Cole at Midwest Orthopedics. (PX25) Dr. Cole noted that Petitioner stated he had a work-related injury in 2003 and had a left knee arthroscopy. He noted that Petitioner told him he made a full recovery from that with no sequalae. Since the 2011 injury, Petitioner stated he had two arthroscopic surgeries to his left knee with Dr. Maday, "first 2011 (he says he was worse and did not recover well), and a second in 2012, also saying he made no change or improvement after that." (PX25) Dr. Cole noted that Petitioner told him he saw Dr. Mark Bowen for a second opinion and was told he would need a total knee replacement. After examination, Dr. Cole noted an impression of advanced osteoarthritis, left knee, and unresolved-aggravation of pre-existing condition. Dr. Cole opined that Petitioner still maintained symptoms that remained a sequelae of a work-related injury of January 26, 2011. He further stated that he appeared to have had sustained an aggravation of a pre-existing condition that has not been brought to a stable endpoint of care and remains and on-going aggravation of a pre-existing condition. Additionally, Petitioner was pursuing further care and has never had a stationary endpoint to bring his period of causally-related treatment to an end. Dr. Cole prescribed a total knee replacement and recommended in the meantime, that Petitioner could work in a restricted duty job with limited squatting, kneeling, climbing and minimum bending and stooping. (PX25). Dr. Cole also confirmed that all treatment to date was reasonable, necessary and related to his January 26, 2011 injury. (PX25)

On January 27, 2015, Petitioner was evaluated by Dr. Raju S. Ghate for the left knee. (PX11). Dr. Ghate recommended a cortisone injection and consideration for a total knee replacement. A cortisone injection was done at that time. (PX11) On April 21, 2015, a utilization review report was issued on behalf of Respondent and it was determined that the prescribed left knee total knee arthroplasty and inpatient hospital stay for 3 nights was certified and medically necessary. (P.X24) On June 1, 2015, Petitioner underwent left total knee replacement surgery performed by Dr. Raju Ghate. (PX11)

On November 3, 2015, Dr. Ghate evaluated Petitioner and recommended a course of work hardening. (PX11) On November 24, 2015, Petitioner returned to Dr. Ghate. (PX11). Dr. Ghate noted Petitioner continued to take Tramadol for occasional knee pain. (PX11) Dr. Ghate noted a good recovery from the total knee replacement and recommended Petitioner return to work December 1, 2015 with restrictions of no kneeling or squatting and return for a follow up visit in six months. (PX11) On June 24, 2016, Petitioner returned to Dr. Ghate for his one year follow up. (PX11) Dr. Ghate noted a good recovery, but left knee pain with twisting/pivoting, pain with stairs, and difficulty bending to the floor. X-rays that were taken at that time showed joint effusion. (PX11) Petitioner was still taking Tramadol for pain, and Dr. Ghate ordered Petitioner's work restrictions permanent. (PX11).

June 27, 2014 accident – 14WC24735

The parties proceeded to hearing on March 26, 2018, with disputed issues as to whether the current condition of ill-being is causally connected to Mr. Donald Haepp's (hereinafter "Petitioner") injury, whether the City of Chicago (hereinafter "Respondent") is liable for unpaid medical bills, whether the Respondent is entitled to credit in accordance to §8(j) of the Act, the nature and extent of the injury that occurred, and whether the Petitioner is entitled to penalties under §19(k), §19(l) and attorney fees pursuant to §16. (ArbX3)

The parties stipulated that Respondent was operating under the Act on June 27, 2014. (ArbX3) The parties stipulated that the date of the accident was June 26, 2014 and that the Petitioner and Respondent had a relationship of employer and employee, and that the accident arose out of and during the course of employment. (ArbX3) The parties also stipulated that the Petitioner worked for the Respondent as a Carpenter, notice of the accident was given within the time limits stated in the Act, Petitioner was 59 years of age on the date of the accident, and married with 0 dependent children. (ArbX3) The stipulated average weekly wage, calculated pursuant to Section 10 of the Act, was $1699.16. (ArbX3)

Petitioner testified that while on duty, on June 27, 2014, he was lifting drywall with a co-worker and felt a twinge in his stomach area and noted a bump in his belly button. (PX1) Petitioner testified that he finished completing the work and then reported the incident. Following the incident, Petitioner was directed to go to the City of Chicago's occupational clinic, Mercy Works, where he was seen by Dr. Homer Diadula (hereinafter "Dr. Diadula"). (PX1) Dr. Diadula diagnosed Petitioner with an umbilical hernia, ordered Petitioner off of work due to a work-related condition, and referred him to see Dr. Daniel Kacey (hereinafter "Dr. Kacey) at Mercy Hospital and Medical Center. (PX1) On July 1, 2014, Petitioner was seen by Dr. Kacey who noted that Petitioner had an acute umbilical hernia. (PX5) Dr. Kacey recommended surgical repair with simple preperitoneal mesh. (PX5) Dr. Kacey noted that Petitioner's expected disability related to repair would be 4-6 weeks. (PX5) Petitioner was referred to his family doctor regarding his overall fitness for surgery.

On July 1, 2014, Petitioner sought additional consultation with his primary care physician, Dr. Timothy Wollner of Little Company of Mary Affiliated Services (hereinafter "Little Company"). (PX6) Dr. Wollner discussed with Petitioner his treatment options, and Petitioner elected to pursue surgical repair. Dr. Wollner referred Petitioner to Dr. Michael Fiorucci (hereinafter "Dr. Fiorucci") to perform the surgery. (PX6) On July 24, 2014, Dr. Fiorucci performed an umbilical hernia repair with mesh. (PX6) Petitioner was discharged from the hospital with the restriction of no lifting over 15lbs. (PX7) On July 26, 2014, Petitioner was re-admitted to Little Company with abdominal pain and swelling. (PX7) Petitioner was diagnosed with postoperative constipation due to the narcotic medication given at the time of surgery and obstruction of the intestine. (PX7) Petitioner was treated and released from the hospital on July 28, 2014. (PX7) On August 6, 2014, Dr. Fiorucci re-evaluated Petitioner and noted he was doing well post-surgery. (PX6). On August 25, 2014 Petitioner returned back to work full duty with no restrictions concerning his umbilical hernia.

December 15, 2014 accident – 15WC1963

The parties proceeded to hearing on March 26, 2018, with disputed issues as to whether the current condition of ill-being is causally connected to Mr. Donald Haepp's (hereinafter "Petitioner") injury, whether the City of Chicago (hereinafter "Respondent") is liable for unpaid medical bills, whether the Respondent is entitled

to credit in accordance to §8(j) of the Act, the nature and extent of the injury that occurred, and whether the Petitioner is entitled to penalties under §19(k), §19(l) and attorney fees pursuant to §16. (ArbX4)

The parties stipulated that Respondent was operating under the Act on December 15, 2014. (Arb. X4) The parties stipulated that the date of the accident was December 15, 2014 and that the Petitioner and Respondent had a relationship of employer and employee, and that the accident arose out of and during the course of employment. (ArbX4) The parties also stipulated that the Petitioner worked for the Respondent as a Carpenter, notice of the accident was given within the time limits stated in the Act, Petitioner was 60 years of age on the date of the accident, and married with 0 dependent children. (Arb.X4) The stipulated average weekly wage, calculated pursuant to Section 10 of the Act, was $1714.72. (Arb.X4)

Petitioner testified that while on duty, December 15, 2014, he was hanging dry wall overhead and began to experience pain in his right shoulder. Petitioner reported the incident to the Respondent the next morning, December 16, 2014. On December 16, 2014, Petitioner sought treatment at Mercyworks with Dr. Diadula. Petitioner complained of difficulty raising his arm up and had pain in his neck and right shoulder. (PX1) Dr. Diadula diagnosed Petitioner with a right shoulder strain/sprain, right cervical sprain and right shoulder rule out labrum tear. (PX1) Dr. Diadula instructed the Petitioner to use over the counter Tylenol for pain and an MRI was ordered of the right shoulder to rule out glenoid or labrum tear. (PX1) Dr. Diadula ordered the Petitioner off work. (PX1)

On December 22, 2014, Petitioner returned to Mercy Works with complaints of pain. (PX1). Physical therapy and medication was prescribed and Petitioner was instructed to remain off work. (PX1). On December 29, 2014, Petitioner was re- examined and the Dr. found decreased range of motion and difficulty in lifting the right arm without pain. (PX1) On January 6, 2015, an MRI was approved and performed showing results positive for supraspinatus tendinopathy. (PX10) On January 8, 2015, a MercyWorks physician reviewed the MRI results, noted the supraspinatus defect, and recommended Petitioner see an orthopedic shoulder specialist, prescribed medication and instructed Petitioner to remain off work. (PX1) On January 19, 2015, Petitioner saw Dr. Mark Bowen (hereinafter "Dr. Bowen") of Northshore Orthopedics, who found no significant atrophy, asymmetry or swelling. (PX10) Dr. Bowen noted, after review of his MRI, that there was some strain pattern in the muscle, probable slight tendinopathy but no evidence of a full-thickness tear. Dr. Bowen's final impression was that there was a rotator cuff strain and recommended a course of physical therapy. (PX10) On March 18, 2015, Petitioner returned to Dr. Bowen with noted improvement but persistent signs of impingement. Petitioner was given a cortisone injection, instructed to continue physical therapy and to remain off work. (PX10) On April 29, 2015, Petitioner returned to Dr. Bowen complaining of pain and cracking with overhead lifting. (PX10) An exam on that date was again positive for impingement. (PX10) Dr. Bowen recommended a surgical decompression of the right shoulder after the completion of knee surgery and prescribed continued physical therapy and continued off work. (PX10)

On December 9, 2015, following the total knee replacement surgery, Petitioner returned to Dr. Bowen for his right shoulder (PX10). During his visit, Petitioner reported to Dr. Bowen that his right shoulder was not bothering him that much from a pain perspective but he still noticed some crepitation or noise through range of motion. (PX28) Petitioner also complained of numbness and tingling in both hands that radiated down his arm. (PX28) Dr. Bowen suggested an MRI and EMG results to evaluate Petitioner's cervical symptoms and ordered him off work. (PX28) On January 6, 2016, Petitioner returned to Dr. Bowen, who authorized Petitioner to return to work with no restrictions concerning his right shoulder effective January 7, 2016.

On April 17, 2017, Petitioner attended a vocational rehabilitation interview with Steven Blumenthal of Blumenthal Associates. (PX20) Mr. Blumenthal issued a report on June 20, 2017 based on his interview with the Petitioner.

CONCLUSIONS OF LAW

Arbitrator's Credibility Assessment/Summary of Testimony:

At hearing, the Petitioner had three witnesses testify, Mr. Edmund Sexton, Mr. Steven Blumenthol and the Petitioner. The Respondent had one witness testify, Mr. Elgin Swanigan. Overall the Arbitrator found the testimony of all of the witnesses to be truthful, credible and otherwise unrebutted.

Mr. Edmund Sexton, a business representative for the Carpenter's Union, was called to testify on behalf of Petitioner. Mr. Sexton testified that he has been in the Union for 13 years and as Union representative he represents all carpenters that work for Respondent. He also testified that he has been a carpenter for 25 years. Mr. Sexton testified to Petitioner's permanent restrictions of no kneeling or squatting that resulted from his 2011WC17266 injury. He testified that the restrictions of no kneeling or squatting for a carpenter would impact a majority of the jobs a carpenter would need to do. Additionally, he testified that if Petitioner was fired from working for the Respondent it would be difficult to place someone with his restrictions in another position as a carpenter elsewhere. However, he acknowledged after review of Petitioner's job duties, some of the duties could be completed without kneeling or bending. On cross-examination, Mr. Sexton testified that he had never observed Petitioner in the performance of his job duties as a Carpenter. Mr. Sexton acknowledged Petitioner's age of 63, and stated that there had been no grievances filed with the union regarding Petitioner's performance of his job duties.

Mr. Steven Blumenthal, a certified vocational rehabilitation counselor with Blumenthal Associates, was called to testify on behalf of Petitioner. On April 17, 2017, Petitioner attended a vocational rehabilitation interview with Mr. Blumenthal. (PX20) Mr. Blumenthal testified that he has been in his field for 38 years and had his practice for 16 years. (PX29) Mr. Blumenthal issued a vocational assessment of Petitioner in a report he issued on June 20, 2017. Mr. Blumenthal's testimony was consistent with his report. On cross-examination, Mr. Blumenthal acknowledged that his April 17, 2017 vocational rehabilitation interview with Petitioner lasted approximately an hour and a half. Mr. Blumenthal testified that the interview was the only meeting he attended with Petitioner. Mr. Blumenthal also testified that he spent less than an hour reviewing Petitioner's records prior to issuing his June 20, 2017 report. Mr. Blumenthal testified that he was aware that Petitioner works as a Carpenter for Respondent and has done so consistently since early 2016.

The Petitioner, Mr. Donald E. Haepp, III, was the last witness to testify on behalf of the Petitioner. Petitioner testified that he has worked for Respondent as a carpenter since 1999. Petitioner testified to his past medical history, mechanisms of injuries, restrictions in result of the injuries, courses of medical treatment and current subjective complaints in all of his consolidates cases (10WC25879, 11WC17266, 14WC24735 and 15WC1963). In addition, Petitioner testified to the unpaid medical bills he claims Respondent is liable for in each case.

At hearing, the Respondent had one witness testify on behalf of Respondent, Mr. Elgin Swanigan, General Foreman of Trades for the Department of Fleet and Facility Management. Mr. Swanigan testified that he supervised Petitioner's immediate supervisor, David Gin. Mr. Swanigan testified that, approximately two to

three times each week, he observes Petitioner perform his job duties as a Carpenter. Mr. Swanigan also testified that he has supervised Petitioner's work as a Carpenter since Petitioner returned to work in early 2016.

Mr. Swanigan testified to the quality of Petitioner's current work as a Carpenter. Mr. Swanigan testified that there are many tasks of a Carpenter that do not require kneeling or stooping, and that Petitioner consistently and competently performs these tasks for his Department. Mr. Swanigan reviewed the essential duties of a Carpenter and stated that Petitioner had demonstrated he was capable of performing all the listed functions within his restrictions. Mr. Swanigan reviewed the physical requirements for a Carpenter and noted that, of the seven physical requirements listed, only two were impacted by Petitioner's restrictions. In addition, he testified Petitioner performs valuable work for the Department. Mr. Swanigan testified that he supervises other Carpenters who perform work with restrictions and that, even amongst the Carpenters with no restrictions, many specialize in specific tasks. Mr. Swanigan testified that Petitioner works the same number of hours and days per week as other Carpenters within the Department. Mr. Swanigan testified that, if Petitioner was no longer employed by the Department, the Department would be forced to hire another Carpenter to replace Petitioner and perform his duties.

With respect to issue (F) whether the Petitioner's current condition of ill-being is causally related to the Injury, the Arbitrator finds as follows:

May 4, 2010 accident – 10WC25879

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that Petitioner did prove by a preponderance of the evidence that his current condition of ill-being is causally connected to his work accident on May 4, 2010.

In the prior 19(b) Decision, Arbitrator Prieto found that there was a causal relationship between Petitioner's work accident of May 4, 2010 and Petitioner's lateral meniscus tear of his left knee. This Decision was subsequently affirmed by the Commission on November 21, 2011. The Commission decision was not appealed by either party and became final after the expiration of the time for filing a written summons to the Circuit Court. The law of the case doctrine applies to matters before the Workers' Compensation Commission where a court's unreversed decision on an issue that has been litigated and decided settles the question for all subsequent stages of the action. *Help at Home v. Ill. Workers' Comp. Comm'n*, 305 Ill.App.3d 1150, 1151 (4th Dist. 2010). Here, a Decision was filed on March 7, 2011, appealed and subsequently affirmed by the Commission on November 21, 2011. Therefore, based on the law of the case doctrine, Petitioner's lateral meniscus tear of his left knee is deemed causally related to the accident of May 4, 2010.

January 26, 2011 accident – 11WC17266

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that Petitioner did prove by a preponderance of the evidence that his current condition of ill-being is causally connected to his work accident on January 26, 2011.

In the prior 19(b) Decision, Arbitrator Kelmanson found that there was a causal relationship between Petitioner's work accident of January 26, 2011 and the additional lateral meniscus tear of his left knee. This Decision was subsequently affirmed and modified by the Commission on September 24, 2012. The Commission decision was not appealed by either party and became final after the expiration of the time for

filing a written summons to the Circuit Court. The law of the case doctrine applies to matters before the Workers' Compensation Commission where a court's unreversed decision on an issue that has been litigated and decided settles the question for all subsequent stages of the action. *Help at Home v. Ill. Workers' Comp. Comm'n*, 305 Ill.App.3d 1150, 1151 (4th Dist. 2010). Here, a Decision was filed on January 3, 2012, appealed and subsequently affirmed/modified by the Commission on September 24, 2012. Therefore, based on the law of the case doctrine, Petitioner's additional meniscus tear of his left knee is deemed causally related to the accident of January 26, 2011.

The Arbitrator also finds that Petitioner did prove by a preponderance of the evidence that there is a causal relationship between the work accident of January 26, 2011 and Petitioner's subsequent total knee replacement on June 1, 2015. Dr. Cole, Respondent's IME examiner, agreed with Dr. Bowen that the total knee replacement was necessary. In addition, Dr. Cole stated in his report that all of the treatment to date was reasonable, necessary and related to Petitioner's January 26, 2011 injury. (PX25) Therefore, the Arbitrator finds that the Petitioner's total knee replacement is causally related to his work injury on January 26, 2011.

June 27, 2014 accident – 14WC24735

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that Petitioner did prove by a preponderance of the evidence that his current condition of ill-being is causally connected to his work accident on June 27, 2014. The Petitioner testified, the parties stipulated, that on June 27, 2014 Petitioner sustained a compensable injury while working for the Respondent. On the date of the accident Petitioner was lifting drywall and felt a twinge in his stomach area. (PX1) Petitioner testified that he reported the accident to the Respondent the same day, June 27, 2014. Petitioner sought medical attention the same day at the Respondent's occupational clinic, Mercy Works, with Dr. Diadula. (PX1) Dr. Diadula diagnosed Petitioner with an umbilical hernia and ordered him off work due to a "work-related condition". (PX1) On July 24, 2014, Dr. Fiorucci performed an umbilical hernia repair with mesh. (PX6) Petitioner was discharged from the hospital with the restriction of no lifting over 15lbs. There was no evidence produced suggesting any other causes or prior injuries or treatment related to a hernia. Therefore, the Arbitrator finds that Petitioner's condition of ill-being is causally related to his work injury of June 27, 2014.

December 15, 2014 accident – 15WC1963

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that Petitioner did prove by a preponderance of the evidence that his current condition of ill-being is causally connected to his work accident on December 15, 2014. The Petitioner testified, the parties stipulated, that on December 15, 2014 Petitioner sustained a compensable injury while working for the Respondent. On the date of the accident Petitioner was hanging drywall overhead, and began to experience pain in his right shoulder. Petitioner reported the incident to the Respondent the next morning, December 16, 2014. On December 16, 2014, Petitioner sought treatment at Mercyworks with Dr. Diadula. Dr. Diadula diagnosed the Petitioner with a right shoulder strain/sprain, right cervical sprain and right shoulder rule out labrum tear. (PX1) On December 22, 2014, Petitioner returned to Mercy Works with complaints of pain. (PX1) Physical therapy and medication was prescribed and Petitioner was instructed to remain off work. (PX1). On January 19, 2015, Petitioner saw Dr. Mark Bowen (hereinafter "Dr. Bowen") of Northshore Orthopedics, who found no significant atrophy, asymmetry or swelling. (PX10) Dr. Bowen noted, after review of his MRI, that there was some strain pattern in the muscle, probable slight tendinopathy but no evidence of a full-thickness tear. Dr. Bowen's final impression was that there was a rotator cuff strain and recommended he undergo a course of physical therapy. (PX10) On January 6, 2016, Petitioner returned to Dr. Bowen, who authorized Petitioner to return to work with

no restrictions concerning his right shoulder effective January 7, 2016. There was no evidence produced suggesting any other causes, prior shoulder injuries or treatment related to Petitioner's right shoulder. Therefore, the Arbitrator finds that Petitioner's condition of ill-being is causally related to his work injury of December 15, 2014.

With respect to issue (J), whether the Respondent paid for all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

May 4, 2010 accident – 10WC25879

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that the medical services provided to the Petitioner were reasonable and necessary to cure his condition of ill-being causally connected to his accident on May 4, 2010. Petitioner submitted into evidence a medical bill from Radiological Physicians in the amount of $46.00 (PX12), for x-rays prescribed by Respondent's occupational clinic MercyWorks on May 11, 2010. Corresponding medical records received into evidence confirm that Petitioner was evaluated at MercyWorks on May 11, 2010 and x-rays were performed. (PX1). This bill was not paid by Respondent and was sent to collections. (PX12). The Arbitrator finds that the aforementioned service was reasonably required to diagnose, treat, cure and relieve Petitioner from the effects of the injury. Additionally, the Arbitrator finds that the service was causally related to Petitioner's work injury. Therefore, the Arbitrator awards the remaining unpaid balance of $46.00 pursuant to the fee schedule.

January 26, 2011 accident – 11WC17266

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that the medical services provided to the Petitioner were reasonable and necessary to cure his condition of ill-being causally connected to his accident on January 26, 2011. Petitioner submitted into evidence a medical bill in the amount of $65,303.09 from Northshore Health for services related to Petitioner's left knee replacement on June 1, 2015. (P.X18) A review of those charges reveal Respondent paid this bill in full on January 10, 2017. (PX18) Additionally, Petitioner submitted into evidence out-of-pocket expenses regarding prescriptions and parking expenses totaling $282.01. (PX23) The Arbitrator finds that the aforementioned expenses were reasonably required to treat, cure and relieve Petitioner from the effects of the injury. Additionally, the Arbitrator finds that the service was causally related to Petitioner's work injury. Therefore, having determined that the Petitioner's condition of ill being is relative to his work injury, the Arbitrator awards and orders Respondent to reimburse the Petitioner for the out-of-pocket expenses in the amount of $282.01.

June 27, 2014 accident – 14WC24735

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that the medical services provided to the Petitioner were reasonable and necessary to cure his condition of ill-being causally connected to his accident on June 27, 2014. Petitioner submitted into evidence a medical bill in the amount of $11, 685.69 from Little Company for services related to Petitioner's hospitalization on July 26-28, 2014 due to complications from the original July 24, 2014 umbilical hernia surgery. Respondent furnished payment for these services on November 9, 2015. (PX14) Petitioner submitted into evidence a bill from Dr. Kacey in the amount of $327.00 for an office consultation regarding the performance of his umbilical hernia surgery. (PX13) The Arbitrator finds that the aforementioned expense was

reasonably required to treat, cure and relieve Petitioner from the effects of the injury. Additionally, the Arbitrator finds that the service was causally related to Petitioner's work injury. The Arbitrator finds the Respondent responsible for this bill.

Petitioner submitted into evidence charges from Evergreen Emergency Services in the amount of $540.00 for emergency room services on July 26, 2014 when the Petitioner returned post-surgery for complications. (PX15) Additionally, Petitioner had a CT scan performed on him when he returned to the Emergency Room on July 26, 2014 in order to diagnose his complaints of abdominal pain. Petitioner submitted into evidence a bill in the amount of $686.00 for the CT scan performed on July 26, 2014 during his hospitalization. (PX16) The Arbitrator finds that the aforementioned expenses were reasonably required to treat, cure and relieve Petitioner from the effects of the injury. Additionally, the Arbitrator finds that the services were causally related to Petitioner's work injury. The Arbitrator finds the Respondent responsible for the aforementioned bills pursuant to the fee schedule.

December 15, 2014 accident – 15WC1963

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that the medical services provided to the Petitioner were reasonable and necessary to cure his condition of ill-being causally connected to his accident on December 15, 2014. Petitioner submitted into evidence a medical bill in the amount of $57,802.00 from Athletico for physical therapy services prescribed by Petitioner's treating physician, Dr. Mark Bowen, related to Petitioner's right shoulder injury. (PX17) A review of those charges reveals that while Respondent has made payments towards this bill, there remains an outstanding balance of $8,995.32. (PX17) Based on the above findings, the Arbitrator finds Respondent is responsible for remaining balance of this bill. Additionally, Petitioner submitted into evidence a bill from Advanced Medical Imaging Center, for an MRI prescribed by Dr. Bowen in the amount of $1,468.00. (PX19) Based on the above findings, the Arbitrator finds the Respondent responsible for the aforementioned bills pursuant to the fee schedule.

With respect to issue (L), what is the Nature and Extent of the injury, the Arbitrator finds as follows:

May 4, 2010 accident – 10WC25879

The Arbitrator finds that since the Petitioner re-injured his left knee after resuming full duty work in January of 2011 and filed a subsequent, consolidated claim 11 WC 17266, the Arbitrator has merged the awards and will address permanency for both claims on the later filing.

January 26, 2011 accident – 11WC17266

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Petitioner made the argument that he should receive a wage differential award under §8(d)1 of the Act because he sustained an impairment of his earning capacity due to the injury that occurred on January 26, 2011 (11WC17266). Specifically, evidence and testimony were introduced at trial regarding Petitioner's current post-injury employment in comparison to his potential wages if the Petitioner were to work in a competitive job market. In this case, Petitioner testified, in February 2016, he returned to work as a Carpenter for the Department of Fleet and Facility management despite his permanent restrictions of no kneeling or squatting.

Petitioner testified that he has worked continuously in this capacity since February of 2016. Additionally, Petitioner testified that he currently earns $46.35 per hour, which is the same wage as the other Carpenters he works with and is a pay increase from the wage he earned prior to his January 26, 2011 accident. Therefore, the Arbitrator finds that the evidence does not support a wage differential award under §8(d)1 of the Act.

The Petitioner testified, and the parties stipulated, that on May 4, 2010, he had been employed by Respondent as a carpenter in the Department of Fleet and Facility Management since 1999. Petitioner testified that on May 4, 2010 he was on duty and sustained an accidental injury to his left knee when he stepped in a hole while carrying a ladder. Additionally, the Petitioner testified that on January 26, 2011, he was on duty when he was entering an elevator with tools in his hands. Petitioner testified that the elevator floor was raised approximately 6 to 8 inches above the lobby floor. As Petitioner attempted to enter the elevator, he tripped and fell into the elevator. Petitioner's fall resulted in him re-injuring his left knee. The Arbitrator finds that since the Petitioner re-injured his left knee and filed a subsequent, consolidated claim 11 WC 17266, the Arbitrator has merged the awards and will address permanency for both claims below. The Arbitrator finds that the Petitioner reached MMI for his May 4, 2010 accident on January 10, 2011 and MMI for his January 26, 2011 accident on December 1, 2015. Therefore, his claim for any permanent partial disability is ripe for adjudication for both claims.

For injuries that occur before September 1, 2011, the Commission evaluates the physical impairment and the effect of the disability on the injured employee's life. Factors that may be considered include the individual's age, skill, occupation, training, inability to engage in certain kinds of activities, pain, stiffness or limitation of motion.

With regard to the Petitioner's age, he was 55 years old at the time of his work-related injury on May 4, 2010 and 56 years old at the time of his January 10, 2011 accident. On the date of hearing the Petitioner testified to being 63 years old. The Petitioner testified that he was returned to work full duty without restrictions after his May 4, 2010 accident. However, after his January 10, 2011 accident he returned to work with permanent restrictions of no kneeling or squatting with Respondent. The Petitioner testified that he is still working in his occupation as a Carpenter but explained that he is only given assignments that do not require kneeling or squatting. Nevertheless, he still has difficulty and pain in the left leg and still takes prescription medication for pain. Petitioner's advanced age also suggests a shorter life expectancy and that the symptoms will likely slow the Petitioner down in comparison to younger, healthier workers not experiencing the same symptoms. Therefore, the Arbitrator gives some weight to this factor.

With regard to the Petitioner's skill, occupation, and training, the Arbitrator notes that the Petitioner testified that he has been a Carpenter with the Respondent since 1999. Petitioner testified that he was able to return to work to the same position, with the same title, and same pay. Petitioner has continued working for the Respondent in the same position he held prior to his May 4, 2010 and January 10, 2011 accidents. However, after returning from his January 10, 2011 accident Petitioner was returned to work with permanent restrictions of no kneeling or squatting. Mr. Edmund Sexton testified that Petitioner would not be able to be placed for work as a carpenter in a competitive labor marker given his restrictions. Mr. Sexton testified, if one cannot kneel or squat, he cannot perform the duties of a carpenter and would not be able to find a job as a carpenter. Respondent's representative, Mr. Elgin Swanigan, also testified that Petitioner could not perform the full functions of a carpenter. On June 20, 2017, Mr. Steven Blumenthal, the vocational rehabilitation counselor who evaluated Petitioner, issued a report stating that "but for his accommodated duty by the City of Chicago, Mr. Haepp would not otherwise be qualified to perform work as a journeyman carpenter." (PX20) Therefore, the Arbitrator gives significant weight to this factor.

With regard to the Petitioner's inability to engage in certain kinds of activities, pain, stiffness or limitation of motion the Petitioner testified that today he still has the permanent restrictions of no kneeling or squatting while at work. Petitioner testified that his left knee still feels numb in the front, in some positions if he moves it a certain way it gets stuck in place and he has to help move his knee. Accordingly, the Arbitrator gives significant weight to this factor in determining the Petitioner's permanent partial disability.

Due to the evidence and testimony supporting the seriousness, permanency and injuries that partially incapacitate him from pursuing the duties of his usual and customary line of employment but have not resulted in impairment in his earning capacity the Arbitrator is awarding compensation under §8(d)2 (person as a whole) of the Act. In a May of 2015 settlement for claims 00 WC 64646 and 00 WC 64647 the Petitioner was awarded 22.5% of his left leg, the same body part at issue in Petitioner's 10WC25879 and 11WC17266 cases. (R.X1) Due to the Arbitrator awarding the Petitioner compensation under §8(d)2 of the Act, credit for the Respondent from Petitioner's 2000 settlement is not relevant here.

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 20 % loss of use of a man-as-a-whole pursuant to §8(d)2 of the Act.

June 27, 2014 accident – 14WC24735

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Petitioner testified, and the parties stipulated, that while working for the Respondent on June 27, 2014 he sustained an injury that resulted in an umbilical hernia. (PX1) On August 25, 2014 Petitioner returned back to work full duty with no restrictions concerning his umbilical hernia. The Arbitrator finds that on August 25, 2014 the Petitioner reached MMI and therefore the claim for any permanent partial disability is ripe for adjudication.

For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the Section 8.1b of the Illinois Workers' Compensation Act. Here, the accident occurred on June 27, 2014 making section 8.1b applicable. With regard to subsection (i) of §8.1b(b), the Arbitrator notes that there was not a permanent partial disability impairment report and/or opinion submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b, the occupation of the employee, the Arbitrator notes that that record reveals that the Petitioner was employed as a Carpenter for the Department of Fleet and Facility Management for the Respondent. Petitioner was able to return to work, full duty without restrictions, in his prior capacity on August 26, 2014. Petitioner testified that he still experiences "twinges now and then" but he mainly just tries not to pick up heavy stuff. He testified that he still experiences some discomfort but it is better that it was. The Arbitrator concludes that the Petitioner's ability to perform work will be adversely affected by his injury if he is required to lift heavy objects in the performance of his duties. The Arbitrator therefore gives some weight to this factor.

With regard to subsection (iii) of §8.1b, the Arbitrator notes that Petitioner was 59 years old at the time of the accident. The Petitioner's permanent partial disability with regard to his injury will be something that could potentially slow the Petitioner down in comparison to younger, healthier workers not experiencing the same symptoms. Therefore, the Arbitrator gives some weight to this factor.

With respect to subsection (iv) of §8.1b, Petitioner's future earning capacity appears to be undiminished as a result of his injuries because he was returned back to work, full-time, in his prior position with his compensation unaffected. At hearing, Petitioner testified that he currently earns $46.35 per hour, which is the current union rate for all Carpenters employed by Respondent. The Arbitrator concludes that there was no evidence suggesting the injury has had any effect on Petitioner's future earning capacity and therefore gives little weight to this factor.

With respect to subsection (v) of §8.1b, evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner's injury is clearly delineated with medical records submitted into evidence and further corroborated by his testimony on March 26, 2018. The Petitioner testified that today he still feels twinges now and then, he tries not to pick up heavy items, and still experiences discomfort with the mesh but that its better than the discomfort he had. Petitioners' original complaints and symptoms regarding his hernia at trial coincide with his complaints to the physicians he was seen by. The Arbitrator concludes that the evidence demonstrates that the Petitioner sustained permanent partial disability regarding the complaints of pain and places some weight on the foregoing 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 of loss use of a person as a whole as a result of his work-related accident.

December 15, 2014 accident – 15WC1963

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Petitioner testified, and the parties stipulated, that while working for the Respondent on December 15, 2014 he sustained an injury that resulted in a rotator cuff strain to Petitioner's right shoulder with a course of physical therapy. (PX10) On January 6, 2016, Dr. Bowen, authorized Petitioner to return to work without restrictions concerning his right shoulder. The Arbitrator finds that on January 6, 2016 the Petitioner reached MMI and therefore the claim for any permanent partial disability is ripe for adjudication. (PX28)

For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the Section 8.1b of the Illinois Workers' Compensation Act. Here, the accident occurred on December 15, 2014 making section 8.1b applicable. With regard to subsection (i) of §8.1b(b), the Arbitrator notes that there was not a permanent partial disability impairment report and/or opinion submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b, the occupation of the employee, the Arbitrator notes that that record reveals that the Petitioner was employed as a Carpenter for the Department of Fleet and Facility Management for the Respondent. Petitioner was able to return to work, full duty without restrictions, in his prior capacity on January 6, 2016. Petitioner testified that he still experiences pain, soreness and limited range of motion in his shoulder. He has noticed that overhead work is harder because he has problems keeping his arms in the air as long. However, he testified that he can still do the overhead work. He testified that he has to take a break to let the pain "die down". The Petitioner's shoulder injury may make performing overhead work harder in the future. The Arbitrator concludes that the Petitioner's ability to perform work will be adversely affected by

his injury if he is required to use his right shoulder in the performance of his duties. The Arbitrator therefore gives some weight to this factor.

With regard to subsection (iii) of §8.1b, the Arbitrator notes that Petitioner was 60 years old at the time of the accident. The Petitioner's permanent partial disability with regard to his left shoulder will be something that could potentially slow the Petitioner down in comparison to younger, healthier workers not experiencing the same symptoms. Therefore, the Arbitrator gives some weight to this factor.

With respect to subsection (iv) of §8.1b, Petitioner's future earning capacity appears to be undiminished as a result of his shoulder injury because he was returned back to work, full-time, in his prior position with his compensation unaffected. At hearing, Petitioner testified that he currently earns $46.35 per hour, which is the current union rate for all Carpenters employed by Respondent and is a higher wage than Petitioner earned at the time of his accident. The Arbitrator concludes that there was no evidence suggesting the injury has had any effect on Petitioner's future earning capacity and therefore gives little weight to this factor.

With respect to subsection (v) of §8.1b, evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner's injury to his right shoulder is clearly delineated with medical records submitted into evidence and further corroborated by his testimony on March 26, 2018. The Petitioner testified at trial that today getting out of cars is difficult, overhead work is harder, at times he has to pick his arm up and move it, and he still experiences numbness. Petitioner testified that he takes Tramidol to "take edge of the pain away." Petitioners' original complaints and symptoms regarding his left shoulder at trial coincide with his complaints to the physicians he was seen by. The Arbitrator concludes that the evidence demonstrates that the Petitioner sustained permanent partial disability regarding the complaints of pain and places significant weight on the foregoing 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 7.5 % loss of loss use of a person as a whole as a result of his work-related accident.

With respect to issue (M), whether the Petitioner is entitled to penalties/attorney's fees under §19(k), §19(l) and §16, the Arbitrator finds as follows:

May 4, 2010 accident – 10WC25879

The Petitioner submitted into evidence a medical bill from Radiological Physicians in the amount of $46.00 (PX12), for x-rays prescribed by Respondent's occupational clinic Mercy Works on May 11, 2010. Corresponding medical records received into evidence confirm that Petitioner was evaluated at Mercy Works on May 11, 2010 and x-rays were performed. (PX1) This bill was not paid by Respondent and was sent to collections. (PX12) The Arbitrator awards the remaining unpaid balance of $46.00 pursuant to the fee schedule. However, after review of the totality of the evidence, the Arbitrator finds no penalties or fees shall be imposed.

January 26, 2011 accident – 11WC17266

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. Section 19(l) of the Act states that "(i)f the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In case the employer or his or her insurance carrier shall without good and just cause

fail, neglect, refuse or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30.00 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000.00. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay.

On November 20, 2014, Respondent had an IME completed on Petitioner with Dr. Brian Cole at Midwest Orthopedics. During this visit Dr. Cole noted that Petitioner saw Dr. Mark Bowen 2 months prior, for a second opinion, and was told he needed a total knee replacement. (PX25) After examination, Dr. Cole concurred that Petitioner needed to undergo total knee replacement for his left knee. Dr. Cole stated that this would be "his only means of definitive management to garner relief of his left knee pain." (P.X25) Additionally he opined that "treatment to date has been reasonable, necessary, and related to the injury date in question." (PX25) Petitioner submitted into evidence a medical bill in the amount of $65,303.09 from Northshore Health for services related to Petitioner's left knee replacement on June 1, 2015. (PX18) A review of those charges reveal Respondent did not pay this bill until January 10, 2017, over a year and a half from the date of service. (PX18)

The Respondent failed to present any evidence to justify its failure to pay the outstanding medical bill for treatment prescribed by its own occupational physician. (PX25) Respondent has an affirmative burden to rebut the presumption that a delay of 14 days is unreasonable. Respondent failed to present any evidence to rebut that presumption. The Arbitrator finds the failure to provide benefits under the Act to be unreasonable and orders penalties pursuant to Section 19(l) of the Act in the maximum amount of $10,000.00.

June 27, 2014 accident – 14WC24735

The Petitioner submitted into evidence a medical bill in the amount of $11, 685.69 from Little Company for services related to Petitioner's hospitalization on July 26-28, 2014 due to complications from the original July 24, 2014 umbilical hernia surgery. Respondent furnished payment for these services on November 9, 2015. (PX14) After review of the totality of the evidence, the Arbitrator finds that no penalties or fees shall be imposed.

December 15, 2014 accident – 15WC1963

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. Section 19(l) of the Act states that "(i)f the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30.00 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000.00. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay.

The Petitioner submitted into evidence a medical bill in the amount of $57,802.00 from Athletico Physical Therapy for physical therapy services prescribed by Petitioner's treating physician, Dr. Mark Bowen, related to Petitioner's right shoulder injury. (PX17) The first PT encounter was on January 20, 2015 and the last on November 23, 2015. (PX17) A review of those charges reveals that while Respondent has made payments towards this bill, there remains an outstanding balance of $8,995.32. (PX17) Additionally, Petitioner submitted into evidence a bill from Advanced Medical Imaging Center, for an MRI prescribed by Dr. Bowen and completed on December 16, 2015 in the amount of $1,468.00. (PX19)

The Respondent failed to present any evidence to justify its failure to pay the outstanding medical bills. Respondent has an affirmative burden to rebut the presumption that a delay of 14 days is unreasonable. Respondent failed to present any evidence to rebut that presumption. Therefore, the Arbitrator finds the failure to provide benefits under the Act to be vexatious and unreasonable and orders penalties pursuant to Section 19(k) of the Act in the amount of $5,231.66 (50% of outstanding medical of $10,463.32 ($8,995.32 + $1468.00 = $10,463.32). Pursuant to Section 19(l), the Arbitrator further awards penalties in the amount of $10,000.00. Finally, the Arbitrator awards attorneys' fees pursuant to Section 16 of the Act in the amount of $2,092.66.

With respect to issue (N), whether the Respondent is due any credit pursuant to §8j of the Act, the Arbitrator finds as follows:

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Respondent claims that it is entitled to a credit pursuant to 820 ILCS 305/8(j). §8(j) states Respondent is entitled to a credit "in the event the injured employee receives benefits, including medical, surgical or hospital benefits under any group plan covering non-occupational disabilities contributed to wholly or partially by the employer, which benefits should not have been payable if any rights of recovery existed under the Act." However, an employer has the burden to establish its entitlement to a §8(j) credit. Elgin Board of Education School District U-46 v. Illinois Workers' Compensation Commission, 949 N.E.2d 198, 350 Ill.Dec. 710 (1st Dist. 2011). During the trial, Respondent failed to present any evidence that it contributed wholly or partially to a group plan or that payments would have been payable irrespective of an accidental injury under the Act. At the end of trial, during the admission of evidence, the Respondent attempted to present into evidence a printout of an itemization of benefits and payments made by the City of Chicago Medical Care Plan dating from July 2, 2013 until May 21, 2016. (RX3). However, the Petitioner objected to its admission based on the fact that there was no testimony laying foundation for this exhibit to address Petitioner's objections. The Arbitrator reserved her ruling and at this time is sustaining the Petitioner's objection and not receiving the Respondent's exhibit into evidence. Therefore, the Arbitrator finds that Respondent has not met its burden of proof establishing entitlement to a §8(j) credit for benefits extended by Petitioner's health plan.

With respect to the objections by Petitioner regarding Respondent's Exhibits #3, #5, and #6, the Arbitrator finds as follows:

Respondent Exhibit #3: Itemization of benefits paid by the city of Chicago Medical Care Plan

At the end of the trial, during the admission of evidence, the Respondent attempted to enter into evidence Respondent's Exhibit #3 -a printout of an itemization of benefits and payments made by the City of Chicago Medical Care Plan dating from July 2, 2013 until May 21, 2016. (RX3) The Petitioner objected to the admission of the itemization of benefits because no foundation was provided for this exhibit to address Petitioner's objections. The Arbitrator sustains the Petitioner's objection based upon a lack of foundation being provided for the exhibit and it is not received into evidence. The Arbitrator gives no consideration to Respondent's exhibit 3.

Respondent Exhibit #5: Work Order Assignments Report (Form 2FM)

At the end of the trial, during the admission of evidence, the Respondent attempted to enter into evidence exhibit #5- 2 FM Work Order Assignments Report for the Petitioner. The report was introduced during the

direct examination of Respondent's witness, Mr. Swanigan. Mr. Swanigan testified that the report was a print out of Petitioner's work order assignments that Petitioner has been assigned and completed from the beginning of 2018 through the date of hearing. (RX5)

The Petitioner objected to the admission of exhibit #5 based upon its relevance and the doctrine of completeness for it only being a "snapshot" of Petitioner's work and not reflecting all of the work that he does. The Arbitrator overrules the Petitioner's objection based upon relevance. However, the Arbitrator sustains the Petitioner's objection based upon the doctrine of completeness. Therefore, exhibit #5 – the work order assignment will not be received into evidence. The Arbitrator gives no consideration to Respondent's exhibit 5.

Respondent Exhibit #6: Petitioner's Performance Evaluation issues on June 30, 2017

At the end of the trial, during the admission of evidence, the Respondent attempted to enter into evidence Exhibit #6 a performance evaluation completed on the Petitioner. The evaluation was introduced during the direct examination of Respondent's witness, Mr. Swanigan. Mr. Swanigan testified that Petitioner's Performance Evaluation Form was issued on June 30, 2017 and had been completed by Petitioner's immediate supervisor, Mr. Gin. Additionally, Mr. Swanigan testified that the evaluation covered Petitioner's work for the one year period from July 2016 through July 2017. (RX6)

The Petitioner objected to the admission of the Petitioner's performance evaluation/ Respondent's exhibit #6 based upon the doctrine of completeness. The Petitioner pointed out through testimony from Mr. Swanigan, there was a Part I and Part II of the document that was not offered to be admitted into evidence with Exhibit #6. The Arbitrator sustains the Petitioner's objection based upon the doctrine of completeness and the performance evaluation will not be received into evidence. The Arbitrator gives no consideration to Respondent's exhibit 6.

Signature of Arbitrator

8/7/18

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
		[X] Modify	[X] None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DONALD E. HAEPP, III

Petitioner,

vs.

NO: 15 WC 1963
(Consolidated with: 10 WC 25879,
11 WC 17266, and 14 WC 24735)

CITY OF CHICAGO,

Respondent.

19IWCC0506

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 permanent partial disability (PPD) benefits and penalties and attorney's fees, and being advised of the facts and law, modifies the Arbitrator's Decision as stated below, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. Separate Decisions have been issued for case numbers 10 WC 25879, 11 WC 17266, and 14 WC 24735.

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. 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 (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 affirms the Arbitrator's award of seven-and-a-half percent (7.5%) loss of use of the person as a whole and the Arbitrator's award of $10,000.00 for Section 19(l) penalties.

However, the Commission vacates the Arbitrator's award of $2,092.66 in Section 16 attorney's fees and $5,231.66 in Section 19(k) penalties.

The penalties and fees pertained to the following medical bills:

1. $8,995.32 (DOS: 1/20/15-11/23/15) Athletico (PX17)
2. $1,468.00 (DOS: 12/16/15) Advanced Medical Imaging Center (PX19)
$10,463.32

The Commission agrees with the Arbitrator's finding that Respondent failed to present any evidence to rebut the presumption that a 14-day delay in payment is deemed unreasonable. However, there is no evidence demonstrating that Respondent acted in any vexatious manner. By its Brief, Respondent states that any outstanding balance only represented "a small fraction of the hundreds of thousands of dollars in medical treatment charges that were assessed with respect to these claims." (Respondent's Brief, pg. 12). A review of the Athletico bill reveals that Respondent did consider the charges, with write-offs by the worker's compensation carrier commencing on January 23, 2015, followed by adjustments and payments on March 30, 2015. It is unclear why Respondent stopped making payments from February 13, 2015 through May 13, 2015, but payments did resume thereafter through November 23, 2015.

The Commission further notes that Respondent failed to make any payment to Advanced Medical Imaging Center, but finds merit in Respondent's position that the delay in payment was in part caused by the complex administration of Petitioner's medical claims. The record demonstrates numerous medical charges by various providers, with evidence of overlapping payments by the workers' compensation carrier and group carrier. Based on the evidence submitted by both Petitioner and Respondent, wherein certain dates, charges, payments, credits, and adjustments do not line up, there is merit to Respondent's position.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed August 7, 2018, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the reasonable and necessary medical services of $10,463.32, pursuant to Section 8(a) of the Act and to be adjusted in accord with the medical fee schedule provided in Section 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall receive credit for medical bills paid through its group medical plan as provided in 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.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given a credit of $26,946.86 for temporary total disability benefits that have been paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $735.37 per week for a period of 37.5 weeks, as provided in Section 8(d)2 of the Act,

for the reason that the injuries sustained caused seven-and-a-half percent (7.5%) loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner penalties of $10,000.00, as provided in Section 19(l) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of penalties and attorney's fees under Section 19(k) and Section 16 of the Act is hereby vacated.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all other 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 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: SEP 16 2019

D. Douglas McCarthy

DDM/pm
O: 7-17-19
052

Stephen Mathis

DISSENT

I respectfully dissent. I do not believe the Act allows for multiple awards of penalties pursuant to Section 19(l) of the Act as the statutory language clearly states an award pursuant to this Section for *benefits* withheld shall not exceed $10,000.00.

Section 19(l) of the Act allows for penalties where benefits are withheld by an employer under either Section 8(a) or 8(b) without a reasonable basis for such withholding. As the Court stated in *McMahan v. Industrial Commission*, "If the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay, an award of the statutorily specified additional compensation is mandatory." 183 Ill. 2d 499, 515, 702 N.E.2d 545 (1998).

Section 19(l) states, in part, "the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000." *820 ILCS 305/19(l)* (West 2013). The majority awards Petitioner $20,000 in penalties pursuant to Section 19(l) purportedly for multiple violations relating to separate injuries despite the fact the matters were consolidated and proceeded to hearing on one occasion regarding all issues. Such an award ignores the statute's express language "that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000." *Id.*

"We must construe the statute so that each word, clause, and sentence is given a reasonable meaning and not rendered superfluous, avoiding an interpretation that would render any portion of the statute meaningless or void." *Cassens v. Transport Co. v. Industrial Commission*, 218 Ill. 2d 519, 524, 844 N.E.2d 414 (2006). Awarding multiple penalty amounts under Section 19(l) which exceed $10,000 renders the $10,000 maximum imposed by the statute meaningless.

Moreover, this interpretation of Section 19(l) is consistent with the Court's interpretation of the assessment of penalties pursuant to Section 19(k). As the Court noted in *Scott v. Industrial Commission*,

> Section 19(k) provides a specific method for calculating additional compensation: "the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award." 820 ILCS 305/19(k) (West 1994). Thus, even if several violations of section 19(k) have occurred, the statute provides a single means of calculating the penalty. 184 Ill. 2d 202, 221, 703 N.E.2d 81 (1998).

For the reasons stated above, I respectfully dissent.

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HAEPP III, DONALD E
Employee/Petitioner

Case# **15WC001963**

10WC025879
11WC017266
14WC024735

CITY OF CHICAGO
Employer/Respondent

19IWCC0506

On 8/7/2018, 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 2.18% 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:

0391 HEALY SCANLON
KEVIN T VEUGELER
111 W WASHINGTON ST STE 1425
CHICAGO, IL 60602

0010 CITY OF CHICAGO
D TAYLOR CHITTICK
30 N LASALLE ST 8TH FLR
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

Donald E. Haepp, III
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **15** WC **1963**

Consolidated cases: **10 WC 25879, 11 WC 17266, 14 WC 24735**

19IWCC0506

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Tiffany Kay** , Arbitrator of the Commission, in the city of **Chicago**, on **March 26, 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 **12/15/14**, 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 $**89,165.44**; the average weekly wage was $**1,714.72**.

On the date of accident, Petitioner was **60** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**26,946.86** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**26,946.86**.

ORDER

Medical benefits
Respondent shall pay reasonable and necessary medical services of **$10,463.32**, pursuant to the medical fee schedule as provided in Section 8(a) and 8.2 of the Act.

Nature and Extent
Respondent shall pay Petitioner permanent partial disability benefits of **$735.37**/week for **37.5** weeks because the injuries sustained caused the **7.5%** loss use of a man as a whole as provided in Section 8(d)2 of the Act.

Penalties
Respondent shall pay to Petitioner penalties and fees of **$2,092.66**, as provided in Section 16 of the Act; **$5,231.66**, as provided in Section 19(k) of the Act; and **$10,000.00**, as provided in Section 19(l) of the Act.

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

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

Tiffany Kay

Signature of Arbitrator

8/7/18
Date

AUG 7 - 2018

PROCEDURAL HISTORY

This matter was originally scheduled to be heard before Arbitrator Douglas Steffenson (hereinafter "Arbitrator Steffenson") on March 26, 2018 in Chicago, Illinois. However, Arbitrator Tiffany Kay (hereinafter "Arbitrator Kay") covered Arbitrator Steffenson's trial call on March 26, 2018. Therefore, by agreement of both parties, this matter was tried before Arbitrator Kay and the decision rendered by Arbitrator Kay. Arbitrator Kay has examined the submitted records.

This case has been consolidated with the following cases: #10WC25879, 11WC17266 and 14WC24735.

SUMMARY OF FACTS AND EVIDENCE

May 4, 2010 accident – 10WC25879

The parties proceeded to hearing on March 26, 2018, with disputed issues as to whether the current condition of ill-being is causally connected to Mr. Donald Haepp's (hereinafter "Petitioner") injury, whether the City of Chicago (hereinafter "Respondent") is liable for unpaid medical bills, whether the Respondent is entitled to credit in accordance to §8(j) of the Act, the nature and extent of the injuries that occurred, whether the Petitioner is entitled to penalties under §19(k), §19(l) and attorney fees pursuant to §16, and whether the Petitioner is entitled to a wage differential. (ArbX1)

The parties stipulated that Respondent was operating under the Act on May 4, 2010. (Arb. X1) The parties stipulated that the date of the accident was May 4, 2010 and that the Petitioner and Respondent had a relationship of employer and employee, and that the accident arose out of during the course of employment. (ArbX1) The parties also stipulated that the Petitioner worked for the Respondent as a Carpenter, notice of the accident was given within the time limits stated in the Act, Petitioner was 55 years of age on the date of the accident, and married with 0 dependent children. (Arb.X1) The stipulated average weekly wage, calculated pursuant to Section 10 of the Act, was $1620.40. (Arb.X1)

The Petitioner testified that on May 4, 2010, he had been employed by Respondent as a carpenter in the Department of Fleet and Facility Management since 1999. Petitioner testified that on May 4, 2010 he was on duty and sustained an accidental injury to his left knee when he stepped in a hole while carrying a ladder. The Petitioner was directed to the Respondent's occupational clinic, Mercy Works. A May 27, 2010 MRI revealed a tear of the posterior horn of the lateral meniscus. Petitioner was referred to see Dr. Michael Maday at Midland Orthopedics by the Respondent and underwent left knee arthroscopic surgery on September 20, 2010. (PX2) The surgery revealed that the Petitioner had a flap tear in the posterior horn of the lateral meniscus. After the surgery the Petitioner underwent a regimen of post-operative physical therapy and continued to follow-up with Dr. Maday. (P.X2) On January 10, 2011 Petitioner returned to work full duty per Dr. Maday's release.

January 26, 2011 accident – 11WC17266

The parties proceeded to hearing on March 26, 2018, with disputed issues as to whether the current condition of ill-being is causally connected to Mr. Donald Haepp's (hereinafter "Petitioner") injury, whether the City of Chicago (hereinafter "Respondent") is liable for unpaid medical bills, whether the Respondent is entitled to credit in accordance to §8(j) of the Act, the nature and extent of the injury that occurred, whether the

Petitioner is entitled to penalties under §19(k), §19(l) and attorney fees pursuant to §16, and whether the Petitioner is entitled to a wage differential. (ArbX2)

The parties stipulated that Respondent was operating under the Act on January 26, 2011. (Arb. X2) The parties stipulated that the date of the accident was January 26, 2011 and that the Petitioner and Respondent had a relationship of employer and employee, and that the accident arose out of and during the course of employment. (ArbX2) The parties also stipulated that the Petitioner worked for the Respondent as a Carpenter, notice of the accident was given within the time limits stated in the Act, Petitioner was 56 years of age on the date of the accident, and married with 0 dependent children. (Arb.X2) The stipulated average weekly wage, calculated pursuant to Section 10 of the Act, was $1630.80. (Arb.X2)

On January 26, 2011, Petitioner was on duty when he was entering an elevator with tools in his hands. Petitioner testified that the elevator floor was raised approximately 6 to 8 inches above the lobby floor. As Petitioner attempted to enter the elevator, he tripped and fell into the elevator. Petitioner's fall resulted in him re-injuring his left knee. On February 9, 2011, following this incident, Petitioner returned to see Dr. Michael Maday, at Midland Orthopedics for treatment. (P.X2) At this visit Petitioner reported doing well until he reinjured his knee. (P.X2) Prior to the re-injury he reported doing well and had returned to work. Dr. Maday diagnosed the Petitioner with "a new injury, not related to his previous injury and he would need him to report this as such." (P.X2) However, he instructed the Petitioner to continue his full unrestricted activities. On February 23, 2011, Petitioner returned to see Dr. Maday and reported increased pain in the iliotibial band area. Dr. Maday assessed him with iliotibial band pain following his injury. At Petitioner's request, he received a left knee injection of Depomedrol and lidocaine to relieve his symptoms. On March 19, 2011, Petitioner underwent an MRI at MRI of River North. On April 6, 2011, Dr. Maday reviewed the MRI and assessed a moderate size radial free edge tear of the lateral meniscus that appeared to be a new tear in an area where there was previously not a tear. Dr. Maday opined that it appeared to be a new injury related to his injury with the elevator. Dr. Maday recommended the Petitioner have surgery to address the meniscal pathology. The Petitioner continued to work full duty while awaiting Worker's Compensation approval. (P.X2)

On September 8, 2011, Dr. Maday performed a left knee arthroscopy on Petitioner. (P.X2) The surgery also consisted of chondroplasty, patellofemoral joint and medial femoral condyle with partial lateral meniscectomy, removal of loose bodies, extensive debridement and injection of the iliotibial band performed by Dr. Maday (P.X2). After surgery, the Petitioner remained off work and began a new course of physical therapy. On November 23, 2011, Petitioner returned to see Dr. Maday. Petitioner reported still having difficulty with stairs, squatting and kneeling. Dr. Maday planned on allowing the Petitioner to return to work full duty as of December 1, 2011. (P.X2) Therapy notes confirm that Petitioner was instructed to avoid kneeling activities and excessive squatting. (PX4). On December 5, 2011, Petitioner was also evaluated at Advocate Occupational Clinic at the request of Respondent. (PX3). Respondent's physicians released Petitioner back to work with restrictions of no kneeling along with the medications Vicodin and Tramadol. (PX3).

Petitioner testified that Respondent accommodated his restrictions. However, he continued to experience difficulty with his left knee. On January 25, 2012, Petitioner returned to Dr. Maday complaining of continued pain in his left knee. (PX2). Dr. Maday recommended a repeat MRI. (PX2) A February 7, 2012 MRI revealed joint effusion of the left knee. (PX2) After reviewing the results of the MRI, Dr. Maday referred Petitioner to Dr. Robert Strugala for platelet rich plasma injections. (PX2) The first injection was completed on March 8, 2012, and a second injection was prescribed on April 12, 2012. (PX2) At that April 12, 2012 visit, Dr. Strugala noted residual symptoms in the left knee, recommended a home exercise program, and requested

authorization for an additional injection. (PX2) No additional authorization for further treatment was provided by Respondent.

On July 14, 2014, following a period of full duty work, Petitioner sought treatment for ongoing left knee symptoms with Dr. Mark Bowen of North Shore Orthopaedic Institute (PX28). Dr. Bowen noted that Petitioner has had three different surgeries in 2004, 2011 and 2012. (P.X10) He noted that Petitioner has restrictions in terms of squatting and twisting. Petitioner complained of only being able to walk one flight of stairs and then having to rest due to pain. (PX10) Dr. Bowen's physical exam revealed slight valgus alignment, palpable osteophytes and crepitation. Additionally, Dr. Bowen noted advanced lateral compartment degenerative arthritis and patellofemoral degenerative joint disease and referred Petitioner to Dr. Raju Ghate for consideration of a total knee replacement. (PX10)

On November 20, 2014, Petitioner attended an Independent Medical Examination (IME) with Dr. Brian Cole at Midwest Orthopedics. (PX25) Dr. Cole noted that Petitioner stated he had a work-related injury in 2003 and had a left knee arthroscopy. He noted that Petitioner told him he made a full recovery from that with no sequalae. Since the 2011 injury, Petitioner stated he had two arthroscopic surgeries to his left knee with Dr. Maday, "first 2011 (he says he was worse and did not recover well), and a second in 2012, also saying he made no change or improvement after that." (PX25) Dr. Cole noted that Petitioner told him he saw Dr. Mark Bowen for a second opinion and was told he would need a total knee replacement. After examination, Dr. Cole noted an impression of advanced osteoarthritis, left knee, and unresolved-aggravation of pre-existing condition. Dr. Cole opined that Petitioner still maintained symptoms that remained a sequelae of a work-related injury of January 26, 2011. He further stated that he appeared to have had sustained an aggravation of a pre-existing condition that has not been brought to a stable endpoint of care and remains and on-going aggravation of a pre-existing condition. Additionally, Petitioner was pursuing further care and has never had a stationary endpoint to bring his period of causally-related treatment to an end. Dr. Cole prescribed a total knee replacement and recommended in the meantime, that Petitioner could work in a restricted duty job with limited squatting, kneeling, climbing and minimum bending and stooping. (PX25). Dr. Cole also confirmed that all treatment to date was reasonable, necessary and related to his January 26, 2011 injury. (PX25)

On January 27, 2015, Petitioner was evaluated by Dr. Raju S. Ghate for the left knee. (PX11). Dr. Ghate recommended a cortisone injection and consideration for a total knee replacement. A cortisone injection was done at that time. (PX11) On April 21, 2015, a utilization review report was issued on behalf of Respondent and it was determined that the prescribed left knee total knee arthroplasty and inpatient hospital stay for 3 nights was certified and medically necessary. (P.X24) On June 1, 2015, Petitioner underwent left total knee replacement surgery performed by Dr. Raju Ghate. (PX11)

On November 3, 2015, Dr. Ghate evaluated Petitioner and recommended a course of work hardening. (PX11) On November 24, 2015, Petitioner returned to Dr. Ghate. (PX11). Dr. Ghate noted Petitioner continued to take Tramadol for occasional knee pain. (PX11) Dr. Ghate noted a good recovery from the total knee replacement and recommended Petitioner return to work December 1, 2015 with restrictions of no kneeling or squatting and return for a follow up visit in six months. (PX11) On June 24, 2016, Petitioner returned to Dr. Ghate for his one year follow up. (PX11) Dr. Ghate noted a good recovery, but left knee pain with twisting/pivoting, pain with stairs, and difficulty bending to the floor. X-rays that were taken at that time showed joint effusion. (PX11) Petitioner was still taking Tramadol for pain, and Dr. Ghate ordered Petitioner's work restrictions permanent. (PX11).

June 27, 2014 accident – 14WC24735

The parties proceeded to hearing on March 26, 2018, with disputed issues as to whether the current condition of ill-being is causally connected to Mr. Donald Haepp's (hereinafter "Petitioner") injury, whether the City of Chicago (hereinafter "Respondent") is liable for unpaid medical bills, whether the Respondent is entitled to credit in accordance to §8(j) of the Act, the nature and extent of the injury that occurred, and whether the Petitioner is entitled to penalties under §19(k), §19(l) and attorney fees pursuant to §16. (ArbX3)

The parties stipulated that Respondent was operating under the Act on June 27, 2014. (ArbX3) The parties stipulated that the date of the accident was June 26, 2014 and that the Petitioner and Respondent had a relationship of employer and employee, and that the accident arose out of and during the course of employment. (ArbX3) The parties also stipulated that the Petitioner worked for the Respondent as a Carpenter, notice of the accident was given within the time limits stated in the Act, Petitioner was 59 years of age on the date of the accident, and married with 0 dependent children. (ArbX3) The stipulated average weekly wage, calculated pursuant to Section 10 of the Act, was $1699.16. (ArbX3)

Petitioner testified that while on duty, on June 27, 2014, he was lifting drywall with a co-worker and felt a twinge in his stomach area and noted a bump in his belly button. (PX1) Petitioner testified that he finished completing the work and then reported the incident. Following the incident, Petitioner was directed to go to the City of Chicago's occupational clinic, Mercy Works, where he was seen by Dr. Homer Diadula (hereinafter "Dr. Diadula"). (PX1) Dr. Diadula diagnosed Petitioner with an umbilical hernia, ordered Petitioner off of work due to a work-related condition, and referred him to see Dr. Daniel Kacey (hereinafter "Dr. Kacey) at Mercy Hospital and Medical Center. (PX1) On July 1, 2014, Petitioner was seen by Dr. Kacey who noted that Petitioner had an acute umbilical hernia. (PX5) Dr. Kacey recommended surgical repair with simple preperitoneal mesh. (PX5) Dr. Kacey noted that Petitioner's expected disability related to repair would be 4-6 weeks. (PX5) Petitioner was referred to his family doctor regarding his overall fitness for surgery.

On July 1, 2014, Petitioner sought additional consultation with his primary care physician, Dr. Timothy Wollner of Little Company of Mary Affiliated Services (hereinafter "Little Company"). (PX6) Dr. Wollner discussed with Petitioner his treatment options, and Petitioner elected to pursue surgical repair. Dr. Wollner referred Petitioner to Dr. Michael Fiorucci (hereinafter "Dr. Fiorucci") to perform the surgery. (PX6) On July 24, 2014, Dr. Fiorucci performed an umbilical hernia repair with mesh. (PX6) Petitioner was discharged from the hospital with the restriction of no lifting over 15lbs. (PX7) On July 26, 2014, Petitioner was re-admitted to Little Company with abdominal pain and swelling. (PX7) Petitioner was diagnosed with postoperative constipation due to the narcotic medication given at the time of surgery and obstruction of the intestine. (PX7) Petitioner was treated and released from the hospital on July 28, 2014. (PX7) On August 6, 2014, Dr. Fiorucci re-evaluated Petitioner and noted he was doing well post-surgery. (PX6). On August 25, 2014 Petitioner returned back to work full duty with no restrictions concerning his umbilical hernia.

December 15, 2014 accident – 15WC1963

The parties proceeded to hearing on March 26, 2018, with disputed issues as to whether the current condition of ill-being is causally connected to Mr. Donald Haepp's (hereinafter "Petitioner") injury, whether the City of Chicago (hereinafter "Respondent") is liable for unpaid medical bills, whether the Respondent is entitled

to credit in accordance to §8(j) of the Act, the nature and extent of the injury that occurred, and whether the Petitioner is entitled to penalties under §19(k), §19(l) and attorney fees pursuant to §16. (ArbX4)

The parties stipulated that Respondent was operating under the Act on December 15, 2014. (Arb. X4) The parties stipulated that the date of the accident was December 15, 2014 and that the Petitioner and Respondent had a relationship of employer and employee, and that the accident arose out of and during the course of employment. (ArbX4) The parties also stipulated that the Petitioner worked for the Respondent as a Carpenter, notice of the accident was given within the time limits stated in the Act, Petitioner was 60 years of age on the date of the accident, and married with 0 dependent children. (Arb.X4) The stipulated average weekly wage, calculated pursuant to Section 10 of the Act, was $1714.72. (Arb.X4)

Petitioner testified that while on duty, December 15, 2014, he was hanging dry wall overhead and began to experience pain in his right shoulder. Petitioner reported the incident to the Respondent the next morning, December 16, 2014. On December 16, 2014, Petitioner sought treatment at Mercyworks with Dr. Diadula. Petitioner complained of difficulty raising his arm up and had pain in his neck and right shoulder. (PX1) Dr. Diadula diagnosed Petitioner with a right shoulder strain/sprain, right cervical sprain and right shoulder rule out labrum tear. (PX1) Dr. Diadula instructed the Petitioner to use over the counter Tylenol for pain and an MRI was ordered of the right shoulder to rule out glenoid or labrum tear. (PX1) Dr. Diadula ordered the Petitioner off work. (PX1)

On December 22, 2014, Petitioner returned to Mercy Works with complaints of pain. (PX1). Physical therapy and medication was prescribed and Petitioner was instructed to remain off work. (PX1). On December 29, 2014, Petitioner was re- examined and the Dr. found decreased range of motion and difficulty in lifting the right arm without pain. (PX1) On January 6, 2015, an MRI was approved and performed showing results positive for supraspinatus tendinopathy. (PX10) On January 8, 2015, a MercyWorks physician reviewed the MRI results, noted the supraspinatus defect, and recommended Petitioner see an orthopedic shoulder specialist, prescribed medication and instructed Petitioner to remain off work. (PX1) On January 19, 2015, Petitioner saw Dr. Mark Bowen (hereinafter "Dr. Bowen") of Northshore Orthopedics, who found no significant atrophy, asymmetry or swelling. (PX10) Dr. Bowen noted, after review of his MRI, that there was some strain pattern in the muscle, probable slight tendinopathy but no evidence of a full-thickness tear. Dr. Bowen's final impression was that there was a rotator cuff strain and recommended a course of physical therapy. (PX10) On March 18, 2015, Petitioner returned to Dr. Bowen with noted improvement but persistent signs of impingement. Petitioner was given a cortisone injection, instructed to continue physical therapy and to remain off work. (PX10) On April 29, 2015, Petitioner returned to Dr. Bowen complaining of pain and cracking with overhead lifting. (PX10) An exam on that date was again positive for impingement. (PX10) Dr. Bowen recommended a surgical decompression of the right shoulder after the completion of knee surgery and prescribed continued physical therapy and continued off work. (PX10)

On December 9, 2015, following the total knee replacement surgery, Petitioner returned to Dr. Bowen for his right shoulder (PX10). During his visit, Petitioner reported to Dr. Bowen that his right shoulder was not bothering him that much from a pain perspective but he still noticed some crepitation or noise through range of motion. (PX28) Petitioner also complained of numbness and tingling in both hands that radiated down his arm. (PX28) Dr. Bowen suggested an MRI and EMG results to evaluate Petitioner's cervical symptoms and ordered him off work. (PX28) On January 6, 2016, Petitioner returned to Dr. Bowen, who authorized Petitioner to return to work with no restrictions concerning his right shoulder effective January 7, 2016.

On April 17, 2017, Petitioner attended a vocational rehabilitation interview with Steven Blumenthal of Blumenthal Associates. (PX20) Mr. Blumenthal issued a report on June 20, 2017 based on his interview with the Petitioner.

CONCLUSIONS OF LAW

Arbitrator's Credibility Assessment/Summary of Testimony:

At hearing, the Petitioner had three witnesses testify, Mr. Edmund Sexton, Mr. Steven Blumenthol and the Petitioner. The Respondent had one witness testify, Mr. Elgin Swanigan. Overall the Arbitrator found the testimony of all of the witnesses to be truthful, credible and otherwise unrebutted.

Mr. Edmund Sexton, a business representative for the Carpenter's Union, was called to testify on behalf of Petitioner. Mr. Sexton testified that he has been in the Union for 13 years and as Union representative he represents all carpenters that work for Respondent. He also testified that he has been a carpenter for 25 years. Mr. Sexton testified to Petitioner's permanent restrictions of no kneeling or squatting that resulted from his 2011WC17266 injury. He testified that the restrictions of no kneeling or squatting for a carpenter would impact a majority of the jobs a carpenter would need to do. Additionally, he testified that if Petitioner was fired from working for the Respondent it would be difficult to place someone with his restrictions in another position as a carpenter elsewhere. However, he acknowledged after review of Petitioner's job duties, some of the duties could be completed without kneeling or bending. On cross-examination, Mr. Sexton testified that he had never observed Petitioner in the performance of his job duties as a Carpenter. Mr. Sexton acknowledged Petitioner's age of 63, and stated that there had been no grievances filed with the union regarding Petitioner's performance of his job duties.

Mr. Steven Blumenthal, a certified vocational rehabilitation counselor with Blumenthal Associates, was called to testify on behalf of Petitioner. On April 17, 2017, Petitioner attended a vocational rehabilitation interview with Mr. Blumenthal. (PX20) Mr. Blumenthal testified that he has been in his field for 38 years and had his practice for 16 years. (PX29) Mr. Blumenthal issued a vocational assessment of Petitioner in a report he issued on June 20, 2017. Mr. Blumenthal's testimony was consistent with his report. On cross-examination, Mr. Blumenthal acknowledged that his April 17, 2017 vocational rehabilitation interview with Petitioner lasted approximately an hour and a half. Mr. Blumenthal testified that the interview was the only meeting he attended with Petitioner. Mr. Blumenthal also testified that he spent less than an hour reviewing Petitioner's records prior to issuing his June 20, 2017 report. Mr. Blumenthal testified that he was aware that Petitioner works as a Carpenter for Respondent and has done so consistently since early 2016.

The Petitioner, Mr. Donald E. Haepp, III, was the last witness to testify on behalf of the Petitioner. Petitioner testified that he has worked for Respondent as a carpenter since 1999. Petitioner testified to his past medical history, mechanisms of injuries, restrictions in result of the injuries, courses of medical treatment and current subjective complaints in all of his consolidates cases (10WC25879, 11WC17266, 14WC24735 and 15WC1963). In addition, Petitioner testified to the unpaid medical bills he claims Respondent is liable for in each case.

At hearing, the Respondent had one witness testify on behalf of Respondent, Mr. Elgin Swanigan, General Foreman of Trades for the Department of Fleet and Facility Management. Mr. Swanigan testified that he supervised Petitioner's immediate supervisor, David Gin. Mr. Swanigan testified that, approximately two to

three times each week, he observes Petitioner perform his job duties as a Carpenter. Mr. Swanigan also testified that he has supervised Petitioner's work as a Carpenter since Petitioner returned to work in early 2016.

Mr. Swanigan testified to the quality of Petitioner's current work as a Carpenter. Mr. Swanigan testified that there are many tasks of a Carpenter that do not require kneeling or stooping, and that Petitioner consistently and competently performs these tasks for his Department. Mr. Swanigan reviewed the essential duties of a Carpenter and stated that Petitioner had demonstrated he was capable of performing all the listed functions within his restrictions. Mr. Swanigan reviewed the physical requirements for a Carpenter and noted that, of the seven physical requirements listed, only two were impacted by Petitioner's restrictions. In addition, he testified Petitioner performs valuable work for the Department. Mr. Swanigan testified that he supervises other Carpenters who perform work with restrictions and that, even amongst the Carpenters with no restrictions, many specialize in specific tasks. Mr. Swanigan testified that Petitioner works the same number of hours and days per week as other Carpenters within the Department. Mr. Swanigan testified that, if Petitioner was no longer employed by the Department, the Department would be forced to hire another Carpenter to replace Petitioner and perform his duties.

With respect to issue (F) whether the Petitioner's current condition of ill-being is causally related to the Injury, the Arbitrator finds as follows:

May 4, 2010 accident – 10WC25879

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that Petitioner did prove by a preponderance of the evidence that his current condition of ill-being is causally connected to his work accident on May 4, 2010.

In the prior 19(b) Decision, Arbitrator Prieto found that there was a causal relationship between Petitioner's work accident of May 4, 2010 and Petitioner's lateral meniscus tear of his left knee. This Decision was subsequently affirmed by the Commission on November 21, 2011. The Commission decision was not appealed by either party and became final after the expiration of the time for filing a written summons to the Circuit Court. The law of the case doctrine applies to matters before the Workers' Compensation Commission where a court's unreversed decision on an issue that has been litigated and decided settles the question for all subsequent stages of the action. *Help at Home v. Ill. Workers' Comp. Comm'n*, 305 Ill.App.3d 1150, 1151 (4th Dist. 2010). Here, a Decision was filed on March 7, 2011, appealed and subsequently affirmed by the Commission on November 21, 2011. Therefore, based on the law of the case doctrine, Petitioner's lateral meniscus tear of his left knee is deemed causally related to the accident of May 4, 2010.

January 26, 2011 accident – 11WC17266

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that Petitioner did prove by a preponderance of the evidence that his current condition of ill-being is causally connected to his work accident on January 26, 2011.

In the prior 19(b) Decision, Arbitrator Kelmanson found that there was a causal relationship between Petitioner's work accident of January 26, 2011 and the additional lateral meniscus tear of his left knee. This Decision was subsequently affirmed and modified by the Commission on September 24, 2012. The Commission decision was not appealed by either party and became final after the expiration of the time for

filing a written summons to the Circuit Court. The law of the case doctrine applies to matters before the Workers' Compensation Commission where a court's unreversed decision on an issue that has been litigated and decided settles the question for all subsequent stages of the action. Help at Home v. Ill. Workers' Comp. Comm'n, 305 Ill.App.3d 1150, 1151 (4th Dist. 2010). Here, a Decision was filed on January 3, 2012, appealed and subsequently affirmed/modified by the Commission on September 24, 2012. Therefore, based on the law of the case doctrine, Petitioner's additional meniscus tear of his left knee is deemed causally related to the accident of January 26, 2011.

The Arbitrator also finds that Petitioner did prove by a preponderance of the evidence that there is a causal relationship between the work accident of January 26, 2011 and Petitioner's subsequent total knee replacement on June 1, 2015. Dr. Cole, Respondent's IME examiner, agreed with Dr. Bowen that the total knee replacement was necessary. In addition, Dr. Cole stated in his report that all of the treatment to date was reasonable, necessary and related to Petitioner's January 26, 2011 injury. (PX25) Therefore, the Arbitrator finds that the Petitioner's total knee replacement is causally related to his work injury on January 26, 2011.

June 27, 2014 accident – 14WC24735

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that Petitioner did prove by a preponderance of the evidence that his current condition of ill-being is causally connected to his work accident on June 27, 2014. The Petitioner testified, the parties stipulated, that on June 27, 2014 Petitioner sustained a compensable injury while working for the Respondent. On the date of the accident Petitioner was lifting drywall and felt a twinge in his stomach area. (PX1) Petitioner testified that he reported the accident to the Respondent the same day, June 27, 2014. Petitioner sought medical attention the same day at the Respondent's occupational clinic, Mercy Works, with Dr. Diadula. (PX1) Dr. Diadula diagnosed Petitioner with an umbilical hernia and ordered him off work due to a "work-related condition". (PX1) On July 24, 2014, Dr. Fiorucci performed an umbilical hernia repair with mesh. (PX6) Petitioner was discharged from the hospital with the restriction of no lifting over 15lbs. There was no evidence produced suggesting any other causes or prior injuries or treatment related to a hernia. Therefore, the Arbitrator finds that Petitioner's condition of ill-being is causally related to his work injury of June 27, 2014.

December 15, 2014 accident – 15WC1963

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that Petitioner did prove by a preponderance of the evidence that his current condition of ill-being is causally connected to his work accident on December 15, 2014. The Petitioner testified, the parties stipulated, that on December 15, 2014 Petitioner sustained a compensable injury while working for the Respondent. On the date of the accident Petitioner was hanging drywall overhead, and began to experience pain in his right shoulder. Petitioner reported the incident to the Respondent the next morning, December 16, 2014. On December 16, 2014, Petitioner sought treatment at Mercyworks with Dr. Diadula. Dr. Diadula diagnosed the Petitioner with a right shoulder strain/sprain, right cervical sprain and right shoulder rule out labrum tear. (PX1) On December 22, 2014, Petitioner returned to Mercy Works with complaints of pain. (PX1) Physical therapy and medication was prescribed and Petitioner was instructed to remain off work. (PX1). On January 19, 2015, Petitioner saw Dr. Mark Bowen (hereinafter "Dr. Bowen") of Northshore Orthopedics, who found no significant atrophy, asymmetry or swelling. (PX10) Dr. Bowen noted, after review of his MRI, that there was some strain pattern in the muscle, probable slight tendinopathy but no evidence of a full-thickness tear. Dr. Bowen's final impression was that there was a rotator cuff strain and recommended he undergo a course of physical therapy. (PX10) On January 6, 2016, Petitioner returned to Dr. Bowen, who authorized Petitioner to return to work with

no restrictions concerning his right shoulder effective January 7, 2016. There was no evidence produced suggesting any other causes, prior shoulder injuries or treatment related to Petitioner's right shoulder. Therefore, the Arbitrator finds that Petitioner's condition of ill-being is causally related to his work injury of December 15, 2014.

With respect to issue (J), whether the Respondent paid for all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

May 4, 2010 accident – 10WC25879

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that the medical services provided to the Petitioner were reasonable and necessary to cure his condition of ill-being causally connected to his accident on May 4, 2010. Petitioner submitted into evidence a medical bill from Radiological Physicians in the amount of $46.00 (PX12), for x-rays prescribed by Respondent's occupational clinic MercyWorks on May 11, 2010. Corresponding medical records received into evidence confirm that Petitioner was evaluated at MercyWorks on May 11, 2010 and x-rays were performed. (PX1). This bill was not paid by Respondent and was sent to collections. (PX12). The Arbitrator finds that the aforementioned service was reasonably required to diagnose, treat, cure and relieve Petitioner from the effects of the injury. Additionally, the Arbitrator finds that the service was causally related to Petitioner's work injury. Therefore, the Arbitrator awards the remaining unpaid balance of $46.00 pursuant to the fee schedule.

January 26, 2011 accident – 11WC17266

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that the medical services provided to the Petitioner were reasonable and necessary to cure his condition of ill-being causally connected to his accident on January 26, 2011. Petitioner submitted into evidence a medical bill in the amount of $65,303.09 from Northshore Health for services related to Petitioner's left knee replacement on June 1, 2015. (P.X18) A review of those charges reveal Respondent paid this bill in full on January 10, 2017. (PX18) Additionally, Petitioner submitted into evidence out-of-pocket expenses regarding prescriptions and parking expenses totaling $282.01. (PX23) The Arbitrator finds that the aforementioned expenses were reasonably required to treat, cure and relieve Petitioner from the effects of the injury. Additionally, the Arbitrator finds that the service was causally related to Petitioner's work injury. Therefore, having determined that the Petitioner's condition of ill being is relative to his work injury, the Arbitrator awards and orders Respondent to reimburse the Petitioner for the out-of-pocket expenses in the amount of $282.01.

June 27, 2014 accident – 14WC24735

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that the medical services provided to the Petitioner were reasonable and necessary to cure his condition of ill-being causally connected to his accident on June 27, 2014. Petitioner submitted into evidence a medical bill in the amount of $11, 685.69 from Little Company for services related to Petitioner's hospitalization on July 26-28, 2014 due to complications from the original July 24, 2014 umbilical hernia surgery. Respondent furnished payment for these services on November 9, 2015. (PX14) Petitioner submitted into evidence a bill from Dr. Kacey in the amount of $327.00 for an office consultation regarding the performance of his umbilical hernia surgery. (PX13) The Arbitrator finds that the aforementioned expense was

reasonably required to treat, cure and relieve Petitioner from the effects of the injury. Additionally, the Arbitrator finds that the service was causally related to Petitioner's work injury. The Arbitrator finds the Respondent responsible for this bill.

Petitioner submitted into evidence charges from Evergreen Emergency Services in the amount of $540.00 for emergency room services on July 26, 2014 when the Petitioner returned post-surgery for complications. (PX15) Additionally, Petitioner had a CT scan performed on him when he returned to the Emergency Room on July 26, 2014 in order to diagnose his complaints of abdominal pain. Petitioner submitted into evidence a bill in the amount of $686.00 for the CT scan performed on July 26, 2014 during his hospitalization. (PX16) The Arbitrator finds that the aforementioned expenses were reasonably required to treat, cure and relieve Petitioner from the effects of the injury. Additionally, the Arbitrator finds that the services were causally related to Petitioner's work injury. The Arbitrator finds the Respondent responsible for the aforementioned bills pursuant to the fee schedule.

December 15, 2014 accident – 15WC1963

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that the medical services provided to the Petitioner were reasonable and necessary to cure his condition of ill-being causally connected to his accident on December 15, 2014. Petitioner submitted into evidence a medical bill in the amount of $57,802.00 from Athletico for physical therapy services prescribed by Petitioner's treating physician, Dr. Mark Bowen, related to Petitioner's right shoulder injury. (PX17) A review of those charges reveals that while Respondent has made payments towards this bill, there remains an outstanding balance of $8,995.32. (PX17) Based on the above findings, the Arbitrator finds Respondent is responsible for remaining balance of this bill. Additionally, Petitioner submitted into evidence a bill from Advanced Medical Imaging Center, for an MRI prescribed by Dr. Bowen in the amount of $1,468.00. (PX19) Based on the above findings, the Arbitrator finds the Respondent responsible for the aforementioned bills pursuant to the fee schedule.

With respect to issue (L), what is the Nature and Extent of the injury, the Arbitrator finds as follows:

May 4, 2010 accident – 10WC25879

The Arbitrator finds that since the Petitioner re-injured his left knee after resuming full duty work in January of 2011 and filed a subsequent, consolidated claim 11 WC 17266, the Arbitrator has merged the awards and will address permanency for both claims on the later filing.

January 26, 2011 accident – 11WC17266

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Petitioner made the argument that he should receive a wage differential award under §8(d)1 of the Act because he sustained an impairment of his earning capacity due to the injury that occurred on January 26, 2011 (11WC17266). Specifically, evidence and testimony were introduced at trial regarding Petitioner's current post-injury employment in comparison to his potential wages if the Petitioner were to work in a competitive job market. In this case, Petitioner testified, in February 2016, he returned to work as a Carpenter for the Department of Fleet and Facility management despite his permanent restrictions of no kneeling or squatting.

Petitioner testified that he has worked continuously in this capacity since February of 2016. Additionally, Petitioner testified that he currently earns $46.35 per hour, which is the same wage as the other Carpenters he works with and is a pay increase from the wage he earned prior to his January 26, 2011 accident. Therefore, the Arbitrator finds that the evidence does not support a wage differential award under §8(d)1 of the Act.

The Petitioner testified, and the parties stipulated, that on May 4, 2010, he had been employed by Respondent as a carpenter in the Department of Fleet and Facility Management since 1999. Petitioner testified that on May 4, 2010 he was on duty and sustained an accidental injury to his left knee when he stepped in a hole while carrying a ladder. Additionally, the Petitioner testified that on January 26, 2011, he was on duty when he was entering an elevator with tools in his hands. Petitioner testified that the elevator floor was raised approximately 6 to 8 inches above the lobby floor. As Petitioner attempted to enter the elevator, he tripped and fell into the elevator. Petitioner's fall resulted in him re-injuring his left knee. The Arbitrator finds that since the Petitioner re-injured his left knee and filed a subsequent, consolidated claim 11 WC 17266, the Arbitrator has merged the awards and will address permanency for both claims below. The Arbitrator finds that the Petitioner reached MMI for his May 4, 2010 accident on January 10, 2011 and MMI for his January 26, 2011 accident on December 1, 2015. Therefore, his claim for any permanent partial disability is ripe for adjudication for both claims.

For injuries that occur before September 1, 2011, the Commission evaluates the physical impairment and the effect of the disability on the injured employee's life. Factors that may be considered include the individual's age, skill, occupation, training, inability to engage in certain kinds of activities, pain, stiffness or limitation of motion.

With regard to the Petitioner's age, he was 55 years old at the time of his work-related injury on May 4, 2010 and 56 years old at the time of his January 10, 2011 accident. On the date of hearing the Petitioner testified to being 63 years old. The Petitioner testified that he was returned to work full duty without restrictions after his May 4, 2010 accident. However, after his January 10, 2011 accident he returned to work with permanent restrictions of no kneeling or squatting with Respondent. The Petitioner testified that he is still working in his occupation as a Carpenter but explained that he is only given assignments that do not require kneeling or squatting. Nevertheless, he still has difficulty and pain in the left leg and still takes prescription medication for pain. Petitioner's advanced age also suggests a shorter life expectancy and that the symptoms will likely slow the Petitioner down in comparison to younger, healthier workers not experiencing the same symptoms. Therefore, the Arbitrator gives some weight to this factor.

With regard to the Petitioner's skill, occupation, and training, the Arbitrator notes that the Petitioner testified that he has been a Carpenter with the Respondent since 1999. Petitioner testified that he was able to return to work to the same position, with the same title, and same pay. Petitioner has continued working for the Respondent in the same position he held prior to his May 4, 2010 and January 10, 2011 accidents. However, after returning from his January 10, 2011 accident Petitioner was returned to work with permanent restrictions of no kneeling or squatting. Mr. Edmund Sexton testified that Petitioner would not be able to be placed for work as a carpenter in a competitive labor marker given his restrictions. Mr. Sexton testified, if one cannot kneel or squat, he cannot perform the duties of a carpenter and would not be able to find a job as a carpenter. Respondent's representative, Mr. Elgin Swanigan, also testified that Petitioner could not perform the full functions of a carpenter. On June 20, 2017, Mr. Steven Blumenthal, the vocational rehabilitation counselor who evaluated Petitioner, issued a report stating that "but for his accommodated duty by the City of Chicago, Mr. Haepp would not otherwise be qualified to perform work as a journeyman carpenter." (PX20) Therefore, the Arbitrator gives significant weight to this factor.

With regard to the Petitioner's inability to engage in certain kinds of activities, pain, stiffness or limitation of motion the Petitioner testified that today he still has the permanent restrictions of no kneeling or squatting while at work. Petitioner testified that his left knee still feels numb in the front, in some positions if he moves it a certain way it gets stuck in place and he has to help move his knee. Accordingly, the Arbitrator gives significant weight to this factor in determining the Petitioner's permanent partial disability.

Due to the evidence and testimony supporting the seriousness, permanency and injuries that partially incapacitate him from pursuing the duties of his usual and customary line of employment but have not resulted in impairment in his earning capacity the Arbitrator is awarding compensation under §8(d)2 (person as a whole) of the Act. In a May of 2015 settlement for claims 00 WC 64646 and 00 WC 64647 the Petitioner was awarded 22.5% of his left leg, the same body part at issue in Petitioner's 10WC25879 and 11WC17266 cases. (R.X1) Due to the Arbitrator awarding the Petitioner compensation under §8(d)2 of the Act, credit for the Respondent from Petitioner's 2000 settlement is not relevant here.

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 20 % loss of use of a man-as-a-whole pursuant to §8(d)2 of the Act.

June 27, 2014 accident – 14WC24735

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Petitioner testified, and the parties stipulated, that while working for the Respondent on June 27, 2014 he sustained an injury that resulted in an umbilical hernia. (PX1) On August 25, 2014 Petitioner returned back to work full duty with no restrictions concerning his umbilical hernia. The Arbitrator finds that on August 25, 2014 the Petitioner reached MMI and therefore the claim for any permanent partial disability is ripe for adjudication.

For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the Section 8.1b of the Illinois Workers' Compensation Act. Here, the accident occurred on June 27, 2014 making section 8.1b applicable. With regard to subsection (i) of §8.1b(b), the Arbitrator notes that there was not a permanent partial disability impairment report and/or opinion submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b, the occupation of the employee, the Arbitrator notes that that record reveals that the Petitioner was employed as a Carpenter for the Department of Fleet and Facility Management for the Respondent. Petitioner was able to return to work, full duty without restrictions, in his prior capacity on August 26, 2014. Petitioner testified that he still experiences "twinges now and then" but he mainly just tries not to pick up heavy stuff. He testified that he still experiences some discomfort but it is better that it was. The Arbitrator concludes that the Petitioner's ability to perform work will be adversely affected by his injury if he is required to lift heavy objects in the performance of his duties. The Arbitrator therefore gives some weight to this factor.

With regard to subsection (iii) of §8.1b, the Arbitrator notes that Petitioner was 59 years old at the time of the accident. The Petitioner's permanent partial disability with regard to his injury will be something that could potentially slow the Petitioner down in comparison to younger, healthier workers not experiencing the same symptoms. Therefore, the Arbitrator gives some weight to this factor.

With respect to subsection (iv) of §8.1b, Petitioner's future earning capacity appears to be undiminished as a result of his injuries because he was returned back to work, full-time, in his prior position with his compensation unaffected. At hearing, Petitioner testified that he currently earns $46.35 per hour, which is the current union rate for all Carpenters employed by Respondent. The Arbitrator concludes that there was no evidence suggesting the injury has had any effect on Petitioner's future earning capacity and therefore gives little weight to this factor.

With respect to subsection (v) of §8.1b, evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner's injury is clearly delineated with medical records submitted into evidence and further corroborated by his testimony on March 26, 2018. The Petitioner testified that today he still feels twinges now and then, he tries not to pick up heavy items, and still experiences discomfort with the mesh but that its better than the discomfort he had. Petitioners' original complaints and symptoms regarding his hernia at trial coincide with his complaints to the physicians he was seen by. The Arbitrator concludes that the evidence demonstrates that the Petitioner sustained permanent partial disability regarding the complaints of pain and places some weight on the foregoing 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 of loss use of a person as a whole as a result of his work-related accident.

December 15, 2014 accident – 15WC1963

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Petitioner testified, and the parties stipulated, that while working for the Respondent on December 15, 2014 he sustained an injury that resulted in a rotator cuff strain to Petitioner's right shoulder with a course of physical therapy. (PX10) On January 6, 2016, Dr. Bowen, authorized Petitioner to return to work without restrictions concerning his right shoulder. The Arbitrator finds that on January 6, 2016 the Petitioner reached MMI and therefore the claim for any permanent partial disability is ripe for adjudication. (PX28)

For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the Section 8.1b of the Illinois Workers' Compensation Act. Here, the accident occurred on December 15, 2014 making section 8.1b applicable. With regard to subsection (i) of §8.1b(b), the Arbitrator notes that there was not a permanent partial disability impairment report and/or opinion submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b, the occupation of the employee, the Arbitrator notes that that record reveals that the Petitioner was employed as a Carpenter for the Department of Fleet and Facility Management for the Respondent. Petitioner was able to return to work, full duty without restrictions, in his prior capacity on January 6, 2016. Petitioner testified that he still experiences pain, soreness and limited range of motion in his shoulder. He has noticed that overhead work is harder because he has problems keeping his arms in the air as long. However, he testified that he can still do the overhead work. He testified that he has to take a break to let the pain "die down". The Petitioner's shoulder injury may make performing overhead work harder in the future. The Arbitrator concludes that the Petitioner's ability to perform work will be adversely affected by

his injury if he is required to use his right shoulder in the performance of his duties. The Arbitrator therefore gives some weight to this factor.

With regard to subsection (iii) of §8.1b, the Arbitrator notes that Petitioner was 60 years old at the time of the accident. The Petitioner's permanent partial disability with regard to his left shoulder will be something that could potentially slow the Petitioner down in comparison to younger, healthier workers not experiencing the same symptoms. Therefore, the Arbitrator gives some weight to this factor.

With respect to subsection (iv) of §8.1b, Petitioner's future earning capacity appears to be undiminished as a result of his shoulder injury because he was returned back to work, full-time, in his prior position with his compensation unaffected. At hearing, Petitioner testified that he currently earns $46.35 per hour, which is the current union rate for all Carpenters employed by Respondent and is a higher wage than Petitioner earned at the time of his accident. The Arbitrator concludes that there was no evidence suggesting the injury has had any effect on Petitioner's future earning capacity and therefore gives little weight to this factor.

With respect to subsection (v) of §8.1b, evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner's injury to his right shoulder is clearly delineated with medical records submitted into evidence and further corroborated by his testimony on March 26, 2018. The Petitioner testified at trial that today getting out of cars is difficult, overhead work is harder, at times he has to pick his arm up and move it, and he still experiences numbness. Petitioner testified that he takes Tramidol to "take edge of the pain away." Petitioners' original complaints and symptoms regarding his left shoulder at trial coincide with his complaints to the physicians he was seen by. The Arbitrator concludes that the evidence demonstrates that the Petitioner sustained permanent partial disability regarding the complaints of pain and places significant weight on the foregoing 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 7.5 % loss of loss use of a person as a whole as a result of his work-related accident.

With respect to issue (M), whether the Petitioner is entitled to penalties/attorney's fees under §19(k), §19(l) and §16, the Arbitrator finds as follows:

May 4, 2010 accident – 10WC25879

The Petitioner submitted into evidence a medical bill from Radiological Physicians in the amount of $46.00 (PX12), for x-rays prescribed by Respondent's occupational clinic Mercy Works on May 11, 2010. Corresponding medical records received into evidence confirm that Petitioner was evaluated at Mercy Works on May 11, 2010 and x-rays were performed. (PX1) This bill was not paid by Respondent and was sent to collections. (PX12) The Arbitrator awards the remaining unpaid balance of $46.00 pursuant to the fee schedule. However, after review of the totality of the evidence, the Arbitrator finds no penalties or fees shall be imposed.

January 26, 2011 accident – 11WC17266

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. Section 19(l) of the Act states that "(i)f the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In case the employer or his or her insurance carrier shall without good and just cause

fail, neglect, refuse or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30.00 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000.00. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay.

On November 20, 2014, Respondent had an IME completed on Petitioner with Dr. Brian Cole at Midwest Orthopedics. During this visit Dr. Cole noted that Petitioner saw Dr. Mark Bowen 2 months prior, for a second opinion, and was told he needed a total knee replacement. (PX25) After examination, Dr. Cole concurred that Petitioner needed to undergo total knee replacement for his left knee. Dr. Cole stated that this would be "his only means of definitive management to garner relief of his left knee pain." (P.X25) Additionally he opined that "treatment to date has been reasonable, necessary, and related to the injury date in question." (PX25) Petitioner submitted into evidence a medical bill in the amount of $65,303.09 from Northshore Health for services related to Petitioner's left knee replacement on June 1, 2015. (PX18) A review of those charges reveal Respondent did not pay this bill until January 10, 2017, over a year and a half from the date of service. (PX18)

The Respondent failed to present any evidence to justify its failure to pay the outstanding medical bill for treatment prescribed by its own occupational physician. (PX25) Respondent has an affirmative burden to rebut the presumption that a delay of 14 days is unreasonable. Respondent failed to present any evidence to rebut that presumption. The Arbitrator finds the failure to provide benefits under the Act to be unreasonable and orders penalties pursuant to Section 19(l) of the Act in the maximum amount of $10,000.00.

June 27, 2014 accident – 14WC24735

The Petitioner submitted into evidence a medical bill in the amount of $11, 685.69 from Little Company for services related to Petitioner's hospitalization on July 26-28, 2014 due to complications from the original July 24, 2014 umbilical hernia surgery. Respondent furnished payment for these services on November 9, 2015. (PX14) After review of the totality of the evidence, the Arbitrator finds that no penalties or fees shall be imposed.

December 15, 2014 accident – 15WC1963

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. Section 19(l) of the Act states that "(i)f the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30.00 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000.00. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay.

The Petitioner submitted into evidence a medical bill in the amount of $57,802.00 from Athletico Physical Therapy for physical therapy services prescribed by Petitioner's treating physician, Dr. Mark Bowen, related to Petitioner's right shoulder injury. (PX17) The first PT encounter was on January 20, 2015 and the last on November 23, 2015. (PX17) A review of those charges reveals that while Respondent has made payments towards this bill, there remains an outstanding balance of $8,995.32. (PX17) Additionally, Petitioner submitted into evidence a bill from Advanced Medical Imaging Center, for an MRI prescribed by Dr. Bowen and completed on December 16, 2015 in the amount of $1,468.00. (PX19)

The Respondent failed to present any evidence to justify its failure to pay the outstanding medical bills. Respondent has an affirmative burden to rebut the presumption that a delay of 14 days is unreasonable. Respondent failed to present any evidence to rebut that presumption. Therefore, the Arbitrator finds the failure to provide benefits under the Act to be vexatious and unreasonable and orders penalties pursuant to Section 19(k) of the Act in the amount of $5,231.66 (50% of outstanding medical of $10,463.32 ($8,995.32 + $1468.00 = $10,463.32). Pursuant to Section 19(l), the Arbitrator further awards penalties in the amount of $10,000.00. Finally, the Arbitrator awards attorneys' fees pursuant to Section 16 of the Act in the amount of $2,092.66.

With respect to issue (N), whether the Respondent is due any credit pursuant to §8j of the Act, the Arbitrator finds as follows:

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Respondent claims that it is entitled to a credit pursuant to 820 ILCS 305/8(j). §8(j) states Respondent is entitled to a credit "in the event the injured employee receives benefits, including medical, surgical or hospital benefits under any group plan covering non-occupational disabilities contributed to wholly or partially by the employer, which benefits should not have been payable if any rights of recovery existed under the Act." However, an employer has the burden to establish its entitlement to a §8(j) credit. Elgin Board of Education School District U-46 v. Illinois Workers' Compensation Commission, 949 N.E.2d 198, 350 Ill.Dec. 710 (1st Dist. 2011). During the trial, Respondent failed to present any evidence that it contributed wholly or partially to a group plan or that payments would have been payable irrespective of an accidental injury under the Act. At the end of trial, during the admission of evidence, the Respondent attempted to present into evidence a printout of an itemization of benefits and payments made by the City of Chicago Medical Care Plan dating from July 2, 2013 until May 21, 2016. (RX3). However, the Petitioner objected to its admission based on the fact that there was no testimony laying foundation for this exhibit to address Petitioner's objections. The Arbitrator reserved her ruling and at this time is sustaining the Petitioner's objection and not receiving the Respondent's exhibit into evidence. Therefore, the Arbitrator finds that Respondent has not met its burden of proof establishing entitlement to a §8(j) credit for benefits extended by Petitioner's health plan.

With respect to the objections by Petitioner regarding Respondent's Exhibits #3, #5, and #6, the Arbitrator finds as follows:

Respondent Exhibit #3: Itemization of benefits paid by the city of Chicago Medical Care Plan

At the end of the trial, during the admission of evidence, the Respondent attempted to enter into evidence Respondent's Exhibit #3 -a printout of an itemization of benefits and payments made by the City of Chicago Medical Care Plan dating from July 2, 2013 until May 21, 2016. (RX3) The Petitioner objected to the admission of the itemization of benefits because no foundation was provided for this exhibit to address Petitioner's objections. The Arbitrator sustains the Petitioner's objection based upon a lack of foundation being provided for the exhibit and it is not received into evidence. The Arbitrator gives no consideration to Respondent's exhibit 3.

Respondent Exhibit #5: Work Order Assignments Report (Form 2FM)

At the end of the trial, during the admission of evidence, the Respondent attempted to enter into evidence exhibit #5- 2 FM Work Order Assignments Report for the Petitioner. The report was introduced during the

direct examination of Respondent's witness, Mr. Swanigan. Mr. Swanigan testified that the report was a print out of Petitioner's work order assignments that Petitioner has been assigned and completed from the beginning of 2018 through the date of hearing. (RX5)

The Petitioner objected to the admission of exhibit #5 based upon its relevance and the doctrine of completeness for it only being a "snapshot" of Petitioner's work and not reflecting all of the work that he does. The Arbitrator overrules the Petitioner's objection based upon relevance. However, the Arbitrator sustains the Petitioner's objection based upon the doctrine of completeness. Therefore, exhibit #5 – the work order assignment will not be received into evidence. The Arbitrator gives no consideration to Respondent's exhibit 5.

Respondent Exhibit #6: Petitioner's Performance Evaluation issues on June 30, 2017

At the end of the trial, during the admission of evidence, the Respondent attempted to enter into evidence Exhibit #6 a performance evaluation completed on the Petitioner. The evaluation was introduced during the direct examination of Respondent's witness, Mr. Swanigan. Mr. Swanigan testified that Petitioner's Performance Evaluation Form was issued on June 30, 2017 and had been completed by Petitioner's immediate supervisor, Mr. Gin. Additionally, Mr. Swanigan testified that the evaluation covered Petitioner's work for the one year period from July 2016 through July 2017. (RX6)

The Petitioner objected to the admission of the Petitioner's performance evaluation/ Respondent's exhibit #6 based upon the doctrine of completeness. The Petitioner pointed out through testimony from Mr. Swanigan, there was a Part I and Part II of the document that was not offered to be admitted into evidence with Exhibit #6. The Arbitrator sustains the Petitioner's objection based upon the doctrine of completeness and the performance evaluation will not be received into evidence. The Arbitrator gives no consideration to Respondent's exhibit 6.

Tiffany Kay

8/7/18

Signature of Arbitrator   Date

STATE OF ILLINOIS)	[X] 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	[X] None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GILBERTO PEREIRO,
Petitioner,

vs. NO: 16 WC 12818

CITY OF CHICAGO,
Respondent.

19IWCC0507

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of permanent partial disability (PPD) benefits, 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.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 29, 2018 is hereby affirmed and adopted.

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

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

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

DATED: SEP 16 2019

DDM/tdm
o9/11/19
052

D. Douglas McCarthy

Stephen Mathis

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PEREIRO, GILBERTO
Employee/Petitioner

Case# **16WC012818**

CITY OF CHICAGO
Employer/Respondent

19IWCC0507

On 11/29/2018, 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 2.47% 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:

4564 ARGIONIS & ASSOCIATES LLC
AL KORITSARIS
180 N LASALLE ST SUITE 1925
CHICAGO, IL 60601

0010 CITY OF CHICAGO LAW DEPT
DANIEL KALLIO
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)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Gilberto Pereiro
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # 16 WC 12818

Consolidated cases: ______

19IWCC0507

An *Application for Adjustment 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 **September 21, 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. [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 ______

FINDINGS

On **February 22, 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 $**41,478.62**; the average weekly wage was $**797.67**.

On the date of accident, Petitioner was **47** years of age, ***married*** with **2** dependent children.

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

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

Respondent shall be given a credit of $ for TTD, $ for TPD, $ for maintenance, and $ 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

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $3,486.00 to Athletico and $12,191.85 to G & T Orthopaedics, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive a credit, pursuant to Section 8(j) of the Act, for medical benefits paid by private group insurance or other entity and Respondent shall hold Petitioner harmless from any claims by any providers for services for which Respondent is receiving a credit under Section 8(j) of the Act, as set forth in the Conclusions of Law attached hereto.

Respondent shall pay Petitioner the sum of **$478.60**/week for a further period of **125.6 weeks**, as provided in Section **8(d)(2) and 8(e)** of the Act, because the injuries sustained caused **20% loss of a left arm and 15% MAW,** as set forth in the Conclusions of Law attached hereto.

Respondent shall pay Petitioner compensation that has accrued from February 22, 2016 through September 21, 2018 and shall pay the remainder of the award, in 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

11/29/2018
Date

NOV 29 2018

Gilberto Pereiro v. City of Chicago; Case #16 WC 12818

Procedural History

This matter was tired before Arbitrator Frank Soto on September 21, 2018. The issues in dispute are whether Petitioner's current condition of ill-being is causally connected to his injury of February 22, 2016, whether Respondent is liable for unpaid medical bills from G &T Orthopedics and Athletico and the nature and extent of Petitioner's injury. The parties stipulated to accident and that Petitioner was correctly paid TTD benefits from 2/26/2016 through 3/26/2018 representing 108 4/7 weeks or the sum of $57,359.50. (Arb. Ex. #1).

Findings of Fact

Gilberto Pereiro (hereafter referred to as "Petitioner") worked for the City of Chicago (hereinafter referred to as "Respondent") as a tree cutter in the Department of Forestry. On February 22, 2016, Petitioner was attempting to remove a large tree branch when the glove on his left hand became snagged on a large tree branch pulling his left arm. Petitioner testified to feeling a sharp pain in his elbow and bicep and feeling a tingling in his left ring and pinky fingers.

That same day, Petitioner sought medical treatment at U.S. Healthworks. Petitioner reported left elbow pain. Petitioner was diagnosed with a left forearm muscle and tendon strain. Petitioner was proscribed Ibuprofen and he returned to work without restrictions. (PX 6). Petitioner returned to U.S. Healthworks on February 25, 2016 complaining of left elbow and bicep pain. Petitioner was placed on light duty and proscribed occupational therapy. On March 22, 2016, a MRI of the left elbow was ordered. (PX 6).

On March 23, 2016, Petitioner underwent an MRI of the left elbow at Athlete Imaging. On April 14, 2016, Petitioner was examined by Dr. Poepping of U.S. Healthworks. Dr. Poepping reviewed the MRI he indicated the MRI showed an intact biceps tendon with no evidence of a tear. Petitioner reported biceps cramping, weakness and difficulties with certain types of rotational type activities such as turning a keel. Petitioner further reported that he has been working and that his symptoms are worsening. Petitioner complained of pain in the anterior aspect of his left proximal forearm and elbow. Dr. Poepping noted that Petitioner has all the signs and symptoms of a biceps tendon tear. Dr. Poepping indicated that he was concerned that

Petitioner may have a biceps tendon tear, so he recommended repeating the MRI to establish the integrity of the tendon. (PX 1).

On April 28, 2016, the Petitioner returned to Dr. Poepping to review the MRI which showed an extensive partial tear of the distal biceps tendon. Dr. Poepping noted that some fibers were still attached to the biceps tendon located at the radial tuberosity. Dr. Poepping ordered one month of therapy before recommending surgery. Thereafter, Dr. Poepping recommended surgery to repair the left distal bicep which was performed on August 30, 2016. (PX. 1).

On September 8, 2016, Petitioner returned to Dr. Poepping for status post left distal biceps tendon repair surgery. Petitioner reported an overall improvement of the elbow pain. Dr. Poepping recommended Physical therapy was recommended. (PX 1).

On October 6, 2016, Petitioner followed up with Dr. Poepping who noted that Petitioner had been participating in therapy when he started to develop pain in both the left elbow and shoulder. The examination of the left shoulder showed tenderness over the proximal biceps tendon in the anterior shoulder with diffused pain along the posterior joint line and posterior greater tuberosity. On March 2, 2017, Petitioner returned to Dr. Poepping reporting increased left elbow pain and left shoulder pain. At that time, work conditioning was recommended. (PX 1).

Petitioner returned to Dr. Poepping on April 6, 2017. At that visit, Petitioner reported decrease of strength during work conditioning and sever pain in the left anterior shoulder. Dr. Poepping diagnosed left proximal long head of the biceps tendinitis, which he opined was, a direct result of his distal biceps surgery. Dr. Poepping recommended continuing with work hardening and possible injections. (PX 1).

On June 1, 2017, Petitioner returned to Dr. Poepping complaining of persistent left anterior and superior shoulder pain. Dr. Poepping recommended left shoulder arthroscopic subacromial decompression surgery. Petitioner underwent the surgery on July 19, 2017.

On July 27, 2017, Petitioner followed up with Dr. Poepping for post left shoulder arthroscopic subacromial decompression, distal clavicle excision, debridement and open subpectoral biceps tenodesis. At that visit, Dr. Poepping recommended physical therapy. (PX 1). On August 24, 2017, Dr. Poepping recommended additional physical therapy. (PX 1).

Petitioner continued treating with Dr. Poepping until March 15, 2018. On that date, Dr. Poepping noted that Petitioner was feeling better, after completing work conditioning, Petitioner indicated that he would like to return to work. Dr. Poepping noted that Petitioner still reports discomfort in the shoulder, but, he released Petitioner to return to work, full duty. (PX 1).

Petitioner testified that he returned to work and has been performing the same job as he was prior to his injury. Petitioner testified that some days are better than others and he experiences pain depending on the amount of work he performs. Petitioner takes ibuprofen for pain. Petitioner testified that his left shoulder range of motion has decreased, and he uses his right arm more to compensate for this fact. Petitioner is right handed. Petitioner testified that it is hard to reach up and use a saw with his left arm.

The Arbitrator found the testimony of the Petitioner to be credible.

Conclusions of Law

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law as set forth below. The claimant bears the burden of proving every aspect of her claim by a preponderance of the evidence. *Hutson v. Industrial Commission*, 223 Ill App. 3d 706 (1992).

With Respect to Issue (F) Whether Petitioner's Current Condition of Ill-Being Is Causally Connected To His Injury, The Arbitrator Finds As Follows:

An accidental injury need not be the sole causative factor, or even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Commission*, 797 N.E.2d 665, 672 (2003). Employers are to take their employees as they find them. *A.C.&S v. Industrial Commission*, 710 N.E.2d 8347 (Ill. App. 1st Dist. 1999) citing *General Electric Co. v. Industrial Commission*, 433 N.E.2d 671, 672 (1982).

The Arbitrator has carefully reviewed and considered all medical evidence along with all testimony. The Arbitrator concludes that Petitioner has proven by the preponderance of the credible evidence that Petitioner's current condition is causally connected to his work injury of February 22, 2016, as set forth more fully below.

Prior to his work injury of February 22, 2016, Petitioner did not have any prior injuries or receive medical treatment for his left shoulder and left elbow. Petitioner was working full duty and able to perform all of his job duties. After the accident, Petitioner experienced pain and

discomfort with his left arm. Most of Petitioner's initial complaints involved the area of the left bicep. The MRI showed an extensive partial tear of the distal biceps tendon and surgery, to repair the left distal bicep, was performed on August 30, 2016. During therapy Petitioner began experiencing persistent left anterior and superior shoulder pain. Dr. Poepping opined that this condition was caused by his initial injury and subsequent surgery. Dr. Poepping recommended left shoulder arthroscopic subacromial decompression surgery. Respondent did not proffer any evidence contradicting the opinion of Dr. Poepping. The Arbitrator finds that Petitioner's complaints were consistent with Dr. Poepping's findings and further supports his opinions.

With Respect to Issue (J), Whether The Medical Services Provided To Petitioner Were Reasonable And Necessary And Whether Respondent Is Liable For Unpaid Medical Expense, The Arbitrator Finds As Follows:

Petitioner asserts that Respondent is liable to pay unpaid medical bills from G & T Orthopedics, in the amount of $12,191.85, and Atheltico, in the amount of $3,486.00. (Arb. Ex #1).

Pursuant to Section 8(a) of the Act, the employer shall pay all necessary first aid, medical and surgical services and all necessary medical, surgical and hospital services which are reasonably required to cure or relieve the employee from the effects of the accidental injury. Respondent did not proffer evidence the medical treatment Petitioner received was not reasonable or necessary. For treatment of an employee's workplace injury to be compensable under the workers' compensation laws, Petitioner must establish the treatment is necessitated by the work injury and not some other condition or conditions. *Hansel & Gretel day Care Center v. Industrial Comm'n*, 215 Ill.App.3d 284; 574 N.E.2d 1244 (1991).

The Arbitrator finds the medical services provided Petitioner were reasonably required to cure or relieve Petitioner from the effects of his injury. As a result of the treatment, Petitioner was able to return to his prior occupation, without restrictions. The Arbitrator does not find the Utilization Review to be persuasive. After the shoulder surgery, Petitioner underwent physical therapy and he continued to improve from the physical therapy. Clearly, Petitioner benefited from this treatment given that he was able to return to his former occupation and return to work without restrictions. As such, Respondent shall pay G & T Orthopedics the sum of $12,191.85 and Athletico the sum of $3,486.00, pursuant to Sections 8(a) and 8.2 of the Act, subject to the

fee schedule. Respondent shall receive a credit, pursuant to Section 8(j) of the Act, for medical benefits paid by private group insurance or other entity and Respondent shall hold Petitioner harmless from any claims by any providers for services for which Respondent is receiving a credit under Section 8(j) of the Act.

With Respect To Issue (L), Nature And Extent Of The Injury, The Arbitrator Finds As Follows:

Pursuant to Section 8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability ("PPD"), 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 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 laborer and his duties include cutting trees and removing the debris. The Arbitrator notes the job duties, as provided by Petitioner, requires the lifting and carry heavy objects, such tree branches, and the operation of power tools. The Arbitrator finds Petitioner's job to be physically demanding. As such the Arbitrator gives this factor significant weight.

Gilberto Pereiro v. City of Chicago; Case #16 WC 12818

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 48 years old at the time of the accident. Petitioner has approximately (20) years of work life remaining. Petitioner will be required to continue to work with the effects of his injury for a long period of time. The gives significant weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Petitioner was able to return to his prior occupation. Petitioner did not proffer evidence sustaining that his future earning capacity has been impaired as a result of his injury. As such, the Arbitrator gives this factor little weight.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records. Petitioner underwent two (2) surgical procedures as a result of this injury. Petitioner had surgery to repair the distal biceps rupture and a left shoulder open subpectoral biceps tenodesis with arthroscopic subacromial decompression and distal clavicle resection. Petitioner testified that he continues to have pain and weakness in his left arm and left shoulder and also has reduced range of motion. Petitioner testified that it is hard to reach over his head with his left arm and he must use his right arm more to compensation for his limitation while at work. The Arbitrator notes that Petitioner returned to his prior occupation, without restrictions, and has been performing his duties without seeking additional medical treatment. The Arbitrator notes that Petitioner told Dr. Poepping he wanted to return to work. The Petitioner appears to be the type of individual who wanted to return to work and continues to work despite his current complaints. The Arbitrator finds that Petitioner's current complaints to be credible and consistent with the medical records. The Arbitrator gives this factor great weight.

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 person, pursuant to Section 8(d)2 of the Act, and 20% loss of use of a left arm, pursuant to Section 8(e) 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 KANE	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PAULA FRASZ,

Petitioner,

vs. NO: 11 WC 4493

NORTHERN ILLINOIS UNIVERSITY,

Respondent.

19IWCC0508

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, and permanent disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, with the following corrections:

The parties stipulated Petitioner's average weekly wage was $1,225.03. ArbX1. This yields a PPD rate of $735.02, however the Commission notes this rate exceeds the maximum as set forth in Section 8(b)4 (*820 ILCS 305/8(b)4)*. The statutory maximum benefit rate for Petitioner's January 2010 date of accident is $664.72. Therefore, Petitioner's PPD award for claim 11 WC 4493 is to be paid at $664.72 per week.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 7, 2018, as amended above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $664.72 per week for a period of 13 weeks, as provided in §8(e)7 of the Act, for the reason that the injuries sustained caused the 100% loss of use of the right second toe.

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

19IWCC0508

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

Pursuant to Section 19(f)(1), this decision is not subject to judicial review.

DATED: SEP 1 6 2019

LEC

O: 9/11/19

43

L. Elizabeth Coppoletti

Stephen Mathis

D. Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

FRASZ, PAULA
Employee/Petitioner

Case# **11WC004493**

11WC004494

NORTHERN ILLINOIS UNIVERSITY
Employer/Respondent

19IWCC0508

On 5/7/2018, 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 1.99% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2762 JASON D KING
569 W GALENA BLVD
UNIT B
AURORA, IL 60506

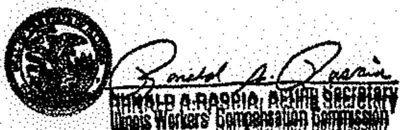
5462 ASSISTANT ATTORNEY GENERAL
MAGGIE TIMLIN
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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

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

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

MAY 7 - 2018



STATE OF ILLINOIS)
)SS.
COUNTY OF **Kane**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

PAULA FRASZ
Employee/Petitioner

v.

NORTHERN ILLINOIS UNIVERSITY
Employer/Respondent

Case # **11** WC **4493**

Consolidated cases: **11 WC 4494**

19IWCC0508

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Ketki Steffen**, Arbitrator of the Commission, in the city of **Geneva**, 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. [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. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other ______

FINDINGS

On **January 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 $**63,701.56**; the average weekly wage was $**1,225.03**.

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

ORDER

ORDER

Permanent Partial Disability: Schedule injury (For injuries before 9/1/11)

Respondent shall pay Petitioner permanent partial disability benefits of $735.02/week ($1,225.03 x .60) for 13 weeks for a total of $ 9,555.26, for the second right toe because the injuries sustained caused 100% loss of toe, 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.

KSSTEFFEN 5/3/18

Signature of Arbitrator Date

MAY 7 - 2018

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 KANE	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PAULA FRASZ,

Petitioner,

vs. NO: 11 WC 4494

NORTHERN ILLINOIS UNIVERSITY,

Respondent.

19IWCC0509

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, and permanent disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, with the following corrections:

1 - The Commission corrects the decision form to reflect Petitioner's condition of ill-being *is* causally related to the accident.

2 - The parties stipulated Petitioner's average weekly wage was $1,225.03. ArbX2. This yields a PPD rate of $735.02, however the Commission notes this rate exceeds the maximum as set forth in Section 8(b)4 (*820 ILCS 305/8(b)4)*. The statutory maximum benefit rate for Petitioner's September 9, 2010 date of accident is $669.64. Therefore, Petitioner's PPD award for claim 11 WC 4494 is to be paid at $669.64 per week.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 7, 2018, as amended above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $669.64 per week for a period of 13 weeks, as provided in §8(e)7 of the Act, for the reason that the injuries sustained caused the 100% loss of use of the left second toe.

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

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

Pursuant to Section 19(f)(1), this decision is not subject to judicial review.

DATED: SEP 16 2019

LEC

O: 9/11/19

43

L. Elizabeth Coppoletti

Stephen Mathis

D. Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

FRASZ, PAULA
Employee/Petitioner

Case# **11WC004494**
11WC004493

NOTHERN ILLINOIS UNIVERSITY
Employer/Respondent

19IWCC0509

On 5/7/2018, 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 1.99% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2762 JASON D KING
569 W GALENA BLVD
UNIT B
AURORA, IL 60506

5462 ASSISTANT ATTORNEY GENERAL
MAGGIE TIMLIN
100 W RANDOLPH ST 13TH FL
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0904 STATE UNIVERSITY RETIREMT SYS
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CHAMPAIGN, IL 61825

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

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

MAY 7 - 2018

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

STATE OF ILLINOIS)
)SS.
COUNTY OF **Kane**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

PAULA FRASZ
Employee/Petitioner

v.

NORTHERN ILLINOIS UNIVERSITY
Employer/Respondent

Case # **11** WC **4494**

Consolidated cases: **11 WC 4493**

19IWCC0509

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Ketki Steffen**, Arbitrator of the Commission, in the city of **Geneva**, 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

B. [ ] 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. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other ______

FINDINGS

On **September 9, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**63,701.56**; the average weekly wage was $**1,225.03**.

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

ORDER

ORDER

Permanent Partial Disability: Schedule injury (For injuries before 9/1/11)

Respondent shall pay Petitioner permanent partial disability benefits of $735.02/week ($1,225.03 x .60) for 13 weeks for a total of $ 9,555.26, for the second left toe, because the injuries sustained caused 100% loss of toe, 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.

_KSSteffen______________________________ May 3, 2018_____

Signature of Arbitrator Date

MAY 7 - 2018

STATE OF ILLINOIS)
)SS.
COUNTY OF **Kane**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

PAULA FRASZ
Employee/Petitioner
v.
NORTHERN ILLINOIS UNIVERSITY
Employer/Respondent

Case # **11** WC **4494**

Consolidated cases: **11 WC 4493**

19IWCC0509

PROCEDURAL HISTORY

An Application for Adjustment of Claim was filed in these matters with Petitioner seeking relief from Respondent, Northern Illinois University ("NIU"), under the Illinois Workers' Compensation Act. The cases were consolidated for hearing. 11WC4493 relates to an accident date of January, 2010 and alleges injuries to her second right toe which was amputated. 11WC4494 alleges a September 1, 2010 injury requiring amputation to the left second toe. On February 20, 2018, these consolidated matters were heard before the Honorable Ketki Steffen in Geneva, Illinois.

DISPUTED ISSUES

As to both contested case, the following issues are presented for adjudication.

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

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

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

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

FACTUAL HISTORY

Petitioner was 56 years old at the time of her injuries and was working as a dance professor for Northern Illinois University ("NIU/Respondent") for twenty-five years. She testified she took up dancing at the age of

thirteen and later became a professional dancer after college around 1976. Her testimony shows a very active, athletic and physical lifestyle that additionally included jogging and horseback riding. She testified that she suffered no prior debilitating injuries (to her feet), although, she testified, it is common to have pain while dancing.

Her job duties as a NIU professor included teaching classes, choreographing, recruiting, advising students and serving on committees. Petitioner currently teaches a variety of dance, including modern dance, tap, musical theater, improvisation and composition. In the past, she has also taught ballet.

Petitioner testified in court that her duties requires her to actively dance. She choreographs each exercise before class and then demonstrates the exercises for the students. Petitioner testified that 90% of her time is spent demonstrating exercises, depending on the level of the students. Petitioner also testified that as a tenured professor, her position also requires her to pursue professional development in dance, which can involve performing. Petitioner said she fulfills this requirement, in part, by running a dance troop in Chicago, traveling the world teaching dance and recruiting. Petitioner further testified she teaches dance four days per week with one additional class on Friday. She also participates in rehearsals that take place on evenings and weekends.

Petitioner testified to working for Respondent as a tenured dance require her to maintain tenure included teaching and instructing dance technique and choreography classes, several per week every semester. NIU also requires performing or instructing dance outside of her classes at NIU as professional development.

Petitioner testified in some detail regarding her work as a dance professor. She stated that over the course of her employment, she was regularly participated physically demonstrating dance to her students. This required taking part in strenuous dancing, instructing and stretching. Her feet are a main focus of dancing, specifically the toes. They are stood directly upon and their points hit the floor often. The number of times her job duties required her to hit her toes on the floor over the years is impossible to estimate as the number is

impossibly too high - numerous times per class, per day, per week, per semester, per year, at NIU and outside NIU as required.

Petitioner testified that due to her age and the physical nature of her work, she is always sore daily one way or another in different areas or her body. In January, 2010, she noticed soreness in her second toe on her right foot. This was the beginning of the semester, and she figured it was typical. She testified that she initially did nothing and tried to work through it, because there is always some pain. Not until March, 2010, when she was performing a dance move, landing a jump, did the pain affect her dancing and she knew the pain was not typical soreness, something was wrong.

Petitioner immediately notified Judy Chitwood, the Head of Dance at NIU, and Alex Galeman, Chair of the Dance Department, of her injury. Petitioner testified in court that her injury occurred during teaching class at NIU. There is also some indication in the record that the pain became excruciating which attending a friend's ballet class in Cincinnati in March, 2010.

Respondent's Exhibit 1 (RX1) is the Notice of Injury filled out by Petitioner on March 26, 2010. In her Notice of Injury, Petitioner described the accident as occurring by "landing a jump – trauma." (Rx 1). She wrote the injury occurred while teaching a dance class at NIU in DeKalb, Illinois. *Id.* She stated her injury was witnessed by an entire class of 40 or more students. *Id.* Petitioner further wrote: "Toe dislocated due to constant trauma of jumping, turning, leaping, etc. in the teaching, choreographing and rehearsal of dance at NIU." *Id.*

At arbitration, Petitioner testified that her right toe injury started in January, 2010, but only became excruciating after landing a jump in March 2010.

On March 19, 2010, Petitioner saw Dr. Rappette. He gave her walking boot and told to use it at all times. She then had an X-ray and MRI. On her next visit on March 23, 2010, she was informed she had a dislocated toe. She recalled the term from her doctor and understood her issues to be from "constant impact trauma." Her doctor discussed her options, and the plan was to insert a pin into her toe.

The surgery (pin insertion) was delayed because its recovery time would force her to cancel a work-related trip to Istanbul. While there, she did not dance, she assisted with choreography. The pin was inserted into her toe on July 1, 2010. On her first doctor's visit after the procedure, she was told she could walk and was given a different walking boot. On her July 15, 2010 doctor's visit, she informed her doctor that she had walked to the bathroom during the night without her boot and bent her pin. The pin was not taken out during this visit.

The pin was taken out on August 5, 2010. Her toe had not healed; her options were discussed. With her doctor, she chose the amputation option because it get her back to work the quickest and allow her to continue her career. On September 9, 2010, Petitioner's right second toe was amputated.

On September 1, 2010, a week before the amputation and after the decision to amputate, she was performing a dance move and felt a pop in her left second toe. She immediately informed her employer and called her doctor. She had not noticed any unusual pain in her left foot before this pop. With Dr. Barrette, the decision was made to amputate her left second toe, said amputation occurring on January 7, 2011, after a delay caused by Petitioner's falling off a horse and breaking her neck.

Petitioner's entire course of treatment was done by Dr. Rappette through Valley Ambulatory and Centers for Foot and Ankle Surgery. According to Dr. Barrette, the Petitioner first presented to him on March 19, 2010 with a painful right second metatarsal. At this time, he diagnosed a dislocated right second MPJ (metatarsal phalangeal joint, the second joint from the tip), as well as a bunion deformity, severe hammer toe of the second digit and minor hammer on the 3rd, 4th and 5th. He ordered X-Rays and an MRI. She was given a walking boot and told to use it at all times, although not wearing the boot pre-surgically wasn't important as the damage was already done. (Petitioner's exhibit "D," PXD, Deposition of Dr. Thomas Rappette, pages 6-9.)

After review of the X-Rays and MRI, he met with Petitioner again on March 23, 2010. His diagnosis after film confirmed a plantar plate tear and a dislocated MPJ. He discussed surgery to repair the plantar plate,

to release the joint, and to insert a K-wire, or pin. After this surgery, recovery would be four to six weeks. It would be approximately three months before she could be on her foot consistently.

Petitioner had planned a work trip to Istanbul. Dr. Rappette warned her that she could do additional damage by being on her foot, but the Petitioner wanted to accompany her student on this trip. Petitioner consented to a March surgery date. (RXD, 10-13.) Dr. Rappette agreed that the delay did not change the procedure but warned the Petitioner regarding being on her feet. (RXD-56)

After signing consents on June 24, 2010, surgery was completed on July 1, 2010 without complication. Surgery confirmed that the toe was dislocated and the plantar plate ruptured. On her first post operative consultation, she was told she could ambulate with activity down and to stay in her boot. (RXD)

Dr. Rappetee testified that the medical standard is four to six weeks with the pin inserted for recovery. Some doctors prefer removal of the pin at four weeks, although Rappette prefers six. Pins are taken out early when a risk of infection is presented, as the bone could get infected creating new complications. Bone infection is a higher issue that joint alignment. Leaving the pin in too long can risk a stiff joint. Bending of the pin does occur with other patients. (RXD, 24, and 40-41)

When Petitioner returned on July 15, 2010, Dr. Rappette reported that Petitioner was noncompliant with his orders as she had admitted to excessive walking in her surgical boot as well as excessive walking without the recommended boot. *Id.* Dr. Rappette opined that due to Petitioner's excessive walking without the boot, the wire put in Petitioner's sagittal plane had bent 15 to 20 degrees, which left the toe elevated from the original surgical position. *Id.* Dr. Rappette noted that Petitioner knew she was noncompliant and knew the wire could break. *Id.*

Dr. Rappette opined that Petitioner could end up needing an additional surgery and implant due to her noncompliance. *Id.* He observed that the foot was not infected and looked. Dr. Rappette further noted that Petitioner swore she would now stay off her foot and not take the boot off, but he remarked that she had sworn

that at the last appointment also. Dr. Rappette removed Petitioner's sutures and advised her to engage in only light activity with the boot on and remain completely non-weight-bearing- with the boot off.

At arbitration, Petitioner testified that the only time she did not wear the boot as directed was while sleeping and using the bathroom in the middle of the night where it was not convenient to put it on. Her walking boot was pretty beat up, but this did not bother him, "people are active." (RXD, 17.) The pin was bent (loss of alignment) due to not wearing the boot. The records indicate the pin was bent "slightly." (Exhibit C, page 7)

Dr. Rappette decided to leave the pin in place. If it were to be bent more, the risk was that it could break. (RXD, 18.) The pin was not taken out due to lost alignment, and the Petitioner did not show a risk of infection. Further, the pin was still in its proper position back to the joint. (RXD, 57, 63)

By August 5, 2010, Petitioner returned to Dr. Rappette to have her pin removed. (RXD 42-43.) The toe was red, painful and swollen showing risk of infection, so the pin was taken out.

> "Q: … that's why the pin was removed?
> A: I removed the pin based upon the fact that she was getting swollen, red, inflamed. Any any time you have the risk of an infection, you want to remove the hardware." (RXD, 23.)

> "Q: Do you have any evidence that the bending of the wire had taken her joint and allowed it to dislocate again?
> A: No, because the pin was still in the proper position as far as at the level of the joint. … [b]ut you've got about … 15-20 degrees of dorsiflection. And so I know that is stretched out some of the repair. (but he would not pull the pin at 15-20 degrees (62)) Whether or not it was going to stabilize it enough … or destabilize it enough to dislocate, you don't know." (RXD, 62-63)

Even without the bending of the pin, there was a chance the toe would need to be amputated anyway. (RXD, 46)

On August 12, 2010, Petitioner complained to Dr. Rappette of foot pain and swelling lasting one week. *Id.* Dr. Rappette took X-rays that showed her right second toe was starting to dislocate dorsally and slightly medially. *Id.* He further noted a possible stress fracture, because Petitioner's foot was very swollen. *Id.* Dr. Rappette recommended an implant fusion or metatarsal head resection with pinning. *Id.*

Petitioner then brought up amputation, because she wanted to continue her same activities and return to them as soon as possible. *Id.* Dr. Rappette opined that amputation was a possibility. *Id.* He instructed her to return to work and they would see how she was doing upon follow up. *Id.*

When Petitioner followed up on August 19, 2010, Dr. Rappette observed the right second toe was moving out of place. *Id.* He then revisited the possibility of amputation, which he noted was initially brought up by Petitioner on her prior visit. *Id.* Dr. Rappette spoke to Petitioner about other treatment options, including joint replacement, fusion and/or a second metatarsal head resection with K-wire fixation. *Id.* However, he wrote that none of these options fit Petitioner's situation, because of her dancing activities. *Id.* After a discussion on how the different options could affect her dancing, Dr. Rappette reported that Petitioner believed amputation was the option that felt best for her. *Id.* Nevertheless, she was given time to consider the options and advised to remain in a surgical shoe and/or boot until her follow up appointment in four weeks. *Id.*

On September 2, 2010, Petitioner called Dr. Rappette. She had been teaching dance and felt a pop. He did not know what type of dancing she was doing, didn't know whether the dancing was solely on the right or left foot, and did not ask. (RXD, 27, 48.) While she was still in the boot for her right foot, in terms of the left, it didn't matter whether she was still treating or not, she was not treating for her left foot. (RXD, 51.) In fact, when asked if she should not have been active as she had been, Dr. Rappette indicated, "... based upon the fact that the toe was already dislocated in the left (likely meaning right by context) foot, she could have aggravated it pretty much at that point in doing anything." (RXD, 66)

In his medical notes, Dr. Rappette notes that in regard to her right foot, Petitioner's dancing at this time was against his medical advice. He stated that he advised Petitioner that she needed to make life changes in regard to her physical activity levels or risk more problems. (PXA, PX3)

On September 9, 2010, Dr. Rappette amputated Petitioner's right second toe without complication, with good post-op results. (RXD, 31) Dr. Rappette noted Petitioner chose amputation rather than a total joint

replacement, because she wanted to continue to dance and dancing with an implant would have complications. *Id.*

At arbitration, Petitioner testified that she understood amputation to be the option that could allow her to return to work the quickest.

On September 10, 2010, Petitioner underwent amputation of the right second toe. (Px B; Px C). The toe was disarticulated at the joint. *Id.* Petitioner was advised to ambulate in a surgical shoe and follow up in one week. *Id.*

Petitioner's toe was sent to Provena St. Joseph Hospital Laboratories for a surgical pathology report. *Id.* The toe was described as measuring 5 cm in length and 2 cm in diameter. *Id.* The diagnosis was acral skin and bone without histopathologic abnormalities. *Id.*

On September 14, 2010, Petitioner returned to Dr. Rappette and reported immediate relief after surgery. (Px A; Px C). Petitioner was advised to continue ambulating in a surgical shoe. *Id.*

On September 28, 2010, Petitioner's sutures were removed. *Id.* Dr. Rappette advised Petitioner to use a regular shoe as tolerated but keep her activity down. *Id.*

At arbitration, Petitioner testified that she did not miss any work nor lose any wages as a result of her injury. Petitioner testified that she never asked anyone at NIU whether she could be accommodated with a position that did not require dancing.

Petitioner testified that on September 1, 2010, which teaching dance at NIU she heard a pop and felt pain in her left foot. She notified her supervisors Judity Chitwood and Alex Galeman of the injury.

<u>LEFT TOE</u>

Petitioner testified that on September 1, 2010, she was teaching a dance class when she heard a pop and felt pain in her left foot. Petitioner testified that she immediately notified Judith Chitwood and Alex Galeman at NIU of this injury.

Petitioner first presented for treatment for her left second toe on September 2, 2010. (Px A; Px C). She reported feeling a pop in her left second toe while teaching tap and going out of a pointe the previous day. *Id.* Dr. Rappette observed the left second toe was dislocated. *Id.*

At this time, Petitioner was already treating with Dr. Rappette for her right toe injury. Dr. Rappette noted that going out of a pointe position was totally against the medical advice he previously gave Petitioner. *Id.* He stated that Petitioner continues to want to dance when she physically cannot due to her foot deformities and structure. *Id.* Dr. Rappette again lectured Petitioner that she cannot continue to dance, because she will continue to have problems with stress fractures, increased digital deformities and possible dislocations in her lesser toes. *Id.*

At arbitration, Petitioner testified that there were no restrictions on her left foot at the time of her injury and she did not recall Dr. Rappette having advised her not to dance.

Petitioner was diagnosed with a ruptured plantar plate at the second metatarsophalangeal joint of the left foot. *Id.* Petitioner's left foot was put in a surgical shoe and she was instructed to keep her activity down. *Id.* At this time, Petitioner was already in the process of having her right second toe amputated. *Id.* Dr. Rappette wrote that Petitioner would need a repair to the left second toe in the future, but Petitioner was now considering removal of the left second toe as well. *Id.*

Per Dr. Rappette, in regards to the left toe treatment, "based upon hereditary, form and structure of her foot, experience with right, then amputation on left was the best option. … its a reasonable option … it was very obvious what the best option was. (RXD, 53, 54). The left second toe was amputated on January 7, 2011, after a delayed caused by Petitioner having fallen off a horse.

Specifically:

"Q: As to the original condition that required the pin to be inserted, do you have an opinion as to what caused that condition?
A: I think its a combination of genetic or hereditary predisposition, as well as her job and her activity … an aerobic instructor or a dancer or a runner, the increased stress and strain on that forefoot can actually develop these problems very quickly in that particular foot type." (RXD, 42)

"Q: Can you rule out the possibility that if she had not bent the pin that she would … have her toe today?
A: (Over speculation objection) I would say there's a chance that we would have lead to amputation anyway and there's a chance that it would have maintained alignment and she would have been fine, but you have a higher risk of losing alignment by bending the pin." (RXD, 46.)

At arbitration, Petitioner testified that she decided to amputate her left toe, because she did not want to go through everything she had already experienced with her right toe injury and knew amputation would be the fastest option to get her back to work.

On October 5, 2010, Dr. Rappette reported that he had called Petitioner to schedule the surgery due to her horseback riding injury. (Px A).

On December 28, 2010, Petitioner presented for a preoperative examination with Dr. Bhavesh Shah. *Id.* Dr. Shah wrote Petitioner was proceeding with a left toe amputation due to chronic trauma secondary to dancing for thirty years. *Id.* Petitioner was cleared for surgery. *Id.*

Petitioner underwent amputation of the second digit of the left foot on January 7, 2011. (Px A – Px C). The toe was disarticulated at the MPJ joint. *Id.*

The left second toe was sent to Provena St. Joseph Hospital Lab for a surgical pathology report. *Id.* The toe's dimensions were 5 cm by 1.5 cm by 1 cm. *Id.* The diagnosis was acral skin and bone without histological abnormalities. *Id.*

Petitioner reported doing well at her postoperative appointment on January 11, 2011. (Px A; Px C). On January 22, 2011, her sutures were removed. *Id.* Dr. Rappette advised Petitioner that if she did not have any problems over the next two weeks, she did not need to return. *Id.*

At arbitration, Petitioner testified that she did not miss any work nor lose any wages as a result of her injury. Petitioner testified that she never asked anyone at NIU whether she could be accommodated with a position that did not require dancing.

Deposition of Dr. Thomas Rappette

On October 9, 2012, the parties took the deposition of Dr. Rappette. The deposition transcript was entered into evidence at arbitration as Petitioner's Exhibit D.

Dr. Rappette testified that when Petitioner first presented for her right toe, she told him the pain started at Christmastime 2009, but it had become progressively more painful. (Px D, p. 7).

Dr. Rappette further testified that the initial right toe surgery was put off because Petitioner had a dancing trip to Turkey planned. *Id.* at 12; 55. Dr. Rappette told Petitioner there was a risk that being on the foot could cause additional damage leading to a stress fracture and being in the boot for that long of a time could also contribute to secondary issues, hip pain or back pain. *Id.* at 12. He told Petitioner she could delay the surgery if she wanted but she would be risking additional injury for being in the boot an extended period of time. *Id.* at 12-13. Dr. Rappette testified that Petitioner understood this, but wanted to follow through with the trip and take care of the toe when she returned. *Id.* at 13; 55. Because the toe was not infected, Dr. Rappette told Petitioner the surgery could wait until her return. *Id.* at 55. When she returned, Dr. Rappette made no observations that the delay had caused any further problems. *Id.* at 56.

Dr. Rappette further testified that Petitioner's initial right toe surgery on July 1, 2010 went well and had no complications. *Id.* at 14-15. He testified that the actual cartilaginous component of the joint was great and still intact and there was no articular cartilage damage. *Id.* at 14.

Dr. Rappette stated that after the first postoperative appointment on July 6, 2010, he told Petitioner to keep her activity down and stay in the boot to protect the pin from bending or moving. *Id.* at 15. He told Petitioner to stay in the boot at all times when ambulating. *Id.* Dr. Rappette further informed Petitioner that there was significant risk if she ambulated without the boot and overuse of the foot without the boot would imperil or retard treatment. *Id.* at 16. Dr. Rappette testified that Petitioner knew walking without the boot could lead to bending of the implanted wire, which could lead to a need for additional correction or surgery. *Id.*

However, Dr. Rappette testified that when Petitioner returned on July 15, 2010, his assistant informed him that Petitioner admitted to walking without the boot. *Id.* at 17. He stated that Petitioner admitted to short

stints, such as getting up to go to the bathroom and similar activities where it was inconvenient to put the boot on. *Id.* When Dr. Rappette heard Petitioner had been walking without the boot, he became immediately concerned about the position of the pin. *Id.* Dr. Rappette again reiterated that Petitioner definitely knew even small stints of walking without the boot could imperil her recovery. *Id.* at 18.

When Dr. Rappette examined the toe, he observed the pin to be bent 15 to 20 degrees. *Id.* He testified that such bending is caused by either weight-bearing without the boot or a fall, and in Petitioner's case, she admitted to ambulating without the boot and never said she fell. *Id.* at 18-19; 64. Dr. Rappette testified that he told Petitioner the bent pin was a side effect of ambulating without the boot. *Id.* at 19.

Dr. Rappette stated that Petitioner understood she had increased her likelihood of having the procedure fail. *Id.* at 19-20. Other than the bent pin, everything had been healing appropriately. *Id.* at 20. Dr. Rappette further testified that it was still possible for Petitioner to have had a good outcome as of July 15, 2015. *Id.* at 58. However, he explained that realistically, once you bend a wire at the joint level two weeks after a repair, the likelihood is that something loosened up and the likelihood of a good, successful outcome drops after that. *Id.* at 60.

Dr. Rappette also testified that on August 19, 2010, Petitioner indicated that she believed amputation was the quickest way for her to get back to her job and dancing. *Id.* at 25-26. He said Petitioner was leaning toward amputation because it had the quickest healing time, no loss of metatarsal strength and no long recovery. *Id.* at 26.

Dr. Rappette opined that Petitioner's right toe amputation was causally related to her redislocation of her toe due to her noncompliance and the wire bending. *Id.* at 38-39. He believed Petitioner ambulating without the boot caused weight-bearing that forced her toe up and bent the wire. *Id.* at 39-40.

Dr. Rappette further testified the bend would not occur just from normal ambulation in the boot as the boot would protect the wire in normal day-to-day activities. *Id.* at 39-40. He explained that the implanted wire is durable and usually takes repetitive trauma to bend. *Id.* at 47. It would not bend with just one step. *Id.* It

takes either repetitive walking without the boot or some type of significant force upon the toe to bend the pin. *Id.* at 47-48. Dr. Rappette testified that since one slip and fall can cause the bend, he tells patients to wear the boot at all times, especially if you're getting up at night. *Id.* at 47.

Dr. Rappette further testified that if Petitioner did not bend the pin, it was still possible she would have required amputation, because these procedures never guarantee the toe will stay in position. *Id.* at 45. However, it was not his opinion that due to how her foot was formed and her job duties, she would have required the amputation regardless. *Id.* He explained there is always a chance of redislocation with anybody, but when you're active, the chance of dislocation reoccurring is quicker. *Id.* at 45-46. Dr. Rappette stated that the initial procedure to insert the pin has the chance of maintaining alignment and making people happy the rest of their lives, or else they would not do the procedure. *Id.* at 46.

In terms of the original condition that required Petitioner's right foot surgery to insert the pin, Dr. Rappette opined that it was caused by a combination of genetic or hereditary predisposition and Petitioner's job and activities. *Id.* at 42.

He explained that heredity meant how the foot was formed, such as when a person is born and develops a flat foot because their mother or father had it. *Id.* at 43. Dr. Rappette stated that Petitioner's foot was very flexible with a bunion and a combination of a flexible forefoot with a bunion can lead to tendon imbalances over time. *Id.* at 42-43. He explained that because of the heredity component, Petitioner was more predisposed to this type of toe injury as a result of impact or repetitive impact. *Id.* at 43-44.

Dr. Rappette clarified that he believed Petitioner's initial need for surgical intervention was caused by being on the foot along with hereditary components. *Id.* at 51-52. Then, the combination of this along with Petitioner's noncompliance led to the amputation. *Id.*

Dr. Rappette further testified that on September 2, 2010, Petitioner informed him she had injured her left toe teaching tap dance. *Id.* at 27. He testified that Petitioner was still in a surgical shoe for her right foot at this time and he had never released her to go back to dancing. *Id.* at 29. Dr. Rappette explained that dancing in a

surgical shoe is against medical advice and would probably be impossible to do as the foot cannot bend. *Id.* at 29. He testified that Petitioner admitted she was dancing at the time of the injury. *Id.* He further testified that Petitioner knew she was not to be dancing in the surgical shoe. *Id.* at 64.

Dr. Rappette was surprised in the medical sense that Petitioner was back dancing against orders, but now that he knew Petitioner, it did not surprise him because she loved dance and it is typical of an athlete to be addicted to their job. *Id.* at 28. He believed she was going to dance at whatever cost. *Id.*

Petitioner had informed Dr. Rappette she was teaching tap dance and felt a pop in her left foot. *Id.* at 49. He testified that he is not an expert on tap dancing and did not know whether she was performing or instructing. *Id.* at 48. He also did not know whether Petitioner was actually at work or doing some activity on the side when she was injured. *Id.* at 49. However, he understood her to be doing some kind of dance move at the time of her injury. *Id.* at 65. Dr. Rappette also stated that he did not know if she was actually dancing on her right foot or if she was wearing the surgical shoe. *Id.* at 51.

For the left second toe, Dr. Rappette testified that Petitioner's lifestyle, hereditary component and the form/structure of her foot led him to believe amputation was the best option. *Id.* at 52-53. He knew Petitioner did not want the downtime of another surgery like the one performed on her right foot. *Id.* at 53; 65. He stated that Petitioner realized her right foot felt great and she was back at the job in two weeks after amputation, so she wanted to take the same approach on the left foot. *Id.* at 53. Dr. Rappette agreed to amputate the left second toe knowing the patient wanted to get back to work and dancing. *Id.* at 54. He testified as you always want to treat the patient and not the foot, amputation was the best procedure for this particular Petitioner. *Id.*
Lastly, Dr. Rappette testified that he had not seen Petitioner since January 22, 2011. *Id.* at 34. He opined that Petitioner would have achieved maximum medical improvement within six weeks of her last surgery. *Id.*

FINDINGS/ANALYSIS

<u>Arising Out of and In the Course of:</u>

Petitioner bears the burden of proving every aspect of his claim by a preponderance of the evidence. Hutson v. Indus. Comm'n, 223 Ill App. 3d 706, 714 (5th Dist. 1992). "Liability under the Workmen's Compensation Act may not be based on imagination, speculation, or conjecture, but must have a foundation of facts established by a preponderance of the evidence…" Shell Petroleum Corp. v. Indus. Comm'n, 366 Ill. 642, 650 (1937). 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. Revere Paint & Varnish Corp. v. Indus. Comm'n, 41 Ill.2d. 59, 63 (1968). Preponderance of the evidence means greater weight of the evidence in merit and worth that which has more evidence for it than against it. Spankroy v. Alesky, 45 Ill. App.3d 432, 436 (1st Dis. 1977).

The Arbitrator finds that Petitioner has proven that she sustained an accident that arose out of and in the course of employment, that timely notice of this accident was given to Respondent, and that recovery for the loss of a second right toe (11WC4493) and the second left toe (11WC4494) is warranted in these consolidated cases. In support of this decision, the Arbitrator finds as follows:

In general, as to both injuries, Petitioner claims that the repetitive actions of pounding and stretching on her toes, uncountable number of times over seventeen years, was a cause of her injury, the treatment and eventual amputation of both of her second metatarsals/toes. The evidence overwhelming supports that Petitioner has been literally 'on her toes' since taking up dancing at age thirteen. During the time of her 2010 injury, she had been dancing for over forty-three years and dancing as a dance professor for NIU for twenty-five years. At the time of her accident, Petitioner was 56 years old. Although Petitioner is not old of age, per her physician, Dr. Rappette

"based upon hereditary, form and structure of her foot, experience with right, then amputation on left was the best option. … its a reasonable option … it was very obvious what the best option was. (RXD, 53, 54).

It is clearly evident from the description of Petitioner's work duties that her toes underwent repetitive trauma over the twenty five years the Petitioner was employed by NIU. Her teaching and instructing duties at

NIU in teaching dance required significant use directly on her toes in dancing, instructing dance, and stretching. Further, Respondent required additional professional development outside of her teaching duties which required the same impact. The Arbitrator finds relevant that no other evidence of causation presented. There is no prior history of prior foot injuries that caused or contributed to Petitioner's condition. There is also ample evidence (unrefuted) that Petitioner, as a tenured professor, would travel and engage in many other dance related activities to enhance her work. Although petitioner was predisposed to this type of injury, that the repetitive trauma was the cause of the injuries is unmistakable after accounting for the totality of the evidence.

Also evident is that Petitioner led a very active, physical life-style that included dancing, horseback riding and some running. As acknowledged by her physician, dancing/physical fitness was addictive to the Petitioner. The Respondent must take the Petitioner as she is by her innate nature.

The Arbitrator also finds that her nature and lifestyle may have caused her to not be wholly compliant with the physicians advise in initially taking it easy on her foot. The evidence shows that she continued to teach her dancing class and did not miss any time from work. Per her own testimony she went to the bathroom, at night, without her boot, as it was not convenient to do so. She also chose to take her Istanbul trip rather than taking it easy.

The Arbitrator also finds that Petitioner actions may have aggravated her condition to some degree. However, The Arbitrator declines to find that that the Petitioner's conduct was a consistent and blatant noncompliance with medical orders to a degree that is egregious enough to warrant a denial of compensation, the Arbitrator respectfully disagrees with this reasoning and conclusion.

Section 19(d) of the Act reads: "If any employee shall persist in insanitary or injurious practices which tend to either imperil or retard his recovery or shall refuse to submit to such medical, surgical, or hospital treatment as is reasonably essential to promote his recovery, the Commission may, in its discretion, reduce or suspend the compensation of any such injured employee." 820 ILCS 305/19(d).

The Arbitrator does not find that Petitioner's actions fall within the non-compliance contemplated by Section 19(d).

Initially, although it sounds intuitive, people are different and present in all shapes, sizes and habits. There is little surprise that a dance professor whose job requires extreme dexterity and physical fitness is active, athletic and loves to dance. Secondly, it is not unforeseeable that a 56 year old women may make a trip to the bathroom, without doling on her boot, in the middle of the night. Minus specific, extreme warnings, a doctor's directive to 'lay off her feet' or 'always wear the boot' may be reasonable interpreted to exclude an urgent nightly call of nature. Although the Arbitrator agrees with the Respondent that the Petitioner did over-engage in activities, it is not egregious enough for a finding of severe medical non-compliance.

There is no case-law that finds that this type of activity warrants a denial of compensation. Additionally, in a 'no-fault' state such as Illinois, the Arbitrator is extremely weary of attempting this slippery slope. If such were the case, can Petitioner be denied compensation if their diet, smoking or poorly controlled diabetes causes treatment aggravations or treatment failure?

Therefore, the Arbitrator declines to find that Petitioner's actions are sufficient to deny coverage or compensation under this factual scenario. The record does not show that Petitioner was non-compliant after the rebuke from her physician.

In support of her findings, the Arbitrator also notes the testimony of Dr. Rappette that Petitioner's completion of her duties in Istanbul that caused delay in the procedure for her job did not matter to him or to her treatment and did not change the procedure. She was given permission by Dr. Rappette.

The arbitrator also finds that Petitioner's actions after her first surgery, between July 1 and July 15, 2010 were not a sufficient intervening cause so as to break the causal chain between the original work injury and the ensuing condition. As long as a "but for" relationship exists between the original event and the subsequent condition, the employer remains liable Vogel v. Industrial Comm'n, 821 NE2d 807 (Ill.App.2d 2005) (specifically, see Vogel's discussion of Mendota Township High School v. Industrial Comm'n, 243 Ill.App.3d

(1993), discussing that playing racket ball and sneezing less than a month after a back injury, while an immediate cause, was not the sole cause, the original back injury was 'a' cause and the matter compensable.)

The Arbitrator also find's significant Dr. Rappette's testimony that after the bending, ultimately the pin was still in the proper location back to the joint. The medical standard for the amount of time until the pin is removed in this type of surgery is four to six weeks, which was met. The pin was ultimately removed within the ideal timeframe and only then removed to prevent a possible infection which is a risk of this procedure not caused by Petitioner.

Although Dr. Rappette indicated that bending the pin created a higher risk that the procedure would not be successful, he indicated he could not testify whether Petitioner would've ultimately needed the amputation had she not bent the pin. To be clear, this is only a higher risk, not an opinion of an intervening cause that breaks the causal chain. This is not testimony that the bent pin was more likely the cause of the first procedure's failure. Evidence as to the cause of the first procedure's failure does not exist, except for the original injury. While the amputation was necessary after the first procedure's failure, no evidence exists that the Petitioner's actions were the direct cause of the first procedure's failure.

Further, Petitioner was clearly using her prescribed walking boot, as it was beat up. While Dr. Rappette's deposition indicates that he told Petitioner to reduce her activity, this is not found in his notes. No evidence exists that overuse by Petitioner, if it existed, was any part of the cause of the failed first procedure. Dr. Rapettes notes prior to the first procedure are clear, however, that the insertion of the pin did not guarantee a recovery and the procedure could fail after six weeks.

The arbitrator also finds support for her opinion in the medical records that contain work restrictions. The Arbitrator notes that the restriction are not specific as to what weight bearing or activity was tolerated. At most, in the pre-surgical consent, the Petitioner indicted that she understood that she would have to protect her toe with an orthopedic after surgery. Dr. Rappette's medical notes on July 15, 2010, after the bend in the wire, are very protective after the fact. While he cites her overuse and non-compliance, he only states that petitioner

understands that the likelihood of failure is increased. His actual testimony at deposition provided no such conclusion to this in fact being the cause for the failed procedure and further treatment.

The Arbitrator finds that evidence does not exist that the bending of the pin completely broke the causal chain between the original injury and the eventual amputation. Dr. Rappette could not testify to this, and at most, testified that the bent pin merely increased the risk failure of the procedure. The procedure could've easily failed on its own despite absolute compliance. Perhaps most significant is the fact that the course of treatment for the second toe was immediate amputation without the effort to save the toe by other procedures first. Petitioner's actions are not enough to rise above a contributing cause to an intervening cause significant enough to deny recovery.

Therefore, as to both injuries (11WC4493 and 11WC4494) the Arbitrator finds that the injuries arose out and in the course of Petitioner's employment.

Notice

As to Notice, the Arbitrator finds that proper notice was given under the act for both toes. The date of a repetitive injury is the date in which injury manifests itself, meaning both the fact of the injury and the causal relationship would become plainly apparent to a reasonable person. Peoria County Belwood Nursing Home v. Industrial Comm'n, 115 Ill.2d. 524, 505.

The Arbitrator finds that there is ample evidence of a repetitive trauma injury as to the right foot and there is no issue of notice as to the acute injury to the left foot.

Petitioner first noticed pain in her toe in January of 2010. However, she testified that dancers, specially at her age, have pain and are sore every day in one way or the other. She testified clearly that she did not recognize the toe be an injury until landing a jump in March, 2010. At this time, she immediately notified her employer and made a doctor's appointment. Following Belwood, this was the reasonable time when both the fact of the injury and the causal relationship were apparent. The short delay in discovering this after the first feelings of pain is reasonable, given the age of the Petitioner and her activities. Any dancer, or even active

sportsperson for that matter, at this age allows time for normal aches and pains to subside while new ones appear. The first time she noticed that this was not typical, she took action and reported the injury. This is further supported and corroborated by Respondent's 'Notice,' exhibit 2.

No evidence exists that she should've known the fact and cause of the injury and reported this any sooner. In fact, Dr. Rappette indicated that in an aerobic instructor or a dancer or a runner, the increased stress and strain on that forefoot can actually develop these problems very quickly in that particular foot type. While the trauma was over the course of seventeen years of employment, evidence does not exists that this injury was gradually occurring and recognizable over that span of time. Further, no evidence exists that the toe could've been saved if treated earlier.

In terms of the left toe, the Arbitrator finds clear that Petitioner exactly felt a pop on September 1, 2010 and reported the injury immediately on September 2, 2010. No contrary evidence exists.

The Arbitrator finds that both toes are compensable, each as a complete loss of a toe. The repetitive nature as cause of the injury is supported by a preponderance of evidence. While Petitioner did bend the pin during recovery of the first procedure, even if this is non-compliance, no evidence exists that this action impacted recovery from that procedure at all. The Petitioner's treating doctor indicated the procedure could have failed anyway. He testified that the pin was still in its proper position back to the joint and the pin had been in place up to the medical standard of time of four weeks. The pin was taken out due to possibility of infection, not due to being bent out of place. The bending of the pin, while a contributing cause, was not an intervening cause that completely broke the causal chain. Proper notice was given when the injury manifested itself. Ultimately, the only treatment that would allow for a return to work and continuing of Petitioner's career was amputation, for both toes.

Causal Connection

Based on the above findings and reasonable, the Arbitrator finds that Petitioner's current condition is causally related to her work accident. Petitioner suffered amputations of the second right and left toes due to her

work-accident. She had good results and has not returned to her doctor for further treatment. She testified that in regards to the recommended treatment, she choose amputations because it would allow her to return to the career with the greatest ease.

The Arbitrator finds that the Petitioner had appropriately exercised her personal medical choice that would help her return to work. The medical testimony supports that this was a sound choice based on the pros and cons of the available medical options.

Nature and Extent

The Arbitrator finds that both toes are compensable, each as a complete loss of a toe. This matter is prior to the 9/1/11 amendment of the Act. The Arbitrator has considered the totality of the evidence presented in this case and finds that the Petitioner is entitled to Permanent partial disability of $735.03/week ($1,225.03 X .60) for 13 weeks for the right second toe amputation and $735.03/week ($1,225.03 X .60) for 13 weeks for the left second toe amputation.

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

LINO NOVIELLI,

Petitioner,

vs. NO: 17 WC 579

VILLAGE OF GLENDALE HEIGHTS,

Respondent.

19IWCC0510

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, modifies the Decision of the Arbitrator, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

So that the record is clear, and there is no mistake as to the intentions or actions of the Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. The Commission has considered all the testimony, exhibits, pleadings, and arguments submitted by the parties. 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 (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 Arbitrator considered the five factors under Section 8.1b of the Act and determined that Petitioner sustained fifty percent (50%) loss of use of the person as a whole. The Arbitrator gave very little weight to the first factor [level of impairment], considerable weight to the second

factor [occupation of the injured employee], great weight to the third factor [age of the employee at the time of injury], very little weight to the fourth factor [employee's future earning capacity], and great weight to the fifth factor [evidence of disability].

The Commission agrees with the Arbitrator's Decision relative to the first and fifth factors under Section 8.1b of the Act. However, the Commission, after reviewing and reweighing the evidence pertaining to the second, third, and fourth factors, finds the PPD award to be excessive. The Commission instead finds that Petitioner is entitled to thirty-five percent (35%) loss of use of the person as a whole under Section 8(d)2 of the Act.

The Commission modifies the Arbitrator's Decision as to the second factor. Petitioner testified at arbitration that he continued to work without restriction for Respondent as a maintenance worker in the streets department. (T.22). However, Petitioner did report at his last appointment with Dr. Cole's office that he had pain with overhead lifting and activities using his left arm. (T.20; PX7). Thus, the Commission assigns the second factor moderate weight.

The Commission further modifies the Arbitrator's Decision and gives no weight to the third and fourth factors. There is no evidence that Petitioner's age had any effect on the level of permanent partial disability, and there is also no evidence that Petitioner's future earning capacity was affected by his work-related injury. The Commission finds that some of the reasoning provided by the Arbitrator is speculative in nature.

Based on the totality of all five factors, the Commission modifies and reduces the Arbitrator's PPD award to thirty-five percent (35%) loss of use of the person as a whole under Section 8(d)2 of the Act. The Commission finds that this award is more in line with the evidence in the record and the injuries sustained by Petitioner as a result of the October 15, 2015 work accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed November 13, 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 $755.22 per week for a period of 175 weeks, as provided in Section 8(d)2 of the Act, for the reason that the injuries sustained caused thirty-five percent (35%) loss of use of the person as a whole under Section 8(d)2 of the Act

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all other 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 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.

19IWCC0510

DATED: SEP 1 6 2019

DDM/pm
D: 9-11-19
052

D. Douglas McCarthy

Stephen Mathis

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
SECOND CORRECTED

NOVIELLI, LINO
Employee/Petitioner

Case# **17WC000579**

VILLAGE OF GLENDALE HEIGHTS
Employer/Respondent

19IWCC0510

On 11/13/2018, 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 2.45% 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:

0609 LAW OFFICE OF E JAMES RAYMOND
45 N ADDISON AVE
ADDISON, IL 60101

5001 GAIDO & FINTZEN
ROBERT L SMITH
30 N LASALLE ST SUITE 3010
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
2ND CORRECTED ARBITRATION DECISION

LINO NOVIELLI
Employee/Petitioner
v.
VILLAGE OF GLENDALE HEIGHTS
Employer/Respondent

Case # **17** WC **579**

Consolidated cases: **0**

19IWCC0510

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Ketki Steffen**, Arbitrator of the Commission, in the city of **Wheaton**, on **July 23, 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 15, 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 $**69,805.72**; the average weekly wage was $**1,342.41**.

On the date of accident, Petitioner was **52** 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 $**21,095.80** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**21,095.80**.

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

ORDER

RESPONDENT SHALL PAY PETITIONER PERMANENT PARTIAL DISABILITY BENEFITS OF **$755.22** WEEK FOR 250 WEEKS, BECAUSE THE INJURIES SUSTAINED CAUSED **50%** 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.

__KSSteffen__ Novemver 11 2018

Signature of Arbitrator Date

ICArbDec p. 2

NOV 13 2018

FACTUAL HISTORY

At the Arbitration Hearing, the Petitioner testified he was employed by the Respondent as a maintenance worker in the Waste Water treatment department at the time of the accident. He stated the job was heavy physical manual labor consisting of maintaining and repairing sewage pipes and equipment with various tools.

On the date of the undisputed accident the Petitioner and a co-worker were moving a water distiller from the attic to another floor. The Petitioner testified the water distiller was made of metal, was approximately 3 feet by 3 feet and weighed about 100 pounds. As the Petitioner was lowering the distiller through a hole to his co-worker it slipped and the Petitioner attempted to stop it by grabbing the distiller. This caused the Petitioner to collide with a beam in the attic with a hard impact. The Petitioner testified he immediately felt a sharp, tingling, shooting pain in his neck extending into his left arm down to the left hand.

The Petitioner was transported by ambulance in a neck brace and IV for pain to the emergency room at Glen Oaks hospital.

A MRI of the Petitioner's neck was done on November 5, 2015. The results of the test were positive showing a two (2) level collapse of disc space at C4-5 and C5-6. (Pet. Ex. 4)

Dr. Zelby saw the Petitioner for his neck injury for the first time on December 2, 2015. The Petitioner testified and Dr. Zelby noted at that visit that he had pain in his neck with shooting pains radiating all the way down to his fingers in his left hand. The Petitioner also testified he had tingling in his left arm which caused him to drop things. (Pet. Ex. 9)

Surgery was done to the Petitioner's neck by Dr. Zelby on February 2, 2016. The surgery was a two (2) level anterior cervical fusion at C4-5 and C5-C6. It consisted of approximately three procedures: 1) C4-5 and C5-6 discectomy and decompression of the spinal cord 2) Anterior cervical arthrodesis, C4-5 and C5-6 with PEEK lordotic cages and bone graft; and 3) Anterior cervical instrumentation C4,C5,C6 with a mini Helix plate and screws. (Pet. Ex. 8)

The Petitioner testified he participated in a course of physical therapy for six months after Dr. Zelby's surgery.

Dr. Zelby saw the Petitioner for the last time for his neck injury on November 28, 2016. (Pet. Ex. 9)

The Petitioner testified that while he was seeing Dr. Zelby for his neck injury, he was also seeing Dr. Cole for his left arm/shoulder injury.

A MRI was done on the left arm/shoulder on November 2, 2015. The results were positive showing: 1) a complete tear of the supraspinatus tendon and 2) blunting anterior glenoid labrum suspicious for a small tear at this site. (Pet. Ex. 1)

Surgery was done to the Petitioner's left arm/shoulder by Dr. Cole on April 12, 2016. It consisted of four (4) separate procedures: 1) Repair of a full thickness tear of the rotator cuff using 4

anchors 2) left biceps tenodesis 3) left shoulder subacromial decompression and 4) left shoulder intra-articular debridement. (Pet. Ex. 6)

Dr. Cole prescribed a TENS unit for the Petitioner to use in his recovery after the surgery. (Pet. Ex. 2)

The Petitioner did a course of physical therapy per Dr. Cole's recommendation from April 2016 til October 11, 2016 for approximately six months. (Pet. Ex. 5)

The Petitioner testified he saw Dr. Cole for an office visit on September 29, 2016 at which time he was released to return to work full duty. Dr. Cole told him to come back if there were any further problems.

On January 19, 2017, the Petitioner returned to see Dr. Cole. He testified he was still having tingling in his left arm down into his fingers. He was unable to push off on anything and he would drop things. Dr. Cole gave the Petitioner's a cortisone injection at that time. (Pet. Ex. 7)

After the cortisone injection the Petitioner testified he continued to have problems with the tingling, shooting pain into his left arm.

Another MRI was done by Dr. Cole to the left arm/shoulder on February 22, 2017. The results were positive. It showed a new postoperative change from supraspinatus repair without recurrent complete tear. New partial tear inferior surface supraspinatus tendon 0.5 cm transverse, 0.2 cm superior to inferior and 0.5 cm AP diameter 2.1 cm from distal insertion along the posterior aspect supraspinatus tendon. New mild worsening diffuse rotator cuff tendinosis most marked involving the supraspinatus tendon. (Pet. Ex. 3)

Dr. Cole saw the Petitioner for the last time on March 23, 2017. At that time Dr. Cole noted, and the Petitioner testified to continuing pain with overhead activities as well as activity using the left arm. Dr. Cole noted the Petitioner took Advil two pills three times daily to help with the symptoms. In his physical examination, Dr. Cole noted the Petitioner was able to demonstrate nearly full active and passive painless range of motion of the left shoulder with the exception of mild deficit of internal rotation approximately 10 degrees less of the left side compared to the right side. Dr. Cole noted in his Plan part of this visit, he was not sure if he could make him much better with additional surgery. Dr. Cole stated he would be happy to provide the Petitioner with additional treatment including future subacromial space injections to help him get through the resting pain, if it was needed. (Pet. Ex. 7)

Petitioner testified, unrebutted, that he saw Dr. Tack for a AMA rating on April 6, 2018. The exam with the doctor lasted approximately five minutes and did not involve any physical exam of his left arm/shoulder. The physical exam of his neck consisted of a few movements of the neck.

The Petitioner testified he is 55 years old at the present time and works in the streets department for the Respondent. He said the job is a very physical manual labor type work. It involves the use of manual tools to repair and fix equipment.

At the Arbitration Hearing the Petitioner testified his present complaints are tingling, shooting pain from his neck down to his left hand fingers. He has a loss of strength in his left arm where he will drop things and cannot use it to push off. He has pain and a loss of motion when reaching

overhead. He uses the TENS unit approximately once a week for treatment and takes Advil, two tablets three times a day for the pain. The Petitioner testified he has neck pain and a loss of range of motion in turning his neck.

ANALYSIS/FINDINGS

In support of the Arbitrator's decision relating to Causal Connection, Issue F, the Arbitrator concludes as follows:

The work accident is not in dispute. On October 15, 2015 Petitioner, a maintenance worker, was moving a water distiller from the attic to another floor and suffered an accident when lowering a 100-pound unit from the attic. Petitioner's body collided with a beam in the attic and the heavy impact caused Petitioner to suffer an injury to her cervical area and left shoulder. An MRI showed a two (2) level collapse of disc space at C4-5 and C5-6. (Pet. Ex. 4) Since then Petitioner underwent medical treatment that included surgery and extensive PT. Petitioner testified to his current condition in relationship to the lingering effects from his injury. The medical records corroborate his testimony and there is clear evidence of causal connection regarding his current condition and his work accident.

The Arbitrator hereby concludes that a causal relationship exists between Petitioner's condition of ill-being regarding his left shoulder and cervical spine due to his work accident of October 15, 2015.

In support of the Arbitrator's Decision relating to Issue L, the Nature and Extent of the injuries, the Arbitrator concludes as follows:

The nature and extent of the injuries to the neck and the left shoulder are in dispute although the medical evidence and treatment is not contested.

In October 2016 Petitioner was released to full duty with respect to his left shoulder. He had two follow-up visits thereafter, and an injection, but was not removed from full duty. Petitioner continues to work full duty for the Respondent. It is uncontroverted that his work in the maintenance department is heavy physical work.

In November 2016 following surgery and PT, Petitioner was released to full duty in relationship to his spine.

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

(i) Impairment. Respondent had the Petitioner examined by Dr. Tack for a AMA Impairment Rating on April 6, 2018. The Petitioner testimony was that the doctor examined him for approximately five minutes and did not physically test his left arm/shoulder. Dr. Tack's report of April 6, 2018 noted in the Physical Examination part that the Petitioner's neck had mild stiffness with lateral flexion. Dr. Tack did not consider the Petitioner's left arm/shoulder injury or the surgery to the left rotator cuff when determining the Petitioner's impairment rating of 5% patient as a whole in his April 6, 2018 report. The Arbitrator finds that the level of impairment does not necessarily equate to permanent partial disability under the Act, but is one factor to be considered in making such a disability evaluation. His limited exam that did not include the left shoulder is noted. The Arbitrator gives very little weight to this factor.

(ii) Occupation. The Petitioner testified at the present time he works in the Streets department for the Respondent. The job is a very physical manual labor type work. The work includes the use of manual tools to repair and fix equipment. The Arbitrator notes the type of work the Petitioner was performing the day that he got injured. It is apparent that Petitioner work is heavy, cumbersome and included a variety of labor intensive activity where physical dexterity is required. The Arbitrator gives considerable weight to this factor.

(iii) Age. The Petitioner is 55 years old at the present time. The Arbitrator concludes, due to the Petitioner's age, that his disability will cause greater restrictions with his work then for a younger individual. The Arbitrator also notes that he may have more difficultly recovering from this injury and may have to occasionally compromise how he performs some heavier job duties in the future. He will have to probably work with these limitations for 5-10 years more years or until normal retirement age. The Arbitrator gives great weight to this factor.

(iv) Future Earning Capacity. The Petitioner has returned to work without evidence of a reduction in his wage-earning capacity. The Arbitrator gives very little weight to this factor but considers that there may be limitations upon post-retirement work which many individuals may need to perform in their golden years.

(v) Evidence of Disability. The Petitioner demonstrated evidence of disability corroborated by his treating doctor's medical records. The evidence shows that as a result of his work accident, Petitioner sustained two (2) injuries: 1) a two (2) level disc herniation requiring a two (2) level anterior cervical fusion at C4-5 and C5-6; and 2) a full thickness tear of the left rotator cuff resulting in surgery to repair the rotator cuff. The Petitioner credibly testified he currently has a tingling, shooting pain from his neck down into the fingers in his left hand. He has a loss of strength in his left arm where he drops things and cannot use it to push off. He has pain and a loss of motion when reaching overhead. He uses a TENS unit approximately once a week for treatment and takes Advil, two tablets three times a day for pain. The Petitioner has neck pain and a loss of range of motion in turning his neck. All of the Petitioner's present complaints are supported by the medical evidence. The Arbitrator gives great weight to this factor in her determination of PPD.

Considering all the factors required under Section 8.1(B), as well as the Petitioner's trial testimony and the medical evidence, the Arbitrator finds the Petitioner has suffered the permanent and partial loss of use of the whole person to the extent 50% thereof due to his work injury.

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

Anthony DiLoreto,

Petitioner,

vs. NO: 16 WC 38451

City of Chicago,

19IWCC0511

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 all issues, and being advised of the facts and law, modifies the Arbitration Decision Form and corrects two scrivener's errors. The Commission otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission solely seeks to correct two clerical errors. On the Arbitration Decision Form, the Arbitrator mistakenly wrote a date of accident of 12/15/**19**. Additionally, on page three (3) of the Decision the Arbitrator mistakenly wrote that Respondent shall pay compensation accrued from 10/2/**19** through 2/21/19. These are clearly scrivener's errors. The Commission thus modifies the above-referenced sentences to read as follows:

> On the date of accident, **12/15/16**, Respondent was operating under and subject to the provisions of the Act.
>
> Respondent shall pay Petitioner compensation that has accrued from **10/2/17** through **2/21/19**, and shall pay the remainder of the award, if any, in weekly payments.

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 March 28, 2019, is modified as stated herein.

The party commencing 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: SEP 16 2019

d: 9/10/19
TJT/jds
51

Thomas J. Tyrrell

Barbara N. Flores

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DiLORETO, ANTHONY Case# **16WC038451**

Employee/Petitioner

CIY OF CHICAGO

Employer/Respondent

19IWCC0511

On 3/28/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.41% 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:

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

0113 CITY OF CHICAGO LAW DEPT
STEPHANIE LIPMAN
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
NATURE AND EXTENT ONLY

Anthony Diloreto
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **16** WC **38451**

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 **David A. Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **2/21/19 & 3/18/19**. By stipulation, the parties agree:

On the date of accident, **12/15/19**, 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 $**74,460.02**, and the average weekly wage was $**1,431.93**.

At the time of injury, Petitioner was **63** years of age, ***married*** with **0** dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

Respondent shall be given a credit of $**39,550.61** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**39,550.61**.

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner the sum of $**775.18**/week for a further period of **62.5** weeks, as provided in Section **8** of the Act, because the injuries sustained caused **a loss of 12.5% man as a whole**.

Respondent shall pay Petitioner compensation that has accrued from **10/2/17** through **2/21/19**, and shall pay the remainder of the award, if any, in weekly payments.

See attached

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

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

David A. Kane
Signature of Arbitrator

March 28, 2019
Date

MAR 2 8 2019

Anthony DiLoreto v City of Chicago 16 WC 38451

An AMA impairment rating was not done in this matter; however, Section 8.1(b) of the Act requires consideration of five factors in determining permanent partial disability:

1. The reported level of impairment;
2. Petitioner's occupation;
3. Petitioner's age at the time of the injury;
4. Petitioner's future earning capacity; and
5. Petitioner's evidence of disability corroborated by treating medical records.

Section 8.1(b) also states, "No single 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 a physician must be examined." The term "impairment" in relation to the AMA Guides to the Evaluation of Permanent Impairment 6th Edition is not synonymous with the term "disability" as it relates to the ultimate permanent partial disability award.

1. Reported level of impairment

An AMA impairment rating was not done in this case. This does not preclude an award for partial permanent disability.

2. Petitioner's Occupation

On the date of accident, the petitioner was a motor truck driver for the Department of Streets and Sanitation. Following his treatment and

recovery, the petitioner was able to return to work to his usual and customary position. This must be given great weight.

3. Petitioner's age at time of injury

The petitioner was 63 years old at the time of injury. This has no effect on the claim should receive little weight.

4. Petitioner's future earning capacity

The petitioner has no loss of earnings. Nothing in the record, including his testimony, suggests that his future earning capacity has been affected by the injury sustained. Great weight must be placed on this factor.

5. Evidence of disability corroborated by medical records

The petitioner suffered an injury to his right shoulder after he slipped and fell from a truck during the course and scope of his employment with respondent. As a result he required surgery to repair a full thickness rotator cuff tear. On 1/20/17 Dr. Forsythe prepared an arthroscopic massive rotator cuff repair, with subacromial decompression and partial distal clavical excision as well as a glenohumeral joint partial synovectomy, coracohumeral ligament release.

The records show that the petitioner reported that his pain complains vary depending on the day. Quick movements, especially overhead movements will cause temporary pain, which he described as a "reminder to let me know its there". The record also shows that Petitioner's recovery allowed him to return to his usual and customary position as a motor truck driver.

The petitioner shall have and receive 62.5 weeks from the respondent at a rate of $775.18 because the petitioner suffered a loss of 12.5% man of a whole.

Respondent shall pay Petitioner compensation that has accrued from **10/2/19** through **2/21/19**, and shall pay the remainder of the award, if any, in weekly payments

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

Erineo Solis,

Petitioner,

vs. NO: 13 WC 23552

Hibachi Grill,

19IWCC0512

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice provided to all parties, the Commission after considering the issues of causal relationship, temporary total disability benefits, medical expenses and permanent partial disability benefits 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.

Temporary Total Disability Benefits

"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). On March 26, 2014, Dr. Malek released Petitioner to return to work without restrictions. PX4. Petitioner testified he returned to work for Respondent following his injury but could not remember the dates. T. 19. The medical records indicate Petitioner underwent surgery on May 1, 2015 but provide no documentation as to Petitioner's work status. PX7.

The Commission finds Petitioner was temporarily totally disabled from May 24, 2013 through March 26, 2014, a period of 43-6/7 weeks. The Commission vacates the award of temporary total disability benefits awarded by the Arbitrator after March 26, 2014.

19IWCC0512

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 Commission finds Respondent is liable for the following medical bills:

-PX9: Dr. Malek in the amount of $875.00.
-PX10: New Life Medical Center, Dr. Ma and Dr. Chunduri in the amount of $39,914.10.
-PX12: Cook County Stroger Hospital in the amount of $354.00.
-PX13: Lake Shore Open MRI & CT in the amount of MRI: $2,600.00.
-PX14: University of Illinois Hospital & Health Sciences Services in the amount of $3,344.00.
-PX15: University of Illinois Physicians Group in the amount of $284.00.
-PX16: eqMD in the amount of $1,801.08.

The Commission awards the bills pursuant to Sections 8(a) and 8.2 of the Act. The Respondent is entitled to a credit for all amounts previously paid.

The Commission corrects the surgery date of August 3, 2015 as referenced in the Arbitrator's decision to the correct date of May 1, 2015.

The Commission affirms all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's December 29, 2017 decision is modified for the reasons stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $286.00 per week for a period of 43-6/7 weeks, representing May 24, 2013 through March 26, 2014, that being the period of temporary total incapacity for work pursuant to §8(b) of the Act. The Commission notes Respondent paid $10,134.00 for TTD benefits and is entitled to credit for same.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of TTD benefits from March 27, 2014 through September 7, 2017 is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the sum of $49,172.18 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. Respondent shall receive credit for any payments made.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $286.00 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 permanent disability of the person as a whole to the extent of 15%.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest 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 $24,000.00. 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: SEP 17 2019
LEC/maw
o07/17/19
43

Stephen J. Mathis

D. Douglas McCarthy

SPECIAL CONCURRENCE/DISSENT

I concur with majority regarding its findings of accident, temporary total disability benefits, and medical expenses. I dissent regarding its findings of causal relationship and permanent partial disability benefits.

I believe Petitioner's condition of ill-being resolved as of March 26, 2014 when Dr. Malek placed Petitioner at maximum medical improvement and released Petitioner to return to work without restrictions. Dr. Malek reviewed the lumbar MRI performed February 28, 2014 and noted it evidenced an S1 segment characteristic of hemangioma. Dr. Malek found Petitioner continued to display multiple Waddell signs and felt Petitioner's symptoms were not proportionate to the findings on the MRI scan. Specifically, Dr. Malek noted, "I am not really sure there is a basis for any restrictions. However, a functional capacity evaluation with validity testing could be considered. There is a possibility it could be invalid. The patient does have some element of tenderness in the sacroiliac area, but he has also tenderness elsewhere rendering such finding of no significance." PX4.

Thereafter, Petitioner sought treatment almost a year later and on May 1, 2015 underwent a procedure for a "disc hernia at L5." PX7. The entirety of the medical records relating to Petitioner's treatment in 2015 is a single paragraph attesting that Petitioner underwent the above

procedure with attendant follow-up care. I do not find such medical statement persuasive nor a valid basis to find a continuing causal relationship between Petitioner's accident and his condition of ill-being. As such, I would modify the award of permanent partial disability benefits to 15 weeks as provided by Section 8(d)2 which represents 3% person as a whole.

Therefore, I respectfully dissent.

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SOLIS, ERINEO
Employee/Petitioner

Case# **13WC023552**

19IWCC0512

HIBACHI GRILL
Employer/Respondent

On 12/29/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.53% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0139 CORNFIELD & FELDMAN LLP
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2837 LAW OFFICES JOSEPH MARCINIAK
NICOLE S McNAIR ESQ
2 N LASALLE ST SUITE 2510
CHICAGO, IL 60602

19IWCC0512

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

ERINEO SOLIS
Employee/Petitioner

v.

HIBACHI GRILL
Employer/Respondent

Case # **13** WC **23552**

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 **George Andros**, Arbitrator of the Commission, in the city of **Chicago**, on **September 21, 2017 and October 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. [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 **May 20, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$17,454.84**; the average weekly wage was **$335.67**.

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

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

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

Respondent shall be given a credit of $**10,134.00** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**10,134.00**.

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of **$286.00**/week for **224** weeks, commencing **May 26, 2013** through **September 7, 2017**, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $10,134.00 for temporary total disability benefits that have been paid.

Medical benefits Respondent shall pay reasonable and necessary medical services of **$63,104.18**, as provided in Sections 8(a) and 8.2 of the Act.

Permanent Partial Disability: Person as a whole

Respondent shall pay Petitioner permanent partial disability benefits of **$286.00**/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 listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

#001Arb George Andros — Signature of Arbitrator

December 22, 2017 — Date

DEC 2 9 2017

STATEMENT OF FACTS 13 WC 23552

On May 20, 2013, Petitioner was employed as a cook for the Respondent. He had been employed up to that point for 1 ½ years with the Respondent. His job was to cook the meals for the guests. On the date of accident, he was carrying a tray of food weighing 45 pounds and he slipped on some grease on the ceramic floor and fell. He fell forward and landed on the tray of food hitting his abdomen. He immediately noticed pain in his low back and felt too weak to stand up by himself. Eventually he rose from the floor and finished his shift. He testified that he never had prior injuries to his back. He self-treated overnight and returned to work the next day where he noticed continuing pain.

He sought medical care on May 24, 2013 at New Life Medical Center and the chiropractor assigned to him was Irene Ma, DC. Petitioner gave a consistent history of the accident of May 20, 2013. He was diagnosed with a lumbar sprain and lumbosacral neuritis. He was prescribed chiropractic care 3 times a week for 4 weeks and was kept off work. Dr. Ma ordered a MRI that was performed on June 4, 2013. The MRI of his lumbar spine showed disc herniations at L4-5 and L5-S1. Dr. Ma referred Petitioner to Dr. Krishna Chunduri on June 12, 2013. Doctor Chunduri took a similar history of the accident and diagnosed, "severe radicular pain from the injury". He prescribed an EMG that was taken on June 17, 2013. The impression on the EMG was mild-moderate L5-S1 neuropathy and strain of the left sacro-iliac joint. Chiropractic care continued on a regular basis through the months of June and July 2013.

On July 24, 2013, Dr. Chunduri diagnosed Petitioner with lumbar disc herniation with radiculitis. He prescribed a L4 and L5 transforaminal epidural steroid injection but it was not performed due to lack of authorization from the workers' compensation insurance carrier. Once again, Dr. Chunduri opined that the diagnosis and symptoms that Petitioner was having were causally related to the injury. Chiropractic care continued through August 2013. Petitioner was seen for an IME on August 27, 2013, performed by Dr. Grear. He opined that Petitioner had an acute lumbar strain related to the May 20, 2013 date of accident. Dr. Grear placed Petitioner on light duty of no lifting greater than 10 pounds.

Petitioner continued his chiropractic treatment with Dr. Ma. He saw Dr. Chunduri on November 6, 2013, where the doctor observed that Petitioner was not complaining of pain radiating down his legs anymore. The doctor prescribed continuation of physical therapy and Medrol Dosepak. During the Petitioner's December 18, 2013 office visit with Dr. Chunduri, he again complained of increased pain in his back. Dr. Chunduri prescribed diagnostic medial branch block at L4-5.

Petitioner was sent to Dr. Michel Malek and seen on February 12, 2014. He diagnosed Petitioner with strain/sprain of the back. He requested an updated MRI. The MRI was performed on February 27, 2014. Dr. Malek reviewed the MRI and his impression stated in his records of March 26, 2014, was S1 segment characteristic of hemangioma. Dr. Malek placed Petitioner at MMI on March 26 2014 and returned him to work full duty.

Petitioner had been kept off work by Dr. Ma, Dr. Chunduri, and the employer (for not providing light duty) from May 26, 2013 through March 26, 2014. His medical bills for that same time period were paid by the Respondent and Temporary Total Disability was paid. Since March 27, 2014, Petitioner has not been paid any TTD and his medical treatment has been paid through Medicaid.

Petitioner continued medical care with his chiropractor, Dr. Ma. He had another lumbar MRI on May 16, 2014, showing L4-5 and L5-S1 bulging discs. Petitioner eventually had surgery performed on August 3, 2015 in Mexico by Dr. Luis Fernando Lopez Orozco. Petitioner testified that after the surgery he was doing much better. He testified that currently his pain is mostly gone. He has limited range of motion where he cannot bend over without pain and he loses his balance.

CONCLUSIONS OF LAW

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

The Arbitrator finds that Petitioner's injury of May 20, 2013 caused the herniated discs and subsequent surgery to Petitioner. The medical records of Dr. Ma and Dr. Chunduri continuously state that they were providing medical care to Petitioner's back as a result of his injury. Respondent's own IME by Dr. Grear causally connected Petitioner's back injury to the accident date. Dr. Malek also opined that there is a causal connection between Petitioner's strain and his injury. Dr. Ma continued treating Petitioner after Dr. Malek released him from care because Petitioner was complaining of the same pain in his low back and down his legs. Fortunately, Petitioner went through a successful surgery that appears to have resolved the complaints.

"J" (Were 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, having found in favor of Petitioner for causation, finds that all medical care was reasonable, necessary, and related to Petitioner's work injury of May 20, 2013. Respondent is ordered to pay the medical bills per Fee Schedule 8.2

"K" (What temporary benefits are in dispute?)

The Arbitrator, having found for Petitioner as to causation and medical bills, also finds that Petitioner is entitled to temporary total disability benefits from May 26, 2013 through September 7, 2017. Petitioner testified that he had surgery in August of 2015 and has had physical therapy up to two weeks prior to this trial date.

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

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no opinion comporting with the specific requirements of §8.1b(a) was submitted into evidence. The Arbitrator therefore gives ***no*** weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a cook 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 therefore gives ***no*** 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. Because of **the relatively young age where Petitioner will deal with the residual disability for many years,** the Arbitrator therefore gives ***greater*** weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes **Petitioner has been released from care to full duty work.** 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 testified to a reduced range of motion and a balance problem. Petitioner did undergo a surgical repair of his back**. 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 **man as a whole** pursuant to **§8(d)2** of the Act.

STATE OF ILLINOIS	)		
	) SS.		
COUNTY OF WILLIAMSON	)		

[X] 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	[X] None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Fitzpatrick,
Petitioner,

vs. NO: 14 WC 09979

The American Coal Company,
Respondent.

19IWCC0513

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 disease covered by the Act and nature and extent, and being advised of the facts and law, affirms 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 Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

19IWCC0513

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: SEP 17 2019

Marc Parker

mp/wj
09-12-19
68

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

FITZPATRICK, DAVID
Employee/Petitioner

Case# **14WC009979**

THE AMERICAN COAL COMPANY
Employer/Respondent

19IWCC0513

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:

0755 CULLEY & WISSORE
KIRK CAPONI
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HARRISBURG, IL 62946

1662 CRAIG & CRAIG LLC
KENNETH F WERTS
115 N 7TH ST PO BOX 1545
MT VERNON, IL 62864

STATE OF ILLINOIS)
)SS.
COUNTY OF **WILLIAMSON**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DAVID FITZPATRICK
Employee/Petitioner

Case # **14** WC **09979**

v.

Consolidated cases: ______

THE AMERICAN COAL COMPANY
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christina Hemenway**, Arbitrator of the Commission, in the city of **Herrin**, on **April 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [x] Other **Section 1(d)-(f) of the Occupational Diseases Act**

Findings

On **January 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.

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 $**91,864.24**; the average weekly wage was $**1,766.62**.

On the date of accident, Petitioner was **59** years of age, ***single*** with **0** dependent children.

Petitioner claims no medical.

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

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

Order

As explained in the Arbitration Decision, Petitioner failed to prove by a preponderance of the evidence that he sustained an occupational disease that arose out of and in the course of his employment by Respondent, and that his current condition is causally related to same. All benefits are denied. The Arbitrator makes no findings as to the remaining issues.

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

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

Signature of Arbitrator

January 16, 2018
Date

JAN 17 2018

STATE OF ILLINOIS)
) ss **19IWCC0513**
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DAVID FITZPATRICK
Employee/Petitioner

v. Case #: **14 WC 09979**

THE AMERICAN COAL COMPANY
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

At the time of arbitration, Petitioner was 62 years old and not married. He graduated from Benton High School and did not have any training or schooling after high school. Petitioner worked for 40 plus years in the coal mining industry with all of those years being underground. During the course of his coal mining employment, he was regularly exposed to coal dust, silica dust, roof bolting glue fumes and diesel fumes.

Petitioner last worked in the coal mine in January 2014, for Respondent at its New Future Mine. He was 59 years old at that time. His last job classification was dust control. He testified that he was exposed to and breathed coal dust on his last day of employment. Petitioner testified that he was let go at that time, and that ended his mining career. He has not worked at any other coal mine since then.

Petitioner started working in the coal mines in August 1973 for Old Ben Coal. His first job classification was belt cleaner where he would shovel on the belt and clean up the coal that had fallen off the belt line. He then bid on a roof bolting job which is where he would drill the hole in the roof, insert a roof bolt pin and tighten it up to support the roof. He testified that there was a lot of rock dust associated with that job, which would come straight down on him. He was also exposed to roof bolting glue pins in that job. The glue pins would give off a strong odor that would take his breath away. After two years as a roof bolter, Petitioner became a miner operator. In that position, he operated the continuous miner at the face of the mine to actually cut out the coal. Petitioner testified that this was one of the dustiest jobs in the mine. Petitioner's next job was as section foreman or face boss. This is the foreman at the face who oversees the operations to make sure they are complying with state and federal laws. Petitioner's next job was as longwall foreman. The longwall is a piece of equipment that cuts all the coal up to the rock as it runs up and down a 1,000-foot face. Petitioner described this as one of the dustiest jobs in the mine if one was not wearing a mask.

Petitioner left Old Ben in 1991 or 1992 and went to Eagle Valley Coal in Equality, Illinois. He first worked as a belt cleaner at Eagle Valley and then went to examining. In his job as a mine examiner he was responsible for making sure the roof bolting and dusting were done properly and that the belt edges were clean. He would be in all areas of the mine as an examiner. In 2000 Petitioner went to Five Star Mining in Petersburg, Indiana. He started there as a belt cleaner. He then became examiner and finally a face boss. Petitioner went to work for Respondent in March 2011, as safety director. It was his duty to make sure things were safe and in compliance with the law. He would walk with the federal and state inspectors as they walked through the mine. The inspections would take place while mining was going on around him. His last position with Respondent was in dust compliance. He was responsible for taking dust samples for the continuous miner to make sure that they were in compliance with the MSHA dust regulations.

Petitioner first noticed his breathing problems in 2012. He was in one of the returns with a federal inspector, and Petitioner had to ask him to stop and let him rest for a little bit because he was getting out of breath. He testified that from that time until he left the mine in 2014, his breathing got worse. He testified that currently he can walk to his mailbox, which is about 700 feet from the house, and he has to stop and rest before he gets back. He testified that he has a terrible time climbing stairs. He uses his Spiriva inhaler in the morning. He also has an Albuterol inhaler which he takes as needed. Petitioner testified that he has a difficult time vacuuming and mowing his lawn because of his breathing. He also has a difficult time walking his dog.

Dr. James Alexander is Petitioner's treating physician and prescribed his inhalers. Petitioner has smoked two cigarettes each morning with a cup a coffee for about ten years. He testified that in the 1980s when he went through a divorce he smoked a pack about every seven or eight days for a couple of years. In addition to his breathing problems, he takes medication for prostate, back problems and hypertension.

Petitioner testified that when he was last at the mine he was suspended for three days. He testified that he was never really told why he was suspended. According to the Corrective Counseling and Disciplinary Action Form Petitioner's suspension was for inadequate work performance. After being given this statement, Petitioner signed a quit slip on January 31, 2014. After that, he applied for unemployment benefits and Respondent did not contest those benefits. After working for Respondent, Petitioner worked at Rend Lake College teaching on an on-call basis. He testified that he may have worked a couple of classes in 2014. He testified that he worked for cash taking care of his brother who had gotten sick and who recently passed away. He testified that another brother had a construction business, and that he might go get something for his brother, but he never did any work. His brother would pay his bills for helping out.

Petitioner testified that from time to time while he was employed as a coal miner, he underwent chest x-ray screening by NIOSH for black lung. After he had a chest x-ray performed, NIOSH would write to him a letter and advise what his film revealed. He did not bring any of those letters to arbitration.

Petitioner saw Dr. Paul in Springfield in May 2014. He testified that he went to Dr. Paul's office twice. On the first occasion x-rays were taken. He then went back for testing at a later date.

Petitioner has not seen any other physician at the request of his attorney. Petitioner testified that he spends time with his grandkids but does not really do anything else for a hobby.

Petitioner testified that after he left Respondent's employ he put in applications at other coal mines, but they did not hire him. Petitioner applied to White Oak Mine in 2015 and Mach Mining in November 2014. He testified that he was willing and ready to work at that point in time. Petitioner testified that he had some concerns trying to go back into the coal mine. He was not sure if he could do it, but he was going to try because he wanted to work as long as he could. He was concerned that he would get into a coal mine and not do the job because of his breathing.

Dr. Glennon Paul testified by way of deposition on March 28, 2016. He is the Director of St. John's Respiratory Therapy and Clinical Assistant Professor of Medicine as SIU Medical School. Dr. Paul is the senior physician at the Central Illinois Allergy & Respiratory Clinic, which specializes in allergy and pulmonary diseases. Physicians in the Clinic take care of patients with respiratory diseases, critical care, allergic diseases, and some internal medicine problems. Dr. Paul reads 15 to 20 chest x-rays per day and interprets about the same number of pulmonary function tests per day. Dr. Paul is board certified in allergy, immunology and asthma. He testified that at the time he did his fellowship in 1970 to 1972 there were not any pulmonary fellowships developed. He testified that there was not a program in pulmonology per se. It was strictly in allergy, asthma and respiratory disease. Dr. Paul is not board certified in pulmonary disease. PX1.

Dr. Paul examined Petitioner one time on May 14, 2014, at the request of his counsel. He testified he has seen over 100 individuals at the request of Petitioner's counsel. At the time of his exam, Petitioner reported to Dr. Paul that he had shortness of breath with walking two blocks, which began in 2013. He reported having shortness of breath with two flights of stairs. He also developed wheezing, coughing and shortness of breath as well as respiratory tract infections which began about a year prior to Dr. Paul's examination. Dr. Paul testified that on physical examination, Petitioner's history of symptoms and signs was confirmed. On physical examination, Petitioner had wheezes and rhonchi throughout both lung fields. Dr. Paul attributed the wheezing and coughing to his diagnosis of asthmatic bronchitis. He attributed the shortness of breath to coal workers' pneumoconiosis and asthmatic bronchitis. He testified that Petitioner had a history of smoking a half pack a day for 12 years. He further testified that smoking does not cause asthma. With administration of methacholine, Petitioner had a 26% fall in FEV1, which is sufficient to diagnose asthma. Dr. Paul called it asthmatic bronchitis because Petitioner is a cigarette smoker and part of that condition could be due to smoking. PX1.

Dr. Paul testified that Petitioner has coal workers' pneumoconiosis and asthmatic bronchitis caused by his exposures in the coal mine. He testified that in light of these diagnoses, Petitioner could not have any further exposure to the environment of a coal mine without endangering his health. Dr. Paul testified that coal dust and fumes from diesel machines and roof bolting glue in the coal mine can cause and aggravate asthma or asthmatic bronchitis. He testified that when one has asthma, the asthma remains all the time, even though triggers may come and go, so that one person may have attacks sometimes and others may not. Dr. Paul testified that Petitioner had clinically significant pulmonary impairment as well as radiographically apparent pulmonary impairment caused by coal mine dust. PX1.

On cross-examination, Dr. Paul testified that Petitioner was not taking any breathing medication at the time of his examination, and did not relate to Dr. Paul ever having taken breathing medication in the past. Dr. Paul acknowledged he did not review any medical records regarding Petitioner. Dr. Paul testified that the number one cause of dyspnea on exertion is respiratory disease but other causes could be heart failure, anemia, hyperventilation and deconditioning. He acknowledged that Petitioner did not tell him that he left coal mining when he did due to a respiratory disease, nor did he relate to Dr. Paul an inability to perform the duties of his last job in the coal mine. PX1.

Dr. Paul testified that Petitioner's diffusion capacity was reduced at 44% and that his reduced diffusing capacity was due to coal workers' pneumoconiosis, which was a consequence of the scarring of his lung. He testified that this scarring would be permanent. He testified that he did not know the inhalation time for the tracer gas that was used in the pulmonary function testing. He further testified that they do not record the hold time or the inspiratory volume. He did not know the date of the chest x-ray. He testified that the opacity type was brown and irregular and he described the profusion as 1. He testified that the profusion did not matter. PX1.

Dr. Henry K. Smith, board certified radiologist and B-reader, interpreted Petitioner's chest x-ray of February 18, 2014, as positive for pneumoconiosis, profusion 1/0 with P/P opacities in all lung zones. Dr. Smith noted a granuloma versus occult lung neoplasm in the lateral left upper lung. PX2. Dr. Michael Alexander, board certified radiologist and B-reader, interpreted Petitioner's chest x-ray dated February 18, 2014, as positive for pneumoconiosis, profusion 1/1 with P/P opacities in all lung zones. Dr. Alexander noted a 10x8 minimally calcified nodule in the left upper zone. PX3.

Records from NIOSH for the Coal Workers' Health Surveillance Program were admitted into evidence. A chest x-ray of May 20, 1974, was interpreted by a B-reader and an A-reader as completely negative. A chest x-ray of November 5, 2001, was interpreted by two B-readers as being completely negative. A chest x-ray of August 6, 2004, was interpreted by an A-reader and a B-reader as not having any parenchymal or pleural abnormalities consistent with pneumoconiosis. A chest x-ray of March 4, 2011, was interpreted by one B-reader as having P/Q opacities in the right upper and middle lung zones with profusion 0/1. Another B-reader interpreted the same film as not having any parenchymal or pleural abnormalities consistent with pneumoconiosis. RX4.

Dr. Cristopher Meyer testified by way of deposition on June 5, 2015. Dr. Meyer reviewed a PA and lateral chest x-ray dated February 18, 2014. He testified that the film was quality 1. He noted the single calcified nodule in the left upper lobe consistent with granuloma. Dr. Meyer testified that there were no findings of coal workers' pneumoconiosis. Dr. Meyer has been board certified in radiology since 1992. He has been a B-reader since 1999. Dr. Meyer was asked to take the B-reading exam by Dr. Jerome Wiot. Dr. Wiot was part of the original committee that designed the training program which is called the B-reading program. Dr. Meyer was recently asked to have a more active academic role in the B-reading program. He is on the American College of Radiology Pneumoconiosis Task Force which is engaged in redesigning the course and the exam and submitting cases for the B-reading training module and exam. RX1.

Dr. Meyer testified that the B-reader looks at the films of the lung to decide whether there are any small nodular opacities or any linear opacities and, based on the size and appearance of the small opacities, they are given a letter score. Dr. Meyer testified that specific occupational lung diseases are described by specific opacity types. Coal workers' pneumoconiosis is characteristically described by small round opacities. The distribution of opacities is also described because different pneumoconioses are seen in different regions of the lung. Coal workers' pneumoconiosis is typically an upper zone predominant process. The last component of the interpretation is the extent of the lung involvement or the so-called profusion. Dr. Meyer testified that the profusion is basically trying to define the density of the small opacities in the lung. Dr. Meyer testified that radiologists have about a 10% higher pass rate on the B-reading exam than other specialties. In Dr. Meyer's opinion, radiologists have a better sense of what the variation of normal is. Dr. Meyer testified that one of the most important parts of the B-reader training and examination is making a distinction between the 0/1 and 1/0 film. RX1.

At the request of Respondent's counsel, Dr. James R. Castle reviewed medical records and chest x-rays regarding Petitioner. Dr. Castle is a pulmonologist and is board certified in internal medicine and the subspecialty of pulmonary disease. Dr. Castle testified that the board certification in pulmonary disease was established in 1941. He practiced in Roanoke, Virginia for 30 years. His practice was limited to pulmonary disease and chest disease, which encompassed critical care medicine. His practice included treating patients with occupational lung disease, including some patients who had coal workers' pneumoconiosis. Dr. Castle has been certified as a B-reader since 1985. RX2.

Dr. Castle reviewed a chest x-ray for Petitioner dated February 8, 2014. He noted a very small nodule in the left upper zone which might contain calcium and was likely a granuloma. He testified that there was no evidence of pneumoconiosis. Dr. Castle testified that the requirements for a proper reading of a chest x-ray for black lung include having the individual's name, date of the x-ray and preferably the facility identification as well as the film quality. He testified that the reader looks at the film for any parenchymal abnormalities that could be consistent with small opacities and if those are present, the reader notes their size and location in the lung as well as the profusion. Then one notes whether there are any large opacities and whether there are any abnormalities in the pleura. Dr. Castle testified that a 0/1 profusion rating is negative for pneumoconiosis. RX2.

Dr. Castle testified that based upon a thorough review of all the data, including the histories, physical examinations, radiographic evaluations, physiologic testing, arterial blood gas studies and other data, Petitioner did not suffer from any pulmonary disease or impairment occurring as a result of his occupational exposure to coal mine dust. Dr. Castle noted that Petitioner worked in or around the underground mining industry for a sufficient enough time to have developed coal workers' pneumoconiosis if he were a susceptible host. Dr. Castle testified that the gold standard for determining the presence of coal workers' pneumoconiosis would be pathologic review, not radiographic. He testified that it is possible for a person to have coal workers' pneumoconiosis despite the fact that he has a negative chest x-ray. RX2.

Dr. Castle testified that the physiologic studies obtained by Dr. Paul on May 14, 2014, demonstrated some technical difficulties. He testified that the pulmonary function study

performed by Dr. Paul did not demonstrate obstruction based upon the normal FEV1/FVC ratio, but Petitioner demonstrated a significant fall in the FEV1 after methacholine challenge which reversed to normal with bronchodilators. He also demonstrated a small but significant degree of bronchoreversibility on the study obtained at The Lung Centre on July 31, 2014. Dr. Castle noted that the findings would probably be consistent with a form of asthmatic bronchitis. He testified that this condition is unrelated to coal mine dust exposure and coal workers' pneumoconiosis. He noted that on Dr. Paul's testing there was a minor reduction in the forced vital capacity and FEV1. The total lung capacity was normal and the diffusing capacity after correction for alveolar volume was normal as well. Dr. Castle testified that there was a significant improvement in both the forced vital capacity and the FEV1 between the study by Dr. Paul and that done at the Lung Centre approximately two months later. Those findings suggested that there was a mild, reversible process such as bronchial asthma or asthmatic bronchitis occurring at the time of Dr. Paul's examination which resolved prior to the next pulmonary function study. This is not a finding that would be seen with an irreversible process such as the coal mine dust-induced lung disease of coal workers' pneumoconiosis. RX2.

Dr. Castle noted that in the testing on July 31, 2014, blood gas studies were obtained both at rest and with exercise. The studies were normal and revealed an entirely normal response to exercise with an increase in the PO2. Dr. Castle testified that Petitioner did not demonstrate any abnormality of blood gas transfer mechanisms from any cause. He testified that the medical records he reviewed did not reveal the diagnosis of asthma and there was no evidence of treatment for asthma or asthmatic bronchitis. Dr. Castle testified that the American Thoracic Society requires that a diffusing capacity be done with an inhalation occurring to total lung capacity of less than four seconds. This should be a 10 second breath of plus or minus two seconds, and exhalation should be less than four seconds. The inspired volume should be 85% of the best vital capacity. Dr. Castle testified that with regard to the testing performed by Dr. Paul, he did not know whether that testing met the criteria of the American Thoracic Society. Dr. Castle noted that the diffusion capacity that was repeated on Petitioner on July 31, 2014, was normal. Dr. Castle testified that a decrease in diffusion capacity due to scarring of the lungs from pneumoconiosis would be permanent. RX2.

Dr. Castle noted that, from the medical records he reviewed, Petitioner suffered from a coronary condition. He testified that there was some significance to the onset of Petitioner's shortness of breath and the diagnosis of his coronary condition. In 2013, Petitioner began having problems with his blood pressure and shortness of breath and was ultimately referred to a cardiologist. He underwent a nuclear study which showed that he had a reduced ejection fraction of 44%. He underwent cardiac catheterization and was found to have minor large vessel obstructive disease. Dr. Castle testified that to the best of his knowledge, this happened about the same time that Petitioner was noted to have shortness of breath. Dr. Castle testified that the decreased ejection fraction was noted both at rest and with exercise and could certainly be causing a significant portion of Petitioner's shortness of breath, if not all of it. RX2.

Dr. Castle testified that there was no evidence from the testing performed on Petitioner that he suffered some permanent functional impairment in terms of his respiratory system. He testified that if he were to apply the pulmonary dysfunction table found in the chapter on pulmonary system in the Guides to the Evaluation of Permanent Impairment Sixth Edition, Petitioner would be in

category zero based upon the most contemporary pulmonary function study. He testified that Petitioner was capable of heavy manual labor. He further testified that the pulmonary function study by Dr. Paul was not totally valid because the exhalation did not last for the appropriate length of time and did not achieve a plateau. He testified that the study from The Lung Centre was a valid study which could account for the difference, rather than hyperactive airway disease. RX2.

Dr. Castle testified that the abnormality of coal workers' pneumoconiosis is basically trapped coal dust in a part of the lung which ends up wrapped in scar tissue and can be accompanied by emphysema around it. The affected tissue cannot perform the function of normal healthy lung tissue. By definition, if a person has coal workers' pneumoconiosis, he would have an impairment in the function of the lungs at the site of the scarring and emphysema. Dr. Castle testified that there is no such thing as radiographically apparent pulmonary impairment. Impairment is determined by valid pulmonary function studies. RX2.

Medical records of Alexander Family Practice were admitted into evidence. Petitioner was seen for a pre-employment physical for Big Ridge Mine on May 13, 2004. His physical examination of the chest on that date revealed the lungs to be normal. Petitioner related smoking a half pack of cigarettes a day for three years. He denied asthma, bronchitis, persistent cough or pneumoconiosis. Chest x-ray performed on that date revealed no active pulmonary disease. Pulmonary function testing performed on that date revealed FVC of 3.78 liters, 87% of predicted, an FEV1 of 3.09 liters, 87% of predicted and an FEV1/FVC ratio of 100%. Petitioner was seen on August 6, 2004, for pre-employment physical for Respondent. A chest x-ray performed on that date was interpreted as 0/0. The spirometry on that date revealed a forced vital capacity of 3.56 liters, 82% of predicted a forced expiratory volume of one second of 2.92 liters, 82% of predicted and an FEV1/FVC ratio of 100%. On August 7, 2004, Petitioner denied asthma or emphysema and constant or bothersome cough, shortness of breath or wheezing. RX5.

Petitioner underwent chest x-ray at Harrisburg Medical Center on September 19, 2013. There was a tiny benign calcified granuloma in the left upper lobe, otherwise the film was normal. Petitioner denied dyspnea on that date. Review of systems pulmonary revealed no dyspnea or cough. An ECG was performed on Petitioner on October 4, 2013, while he was exercising. Petitioner achieved 9 METS at his maximum workload. The test was stopped due to fatigue and reaching his target heart rate. Profusion study performed with this testing was interpreted as abnormal, demonstrating diminished profusion of the inferior aspect of the heart on both sides that could be secondary to previous infarction. He had a diminished ejection fraction of 44%. On January 24, 2014, Petitioner's review of systems revealed dyspnea and cough but no wheezing. Physical examination of the chest revealed rales/crackles bilaterally at the mid lung fields. No wheezing or rhonchi were heard. On this date, coal workers' pneumoconiosis was added to the assessment. RX5.

On February 2, 2015, Petitioner was seen at Alexander Family Practice. His active problems were noted to be benign hypertension, BPH, depression and hyperlipidemia. Petitioner denied dyspnea. It was charted that he had started paperwork for his black lung disability. Under social history, it was noted that he used tobacco. It was noted that he had no physical disability. Review of systems pulmonary revealed no dyspnea, cough or wheezing. Petitioner was seen on August 27, 2015, for recheck of his depression and blood pressure. He related that his breathing

seemed to be getting worse. He reported that climbing stairs made him more short of breath as time went on. He was not using any inhalers. Review of systems pulmonary revealed dyspnea on exertion and no cough or wheezing. Physical examination of the chest revealed the lungs were clear to percussion and auscultation without wheeze, rhonchi, crackle or rale. Assessment was essential hypertension with coal workers' pneumoconiosis, benign prosthetic hypotrophy and anxiety disorder. RX5.

Petitioner was seen in the office on September 9, 2015, for respiratory recheck. It was noted that he suffered from chronic dyspnea and wheezing without cough or sputum. He had been on Incruse for the prior two weeks and had noticed an improvement in his breathing. He noticed bending over would cause him to lose his breath. Rainy weather caused his breathing to be difficult. He occasionally woke up in the middle of the night with shortness of breath. It was noted that Petitioner was a tobacco user. Review of systems pulmonary revealed shortness of breath but no cough or wheezing. Physical examination of the chest revealed the lungs to be clear to percussion and auscultation without wheeze, rhonchi, crackle or rale. The assessment was chronic obstructive pulmonary disease and coal workers' pneumoconiosis. It was charted that Petitioner's pulmonary function test looked really good. He was to continue using Incruse as his symptoms were very well controlled by same. Petitioner underwent pulmonary function testing on September 9, 2015. He had a forced vital capacity of 3.61 liters or 85% of predicted, an FEV1 of 2.99 liters or 93% of predicted and an FEV1/FVC ratio of 83%. RX5.

Petitioner was seen by Dr. Alexander on September 25, 2015, for recheck. He related no dyspnea or feeling of shortness of breath at rest or with exertion. He had no wheezing. Under diagnoses, Dr. Alexander included emphysema and coal workers' pneumoconiosis (complicated). Under social history, it was indicated that Petitioner was a someday smoker. Review of systems pulmonary revealed no dyspnea or cough. Physical examination of the chest revealed same to be clear to percussion and auscultation without wheeze, rhonchi, crackle or rale. RX5.

Petitioner was seen on October 5, 2015. He related shortness of breath on exertion. He had no chronic cough. He was noted to be a light tobacco smoker. Review of systems pulmonary revealed no dyspnea or cough. Physical examination of the chest revealed the lungs to be clear to percussion and auscultation without wheezes, rhonchi, crackle or rales. He was seen again on October 12, 2015, complaining of pain in his back and ribs on the right, which was worse with breathing. Review of systems respiratory revealed no dyspnea, cough or wheezing. On physical examination, he had normal breath sounds without rales or crackles. Chest x-ray revealed his lungs were clear of active infiltrates. He had no active cardiopulmonary disease. RX5.

Petitioner underwent a chest x-ray on December 22, 2015. It noted the lungs were clear except for left upper lobe where there was a granulomatous calcification. He was seen by Dr. Alexander on January 20, 2016, to have disability papers filled out. He denied dyspnea at rest or with exertion. He was noted to be a current someday smoker. From a functional standpoint, it was noted that he suffered from physical disability and was unable to perform usual physical activities for his age, unable to stand, unable to lift, severe breathing difficulty and incapable of substantial gainful activity. A physical examination of the chest revealed decreased breath sounds with rales and crackles. Assessment was lumbar disc degeneration, lumbar canal stenosis, moderate recurrent major depression and adjustment disorder with prolonged depression. RX5.

Petitioner was seen again on April 22, 2016, and related having dyspnea during exertion and chronic cough with wheezing. Physical examination of the lungs revealed decrease in breath sounds and rales/crackles. No wheezing was heard. Assessment was benign hypertension, obstructive emphysema, hyperlipidemia and depression. Petitioner returned on June 2, 2016, with the same active problems. He reported that his breathing and COPD were stable. He felt the Spiriva was helping him. He reported he got winded with working outside. He was noted to be a current every day smoker. Review of systems pulmonary showed dyspnea but no cough. Physical examination of the lungs was normal. He was down to smoking two cigarettes per day. Petitioner was seen on August 5, 2016. Review of systems pulmonary showed dyspnea and cough. Wheezing was noted. Decreased breath sounds and rales/crackles were noted. Assessment included chronic obstructive pulmonary disease. Petitioner was seen on December 22, 2016. The review of systems pulmonary continued to show dyspnea. There was no cough or wheezing. Physical examination of the lungs showed decreased breath sounds as well as rales/crackles. Assessment was chronic obstructive pulmonary disease, stage III chronic kidney disease and hyperlipidemia. RX7.

Medical records of Prairie Cardiovascular Consultants were admitted into evidence. Petitioner was seen on November 7, 2013, for chief complaint of angina. Petitioner was being seen because of chest discomfort and an abnormal stress test. His review of systems respiratory revealed shortness of breath. The doctor's impression was hyperlipidemia, hypertension, angina, CAD, left ventricular systolic dysfunction, dyspnea on exertion and abnormal stress test. The doctor planned to proceed with catheterization. Petitioner underwent heart catheterization on November 15, 2013. It revealed a 35% stenosis in the first obtuse marginal but otherwise the catheterization was for the most part normal. RX6.

CONCLUSIONS OF LAW

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

In support of the Arbitrator's decision relating to issue (C), whether an occupational disease occurred that arose out of and in the course of Petitioner's employment by Respondent, and issue (F), whether Petitioner's current condition is causally related to the injury, the Arbitrator finds the following:

To recover compensation under the Workers' Occupational Diseases Act, a claimant must prove that he suffers from an occupational disease and that a causal connection exists between the disease and his employment. An occupational exposure need not be the sole or principal causative factor, as long as it was a causative factor in the condition of ill-being. *Bernardoni v. Industrial Comm'n*, 362 Ill.App.3d 582, 596 (3rd Dist. 2005).

In this case, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he suffers from coal workers' pneumoconiosis. In so concluding, the Arbitrator relies, in part, upon the findings of the two NIOSH B-readers that Petitioner's chest x-ray of March

4, 2011, was negative for pneumoconiosis. The Arbitrator further notes that all of the NIOSH B-readers and A-readers found Petitioner's chest x-rays of November 5, 2001, and August 6, 2004, to be negative for coal worker's pneumoconiosis. However, the Arbitrator gives less weight to these interpretations due to the temporal remoteness of those x-rays to Petitioner's last date of exposure. The Arbitrator relies upon the opinions of the NIOSH physicians as NIOSH is the governmental agency responsible for administrating the health surveillance program for the benefit of coal miners, NIOSH is not a party to this action, and the x-rays were taken and reviewed for reasons independent of litigation.

The Arbitrator recognizes that Petitioner's alleged condition of coal workers' pneumoconiosis may have developed in the time period subsequent to this final NIOSH x-ray of March 4, 2011. Nonetheless, the Arbitrator finds that reverberation of opinions amongst B-readers Dr. Meyer and Dr. Castle compelling in conjunction with a significant number of negative x-ray interpretations performed at the behest of NIOSH, discussed above. The Arbitrator notes that the totality of evidence demonstrates the significant majority of B-readers concur that Petitioner does not have coal workers' pneumoconiosis.

Further, the Arbitrator finds the B-reading interpretations and opinions of Drs. Meyer and Castle to be more persuasive than the B-reading interpretations by Drs. Smith and Alexander. The Arbitrator gives no weight to Dr. Paul's x-ray interpretation as in his testimony he did not properly describe the findings on the chest x-ray for it to be a competent interpretation.

On Dr. Paul's testing on May 14, 2014, Petitioner had a diffusing capacity that was reduced at 44%. Dr. Paul testified that the reduced diffusing capacity would be a consequence of the scarring of the lung caused by coal workers' pneumoconiosis. Dr. Castle testified that the diffusion capacity that was repeated on Petitioner on July 31, 2014, was normal. Dr. Castle testified that a decrease in diffusion capacity due to scarring of the lung from pneumoconiosis would be permanent. The Arbitrator finds, therefore, that the reduced diffusing capacity on Dr. Paul's testing was not related to coal workers' pneumoconiosis.

Dr. Paul diagnosed Petitioner with asthmatic bronchitis. This finding was based on the 26% fall in FEV1 with the administration of methacholine. Dr. Paul referred to it as asthmatic bronchitis because Petitioner was a cigarette smoker and part of the condition could be related to his smoking. Dr. Castle testified that there was a significant improvement in both the forced vital capacity and the FEV1 between the time of the study by Dr. Paul and that done by The Lung Centre approximately two months later. Dr. Castle testified that those findings suggested that there was a mild, reversible process such as bronchial asthma or asthmatic bronchitis occurring at the time of Dr. Paul's examination, which resolved prior to the next pulmonary function study. Dr. Castle testified this would not be a finding that would be seen with an irreversible process such as coal mine dust-induced lung disease or coal workers' pneumoconiosis. Dr. Castle testified that Petitioner did demonstrate a small but significant degree of bronchoreversibility on the study obtained at The Lung Centre on July 31, 2014. He testified that these findings would probably be consistent with a form of asthmatic bronchitis, but that this condition is unrelated to coal mine dust exposure and coal workers' pneumoconiosis. The Arbitrator finds Dr. Castle's opinion to be more credible and persuasive.

The Arbitrator notes that there are treatment records for Petitioner which were admitted into evidence. Coal workers' pneumoconiosis was added to the assessment, but the record is void as to the basis for that diagnosis. Dr. Alexander did not note any abnormalities on the two spirometry studies performed in 2004. Petitioner underwent pulmonary function testing on September 9, 2015. Dr. Alexander noted on that date Petitioner's pulmonary function test looked really good. Throughout the medical records, Petitioner related complaints of shortness of breath. Dr. Paul testified that there are causes for shortness of breath other than respiratory disease. Other than the diagnosis of coal workers' pneumoconiosis, for which there is no support in the treatment records, no physician related Petitioner's pulmonary complaints to an occupational disease.

The Arbitrator finds that reverberation of opinions amongst B-readers Drs. Meyer and Castle, in conjunction with the aforementioned opinions of the NIOSH B-readers, to be compelling. Based upon the foregoing and the record in its entirety, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he suffers from coal workers' pneumoconiosis and/or reduced pulmonary capacity that arose out of and in the course of his exposures in the coal mine, and that his current condition of ill-being is causally related to his employment. All benefits are denied. The remaining issues are moot and the Arbitrator makes no conclusions as to those issues.

STATE OF ILLINOIS	)	[X] 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	[X] None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Gary Malecki,

Petitioner,

vs.

19IWCC0514

NO. 16WC030823

Waste Management,

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, causal connection, prospective medical care, notice, occupational disease, special findings, temporary disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 10, 2018 is hereby affirmed and adopted.

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

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

DATED: SEP 18 2019

SJM/sj
o-8/28/2019
44

Stephen J. Mathis

L. Elizabeth Coppoletti

Douglas McCarthy

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

MALECKI, GARY Case# **16WC030823**
Employee/Petitioner

WASTE MANAGEMENT
Employer/Respondent

19IWCC0514

On 9/10/2018, 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 2.24% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1377 PARENTE & NOREM PC
MATTHEW COLEMAN
221 N LASALLE ST SUITE 2700
CHICAGO, IL 60601

0766 HENNESSY & ROACH PC
MITZI H WESTERHOFF
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

19IWCC0514

STATE OF ILLINOIS)
)SS.
COUNTY OF **COOK**)

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

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

GARY MALECKI
Employee/Petitioner

v.

WASTE MANAGEMENT
Employer/Respondent

Case # **16** WC **30823**

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 **OCTOBER 26, 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 **DEPOSITION**

FINDINGS

On the date of accident, **JULY 6, 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 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 $**80,960.88**; the average weekly wage was $**1,556.94**.

On the date of accident, Petitioner was **49** years of age, ***married*** with **2** dependent children.

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

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**9,604.40** for other benefits, for a total credit of $**9,604.40**.

Respondent is entitled to a credit of $**93,527.68** under Section 8(j) of the Act.

ORDER

As detailed in the attached memorandum discussing the *Findings of Fact and Conclusions of Law:*

> The Petitioner failed to prove his July 6, 2016, accident arose out of and in the course of his employment with the Respondent, that he provided timely notice of the accident, and that his current condition of ill-being is causally related to the accident. As such, all other issues are moot and the Petitioner's requests for benefits under the Act are denied.

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

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

Signature of Arbitrator

SEPTEMBER 10, 2018
Date

SEP 10 2018

GARY MALECKI v. WASTE MANAGEMENT

16 WC 30823

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter[1] was tried on the Petitioner's Section 19(b) Petition before Arbitrator Steffenson on October 26, 2017. The issues in dispute were accident, notice, causal connection, wages, medical bills, prospective medical care, TTD & Maintenance, and the taking of a deposition. AX 1. The parties agreed to receipt of this Arbitration Decision via e-mail and requested a written decision, including findings of fact and conclusions of law, pursuant to Section 19(b) of the Act. AX 1.

FINDINGS OF FACT

Petitioner is a commercial driver for Waste Management. TX 19. Petitioner alleged that he sustained a manifestation of a repetitive trauma injury on July 6, 2016 that aggravated his longstanding pre-existing back condition.

Petitioner's job requires him to collect garbage at the stops that are on his route for a particular day. TX 20. Petitioner testified that he had between 75-125 stops per route and it takes 10-12 hours to complete his route. TX 20. The containers that he deals with range in size from a 90-gallon toter all the way to a 10-yard dumpster. TX 20.

Petitioner testified to having a history of back problems. He testified that he had pain in his lower back and down the side of his right leg prior to July 6, 2016. TX 34. Prior to July 6, 2016 he treated with Dr. Jain for back pain. He testified to receiving 13 injections into the right lower back from January 26, 2008 through April 23, 2016. TX 35. He had two nerve blocks performed by Dr. Jain; one on July 31, 2010 and a second on December 19, 2013. TX 35. He also had 4 radiofrequency ablations performed by Dr. Jain in November 2011, December 2012, and September 2014 and July 2015. TX 36. Petitioner also testified to seeking treatment with a chiropractor for back pain prior to July 6, 2016. TX 37. Prior to July 6, 2016 Petitioner had also

[1] Prior to the start of this hearing, the Petitioner voluntarily dismissed a separate Application, 16 WC 26615.

been told by Dr. Jain that he needed surgery. TX 38. Prior to July 26, 2016 Petitioner also testified that he was taking hydrocodone for pain. TX 39.

Petitioner testified that on July 6, 2016 he did his route and did not notice anything unusual about his foot. TX 40. He claimed that midway through work his foot started to feel a little heavy and he was having trouble moving it back and forth. TX 41. Just prior to noticing the sensation he testified that he was dumping containers. He claims he finished his route and went home. TX 42. He testified that he was off work the next day, July 7, 2016, and that same day he called work and was told to come in and fill out an incident report. TX 42. He testified that he filled out the report with Rich Sarac. TX 42. Petitioner then sought treatment with Dr. Jain and was referred to Dr. Darwish for surgical evaluation. TX 43. Dr. Darwish performed a fusion procedure on August 31, 2016 and Petitioner was released from treatment by Dr. Darwish with permanent restrictions on August 24, 2017. TX 44.

Petitioner testified to prior work injuries in 2009, 2010, 2011, and 2014. He testified that he reported the claims, was provided benefits, and subsequently resolved his claims. TX 50.

Petitioner testified that he did apply for benefits through the local 731 health and welfare plan. TX 54. Petitioner testified that his wife filled out the paper work and he signed it. TX 56. The application for disability benefits states that Petitioner was walking to his truck and had sudden numbness and tingling in his right leg. RX Q, at 377. He also claims that the first date he sought treatment was August 5, 2016 and that the date his disability commenced was July 19, 2016. RX Q, at 377.

Petitioner testified that as part of his job he was required to swipe in and out at the start and finish of each date that he worked. TX 59. Petitioner testified that his supervisor was Paula Zito-Baysinger. TX 59.

Petitioner's supervisor, Ms. Paula Zito-Baysinger testified that she is a commercial route manager for Waste Management and that she was the Petitioner's supervisor in July 2016. TX 68. She explained that the Petitioner's time card was kept with a computerized system called a "Kronos System". TX 72. Ms. Baysinger testified to the Kronos report that documented the Petitioner's hours worked from July 1, 2016 through July 31, 2016. RX B, at 4-5. She testified that the Petitioner worked July 6, 7, and 8. TX 73. Petitioner did not work July 10th through the 16th. RX B, TX 73-74. Petitioner was on vacation for that entire week. TX 75. The Kronos report shows the hours and the wages Petitioner received for the month of July 2016. RX B. Ms. Baysinger also testified to the procedure for requesting vacation time. TX 70. She testified that the Petitioner was on vacation the entire week of July 10-16. RX A, TX 70. She also testified

that as part of her job responsibility she maintains vacation logs and has access to the Kronos report identified as Exhibit B. TX 69, 72.

Ms. Baysinger testified that she had no recollection of Petitioner reporting any injuries to her on July 6 or 7, 2016. TX 80. Ms. Baysinger testified that as Petitioner's route manager she should have been his first recourse for reporting an injury. TX 81. Ms. Baysinger testified that on July 19, 2016 she received a voicemail from Petitioner advising that he had personal things to deal with and would not be in to work. TX 83. Later that same morning she received a text message from Petitioner stating, "I will not be in the rest of the week my right foot is numb can't drive have doctor appointment tomorrow afternoon." RX D. She further testified to receiving the text message and not receiving any further communication explaining if he had sustained an injury or aggravation of a medical condition because of his work activities. TX 85. July 22, 2016 was the next date that she learned anything about Petitioner reporting a work injury. TX 93. On that date she had a conversation with Petitioner and when it concluded she could not state what exactly Petitioner was claiming in relation to any work activities causing his injury. TX 93.

John Nelson Schwab, Jr. testified that in July 2016, he was a district operations manager at the Cicero facility where Petitioner worked. TX 134. Currently, he is a district manager at a different location in Wheeling. TX 135. When injuries were reported in July 2016, they should have first been reported to the route manager, Paula Zito-Baysinger, and then next been reported to Mr. Schwab as the district operations manager. TX 136. Mr. Schwab testified he received the Employee's Report of Injury Cause from Petitioner after he filled it out. TX 138, RX E. He testified that the document described the type of injury, "Pinching feeling and shooting pain in the lower back, right leg, and foot." It stated that he reported his injury to Rich Sarac two weeks after. TX 140. Petitioner signed the document July 6, 2016, but Mr. Schwab signed the document July 25, 2016. TX 141. Per Mr. Schwab's testimony he did not believe that the Petitioner had filled out the report on July 6, 2016. TX 141.

Rich Sarac also testified that, as of the trial date, he was the district manager in Kansas City, Kansas. TX 153. As of the alleged date of injury July 6, 2016, he was district manager at the Stickney, IL facility. TX 154. He testified that he did not fill out the Employee Report of Injury Cause, RX E, he also testified that Petitioner did not provide him with a personal notice of his alleged work accident. TX 156-157. He further testified that Petitioner did not provide him with notice of his alleged injury. TX 158.

Nichole Overton testified she is a human resources manager at Waste Management. TX 165. She testified that as part of her job she reviews workers' compensation cases to see if accommodations can be offered to return people to work. TX 165. Ms. Overton confirmed that she had reached out to the Petitioner to discuss returning him to work via phone and letter. TX

172, RX R. She had not been able to contact the Petitioner directly but was contacted by his attorney. TX172. RX S.

Amy Gallagher testified at trial. She testified that she is employed by Gallagher Bassett and is the primary claims handler for Waste Management in the state of Illinois. TX 188. She testified to handling the claim filed by Gary Malecki for workers' compensation benefits. TX 195. She testified to first talking with Petitioner and speaking with his wife, "she answered the phone. She did not want –she wouldn't let me talk to Gary for a while, and then I told her I needed to talk to Gary. And he told me he was walking to his truck, and he felt numbness and tingling down into his foot." TX 195. He could not tell her where he was at the time he was walking to the truck and experienced pain. TX 195. He also indicated that he there was nothing special about the terrain. TX 196. Ms. Gallagher provided the following testimony about Petitioner's response during their initial conversation when asked what he was doing at the time he experienced pain:

> Q: Miss Gallagher, what was your understanding of the activity Mr. Malecki was performing at the time he alleges to have experienced pain or an increase in his symptoms?
>
> A: He was walking to his truck.
>
> Q: Miss Gallagher, do you have any understanding as to whether he was performing any sort of work activities at the time he was walking?
>
> A: From his description, he was not performing any work activities at the time. TX 197-198.

Ms. Gallagher testified that she spoke with Petitioner on August 22, 2016 and had another discussion with him where she confirmed whether he was walking, carrying anything, on gravel, what have you. He confirmed that none of that applied. "and I read part of the doctor's note to him that said the same thing. I asked him if that was correct. He said it was." TX 199, RX I. The medical history she referenced is cited to in RX I: "I also read him part of the MD note history wherein he told the MD that he was walking to his truck to ask him that information was correct, and he confirmed that it was." RX I, at 25.

Prior to the alleged date of injury/manifestation, Petitioner saw Dr. Jain on May 26, 2016. The history of present illness is noted to say, Patient was last seen on April 23, 2016 for a right L3-L4, L4-L5, and L5-S1 transforminal epidural steroid injection and selective nerve root block. The patient relates he had 60% relief from the injection. He does continue to have residual pain with radiation down the right leg. He has been able to reduce his use of Norco to

four or five pills per day rather than six. He uses medications only in the evenings when he will not be driving. RX K, at 52.

On July 12, 2016 Petitioner sought treatment with Dr. Hamidani. The reason for the visit is noted as, "Patient present in the office for upper and lower leg pain that started 3 weeks ago. Patient states that the pain radiates to his toes." RX J, at 33 (emphasis added). The record contains no discussion of Petitioner's work activities impacting his condition or causing/aggravating any pre-existing problems.

On July 14, 2016 Petitioner had a provocative diagnostic lumbar discography L2-3, L3-4, L4-5, L5-S1. The reason for the procedure is noted that Petitioner has had recalcitrant back and lower extremity pain for several years. At this point, he is entertaining the possibility of surgical intervention. RX K, at 47.

On August 5, 2016 Petitioner was evaluated by Dr. Darwish. He reported to Dr. Darwish that he has had back pain for 2 years. On July 6, 2016 he was walking to his truck and, suddenly, had numbness in his right leg. He reports that he is unable to complete his job due to not being able to drive due to the numbness in his leg. Dr. Darwish provided the opinion that the Petitioner had been working as a garbage truck operator for many years. The job requires repetitive lifting and pushing of heavy objects such as dumpsters and garbage cans/bags. This certainly has causes multiple back injuries and contributed to his current condition. Dr. Darwish provided deposition testimony related to his opinions on causation. He also testified to not having reviewed any of the Petitioner's prior records or reviewed any prior MRIs other than the initial 2016 MRI that was done post the accident date of July 6, 2016. PX1.

Petitioner had surgery on August 31, 2016. Petitioner had a L4-5 and L5-S1 transforaminal lumbar interbody fusion, L4-5; L5-S1 posterior instrumented fusion; L4-5 interbody PEEK cage; L5-S1 interbody PEEK cage; L4-5 and L5-S1 posterolateral fusion. Dr. Darwish performed the surgery. PX 2, at 30.

On December 6, 2016 Petitioner had an initial evaluation at ATI physical therapy. He reported the nature of his injury as follows; "Patient had major back surgery August 31, 2016: 6 -inch rods and four or five cages in spine. 4 discs were "deflated" according to patient. He drives a garbage truck for waste management. July 15th or 16th 2016, patient's legs went numb after lifting items into truck; he opened door and felt numbness in legs." RX P, at 329 (emphasis added).

Petitioner was discharged from physical therapy on April 10, 2017. Petitioner at the time of discharge was assessed as reaching the maximum benefit of skilled physical therapy services and has called the clinic stating that MD had discharged patient from PT. Of note in reviewing the Petitioner's ATI records it is noted that the Petitioner reported he was snow

plowing driveways after therapy on March 14, 2017. RX P, at 272. Also noted in the records is the physical therapists comment on March 30, 2017 that Patient reports feeling the same. Patient stated that he continues to feel pretty good, that the stretching he has been doing at home seems to be really helping. "Over heard patient telling another patient that he doesn't want to be too good because he is going for disability." RX P, at 263.

On August 24, 2017 Petitioner was assessed to have reached maximum medical improvement and provided permanent work restrictions by Dr. Darwish. PX 2, at 59.

Dr. Alexander Ghanayem evaluated Petitioner on January 19, 2017 in the capacity of a section 12 examiner. Dr. Ghanayem opined, "that this gentleman appears to have developed symptoms related to a stenosis and spondylothesis while at work. This is a distinction from symptoms related to work as I see it. He was simply walking back to the truck after doing something and developed these symptoms. He did not report an injury per se the structural issues at hand are long standing in nature. Therefore, while I agree with the nature of his medical care, I do not believe that it was related to the work injury that occurred in July 2016. The origins of his low back problem appear to be at least 6 years old, if not longer. It is a progressive issue that finally caught up with him while he happened to be at work." RX M, at 228.

To further support his opinions Dr. Ghanayem provided the assessment that he reviewed the Petitioner's MRIs and he had an MRI from August 2016 which reveals a large central to right sided disc herniation at L4-L5. He has a grade I slip at L4-L5. There is disk disease at L5-S1. The MRI from August 2016 is identical to the MRI of November 2015. There is also an MRI from 2010 which shows the same disk disease at L5-S1. L4-L5 has a disk herniation associated with it, but he has not started to slip at that time. RX M, at 227.

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 has alleged a repetitive trauma injury. The Petitioner must demonstrate a point in time when both the injury and its link to the Petitioner's work become plainly apparent to a reasonable person. The Arbitrator first finds that the Petitioner's credibility is challenged significantly by the inconsistencies in his testimony and the evidence that was presented by the Respondent. The Arbitrator finds the Petitioner is not credible.

19IWCC0514

The Arbitrator finds the Petitioner failed to establish that on July 6, 2016 that he sustained a manifestation of a repetitive trauma injury to the lumbar spine that could be attributed to his work activities, for the following reasons: 1) the Petitioner was unable to provide any specific testimony about the actual route or activities that he was working on July 6, 2016 at the time he noticed an increase in symptoms, 2) the Petitioner claimed that he did not work on July 7, 2016, and that he reported the injury that date, whereas the records show he worked the 7th, 8th, and then took vacation the following week and did not report any medical condition until July 19, 2016, and 3) that the Petitioner has not demonstrated any increased risk that he was exposed to which contributed to experiencing pain while walking.

An employee alleging injury based on repetitive trauma must meet the same standard of proof as claimants alleging a single, definable accident. Peoria County Belwood Nursing Home v. Industrial Comm'n of Illinois, 138 Ill. App. 3d 880, 885 (3d Dist 1985). See AC & S v. Industrial Comm'n, 304 Ill.App.3d 875, 879; Nunn v. Industrial Comm'n, 157 Ill.App.3d 470, 480, 109. That means an employee suffering from a repetitive-trauma injury must still point to a date within the limitations period on which both the injury and its causal link to the employee's work became plainly apparent to a reasonable person. Williams v. Industrial Comm'n, 244 Ill.App.3d 204, 209(1993). Setting this so-called manifestation date is a fact determination for the Commission. Palos Electric Co. v. Industrial Comm'n, 314 Ill.App.3d 920, 930; Durand v. Indus. Comm'n, 224 Ill. 2d 53, 64–65, 862 N.E.2d 918, 924–25 (2006). In this case, the Petitioner has alleged a manifestation date of July 6, 2016 on his application for adjustment of claim. At his July 12, 2016 appointment with Dr. Hamidani he cites his physical complaints of leg pain as originating 3 weeks earlier, with no reference to any inciting event. RX J, at 33. At his initial PT evaluation at ATI he cited the activities of lifting items into his truck and opening the door of the truck on July 15th or 16th as the source of his problems. RX P, at 329. Per the evidence provided, the Petitioner was not working on either of those dates. Even if the evidence compelled the Arbitrator to state that the Petitioner's work activities were repetitive in nature, a manifestation date cannot be identified and, therefore, the Petitioner has not met the required burden of proof.

Besides evaluating this case for a manifestation of a repetitive trauma, the Arbitrator also must consider how the Petitioner's statement that he was just walking impacts his repetitive trauma claim. Walking is an ordinary activity of life injury. If an employee is exposed to a risk common to the general public to a greater degree than other persons, the accidental injury is also said to arise out of his employment. Caterpillar Tractor Company v. Industrial Commission, 129 Ill. 2d 52, 58 (IL 1989). If the injury results from the hazard to which the employee would have been equally exposed apart from the employment, or a risk personal to the employee, it is not compensable. Caterpillar, 129 Ill. 2d at 59. In this case, Petitioner was unable to provide any details about where he was at when he was walking to his truck, or the

terrain he was walking over, or what he was doing as reported to the claims rep and Dr. Darwish. TX 197-198, PX 1, at 42. There is no evidence that he was performing any activities to benefit the employer or that he was exposed to any greater risk than the general public. For these reasons the Arbitrator finds that the Petitioner has not provided the details necessary to establish that he was exposed to any greater risk than the general public.

Issue E: *Notice*

The Arbitrator finds that the testimony from the Petitioner was not credible regarding his reporting of the alleged manifestation. The Petitioner testified that he reported his condition on July 7, 2016 to Rich Sarac. Rich Sarac testified that he did not receive a report of injury from the Petitioner and that it would have been very unusual for the Petitioner to come to him as opposed to his route manager. The route manager Ms. Paula Zito-Baysinger also testified that she did not receive any notice from the Petitioner on July 6th or July 7th. Petitioner's testimony on notice is also conflicted by the employee's report on injury cause. RX E. Mr. Schwab testified that he reviewed and signed off on the report on July 25, 2016. Petitioner signed the report July 6, 2016 but he testified that he did not report any injuries on July 6, 2016. Petitioner stated that he reported the injury 2 weeks after, which would have been July 20, 2016. Rich Sarac did not have contact with the Petitioner on that date. The Arbitrator finds that the Petitioner did not provide notice to the Respondent of a manifestation of a repetitive trauma.

Issue F: *Causal connection*

As the evidence does not support a finding of accident, the Petitioner's condition is assessed as not related to his work activities. This assessment is not only supported by the accident evaluation above and the finding of no credibility towards the Petitioner, but also by the opinion of Dr. Alexander Ghanayem. Dr. Ghanayem is the Director of the Division of Spine Surgery at Loyola University Medical Center. Dr. Ghanayem evaluated the Petitioner on January 19, 2017. He reviewed medical records in conjunction with his examination. He opined that the Petitioner had developed symptoms related to a stenosis and spondylothesis while at work. He found that there was a distinction from symptoms related to work. Petitioner reported to Dr. Ghanayem that he was simply walking back to his truck after doing something and developed these symptoms. RX M, at 228. There is no explanation of what he was doing before the symptoms developed and Petitioner, when given the opportunity to provide this testimony at trial, did not state what it was that he was doing before he experienced these symptoms. The record does not clearly state whether he was working his route, returning from lunch, or returning from a personal activity. Petitioner's structural issues are long standing in nature. RX M. The origins of his low back problem are at least six (6) years old. RX M. Petitioner himself testified during direct examination as to his low back problems going back to

2008. TX 35. The records from Dr. Jain's office demonstrate that as of January 22, 2008 Petitioner reported back pain existing 20 years prior to 2008. PX 7, at 2.

Issue G: *Wages*

The Petitioner and Respondent have agreed to an average weekly wage (AWW) of $1,556.94 but disagreed as to the alleged gross earnings of $93,600.00. AX 1. As the parties have stipulated to an AWW of $1,556.94, the Arbitrator finds the Petitioner's earnings during the preceding year of the alleged injury to be $80,960.88.

Issue J: *Medical bills*

As the evidence did not support a finding of accident or causation, the Arbitrator finds that the Petitioner is not entitled to reasonable or necessary medical expenses. From reviewing the medical bill exhibit (PX 9), the Arbitrator also notes that the Petitioner has not submitted supporting medical records to establish reasonable and necessary treatment for the following providers: 1) LaGrange Memorial Hospital, 2) Amita Health Medical Group, 3) Oak Brook Surgical Center, 4) Oak Brook Anesthesiologists, 5) Neurological Surgery and Spine Surgery, and 6) Suburban Anesthesiologists.

Issue K: *Prospective medical care*

Due to the above finding of no accident or causation, the Petitioner is not entitled to any prospective medical care.

Issue L: *TTD and Maintenance benefits*

Due to the finding of no accident or causation, the Petitioner is not entitled to any temporary total disability benefits or maintenance benefits.

Issue O: *Deposition*

As the Arbitrator finds that the Petitioner did not sustain the burden of proof for accident or causation, this issue will be treated as moot and not addressed.

____
Signature of Arbitrator

SEPTEMBER 10, 2018
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

[X] 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	[X] None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tabitha Martin,

19IWCC0515

Petitioner,

vs. NO. 15WC009138

Petersen Healthcare Inc., d/b/a Farmer City Rehab & Healthcare,

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 26, 2019 is hereby affirmed and adopted.

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

No bond is required for 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: SEP 18 2019
SJM/sj
o-8/20/2019
44

Stephen J. Mathis

L. Elizabeth Coppoletti

Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MARTIN, TABITHA
Employee/Petitioner

Case# **15WC009138**

PETERSEN HEALTHCARE INC D/B/A FARMER CITY REHAB & HEALTHCARE
Employer/Respondent

19IWCC0515

On 2/26/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.45% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0564 WILLIAMS & SWEE LTD
WILLIAM D TRIMBLE
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

1337 KNELL LAW LLC
ILIR IMERI
504 FAYETTE ST
PEORIA, IL 61603

19IWCC0515

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

Tabitha Martin
Employee/Petitioner

Case # **15** WC **9138**

v.

Consolidated cases: **N/A**

Petersen Healthcare Inc., d/b/a
Farmer City Rehab & Healthcare
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Melinda Rowe-Sullivan**, Arbitrator of the Commission, in the city of **Bloomington**, on **January 24, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches 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.

Per the stipulation of the parties, in the year preceding the injury, Petitioner earned **$12,596.17**; the average weekly wage was **$251.92**.

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

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, **$0** in non-occupational indemnity disability benefits and **$0** for other benefits, for a total credit of **$0**.

Respondent is entitled to a credit for medical bills paid in the amount of **$0** through its group medical plan for which credit may be allowed under Section 8(j) of the Act.

ORDER

Petitioner failed to prove that she sustained an accident that arose out of and in the course of her employment with Respondent, and that her current condition of ill-being is casually related to her alleged accident. All benefits are denied; the remaining issues are moot and the Arbitrator makes no conclusions as to those issues.

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

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

2/25/19
Date

FEB 26 2019

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Tabitha Martin
Employee/Petitioner

Case # **15** WC **9138**

v.

Consolidated cases: **N/A**

Petersen Healthcare, Inc., d/b/a
Farmer City Rehab & Healthcare
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified at arbitration that she has worked as a CNA for 10+ years and that on March 5, 2014, she was working for Respondent as a CNA. She testified that she had been working for Respondent for about four or five years as of March 5, 2014. Petitioner testified that her schedule with Respondent required her to work eight or nine days every two weeks, working about 7½ hours per day, and that she worked the second shift, was that of 2-10 p.m.

Petitioner testified that her job as a CNA primary involved resident care. She testified that this included answering call lights (*i.e.*, walking to a resident's room to see what they needed), assisting residents in getting something to eat, clothing residents, assisting residents in using the toilet, assisting residents in taking a shower, assisting residents in walking, pushing residents up and down the hallway in a wheelchair, and lifting and moving residents as necessary. She testified that she also had to roll residents every two hours or so in order to prevent injury and skin damage.

Petitioner testified that in order to assist residents, she would sometimes have to assist in lifting the residents up out of bed and onto a chair in order to take that resident to the restroom or to the dining room. She testified that she would have to use a Hoyer lift if the resident was incontinent. She testified that depending on the resident, she would either have to lift the resident herself or with the help of another CNA. She testified that some of her activities, like when she assisted in helping residents move around with the use of a belt, required her to forcefully grip the belt.

Petitioner testified that she started noting bilateral hand pain in February 2014. She testified that she knew that her bilateral hand pain was work-related as of the first time that she saw her primary care physician. She testified that she provided notice to Respondent of this alleged work injury as soon as she started treating for her bilateral hand pain. She further testified that she gave notice to the administrator at the time, Mary Kay Hirsburner.

Petitioner testified that she knew what the company policy was regarding work-related injuries since she had filed a prior workers' compensation claim against Respondent. She testified that she was required to fill out paperwork as soon as she reported her prior work-related injury. She testified that she never filled out any paperwork for this injury even though she knew that the company policy required her to fill out a statement as to how the alleged accident occurred once a claim was reported.

Karen Jones was called as a witness by Respondent at the time of arbitration. Ms. Jones testified that she works as the administrator of Respondent's facility, and that she was the assistant administrator to Mary Kay Hirsburner at the time of this alleged accident on March 5, 2014. She testified that she worked closely with Mary Kay Hirsburner. She testified that once an employee reported a work injury to Ms. Hirsburner, Ms. Hirsburner would have documented it. She further testified that she would have also known if an employee was claiming the work-related injury since part of her duties as an assistant administrator included helping in the filling out of workers compensation-related documents and forms.

Ms. Jones testified that if a work-related injury was reported, Respondent would have documented it as this was company policy. She testified that no documentation of a March 5, 2014, work-related injury existed. She further testified that Mary Kay Hirsburner no longer worked for Respondent and is currently in a hospital in Florida.

Crystal Simmons was called as a witness by Respondent at the time of arbitration. Ms. Simmons testified that she was the assistant director of nursing for Respondent in October 2014. She testified that on October 30, 2014, Petitioner came into Respondent's facility and told Respondent that she wanted to report that her bilateral carpal tunnel from March of 2014 was work-related. When asked why Petitioner had waited until October 30, 2014, to report this to Respondent, she responded that Petitioner stated she had just talk to her attorney and that her attorney had told her to come in and tell Respondent that it was work-related.

Ms. Simmons testified that she was told by Mary Kay Hirsburner to suspend Petitioner for three days for not having provided notice to Respondent earlier of this alleged work-related injury. She testified that Petitioner never reported having suffered a work-related injury prior to October 30, 2014 and that if she had reported a work-related injury, she would have needed to fill out paperwork pursuant to company policy.

The transcript of the deposition of Dr. James Sobeski dated May 24, 2018 was entered into evidence at the time of arbitration as Petitioner's Exhibit 1. Dr. Sobeski testified that his specialty is that of hand surgery and that he has been board-certified since 2002. (PX1).

Dr. Sobeski testified that he saw Petitioner on May 8, 2014, at which time it was noted that she had numbness and tingling in both hands, right worse than left, that it bothered the thumb, index and middle fingers primarily, that she had some nighttime symptoms as well, and that an EMG showed evidence of carpal tunnel syndrome. He testified that Petitioner denied any history of diabetes or thyroid problems. He testified that his diagnosis as of May 8, 2014 was that of right greater than left carpal tunnel syndrome. When asked whether Petitioner mentioned to him what her occupation was, Dr. Sobeski responded that if she did he did not note it and that he did not have an independent recollection of what she did for a living. (PX1).

Dr. Sobeski testified that he next saw Petitioner on May 27, 2014 when he performed a right carpal tunnel release. He testified that the diagnosis was that of right carpal tunnel syndrome and that the surgical procedure was necessary because Petitioner had symptoms that she could not live with. He testified that Petitioner would have been unable to work as of May 27, 2014. He testified that he next saw Petitioner on June 27, 2014 although she had to have her stitches out somewhere between the two dates, so she was probably seen by someone else. He testified that when he saw Petitioner on June 27th, he performed a left carpal tunnel release for the diagnosis of left carpal tunnel syndrome. He testified that Petitioner would have remained unable to work as of that date as well, and that the surgical procedure was necessary for the same reasons. (PX1).

Dr. Sobeski testified that he next saw Petitioner on September 21, 2016, at which time he noted that she had carpal tunnel releases in 2014, that the left side was doing fine, that she stated that she occasionally got numbness and tingling on the right side that had started a couple of months prior, and that she stated that for about two years her symptoms were completely gone. He testified that Petitioner had a well-healed incision and that they ultimately decided that she was okay and did not want to do anything about it. When asked how long typically after a surgical procedure he would expect someone who was a CNA to be able to return to work full duty, Dr. Sobeski responded that he would say at the shortest six weeks and at the longest 12 weeks. He testified that he would defer to his co-workers or physician's assistant as far as return to work. (PX1).

After having been posted a hypothetical as to Petitioner's job duties, Dr. Sobeski testified that he thought that some of Petitioner's activities could have caused her condition of ill-being but that he thought that others probably would not. (PX1).

When asked whether in giving his opinion as to causation it had any effect on his opinion that Petitioner was obese, Dr. Sobeski responded that obesity was a risk factor for carpal tunnel syndrome. When asked whether the job duties would still contribute to Petitioner's carpal tunnel syndrome even though she was obese, Dr. Sobeski responded that they could. He testified that being female was a "mild risk factor" for carpal tunnel syndrome. When asked whether Petitioner's job duties still contributed to her carpal tunnel syndrome even though she was female, Dr. Sobeski responded that they could. He testified that polycystic ovary disease did not, to his knowledge, contribute to carpal tunnel. When asked if some of the job duties described were sufficiently repetitive flexion and extension of the hands and wrists involving gripping in a forceful manner, Dr. Sobeski responded that he thought that some of the heavier gripping things like moving patients could have contributed to Petitioner's carpal tunnel syndrome, but that some of the lighter things like washing and writing would have been unlikely to do so. (PX1).

On cross examination when asked whether during the visit of May 8th Petitioner ever complained to him of her condition in any way being caused or related to her work, Dr. Sobeski responded that if she did, he did not note it. When asked whether he usually noted it when a claimant gave him a history like that, Dr. Sobeski responded that he typically did note it. He agreed that at no time during his treatment of Petitioner did she ever inform him that she believed that her work was in any way a contributing factor. He testified that it was not noted that Petitioner told him that she had to do anything repetitively, and he agreed that if she had told him that it was something that he would normally note in his records. (PX1).

On cross examination, Dr. Sobeski agreed that carpal tunnel syndrome could be caused by a variety of different issues or diseases, and further testified that it was multi-factorial. He agreed that one of the potential primary causes or risk factors for the development of carpal tunnel syndrome was pregnancy. He testified that he was not aware if Petitioner was pregnant or how many times before he saw her that she had been pregnant. He testified that being pregnant was a risk factor, but that he did not know that that did not go away after the baby was delivered. He agreed that obesity increased the risk for developing carpal tunnel as well. He agreed that Petitioner was obese and testified that her BMI as of May 8, 2014 was 43.49, which was obese. (PX1).

On cross examination when asked whether carpal tunnel could be a hereditary issue, Dr. Sobeski responded that there had been studies and that there may by a connection. When asked whether depression increased the likelihood of developing carpal tunnel, Dr. Sobeski responded that he was not familiar with that but that it would not surprise him. When asked whether he would have reason to disagree with the American Society of Surgery of the Hand which indicated that psychological factors including depression could be a risk factor for the development of carpal tunnel syndrome, Dr. Sobeski responded that he would not disagree. (PX1).

On cross examination when asked whether everyday activities such as gardening or any other activity throughout the day where one used their hands would be a risk factor, Dr. Sobeski responded that anything that Petitioner did during the day that involved heavy gripping could also cause problems. He testified that he had not heard that polycystic ovarian disease increased the likelihood of developing carpal tunnel. (PX1).

On cross examination when asked to consider that Petitioner had five children including one miscarriage, that she was obese, that she had depression and whether he believed that these pre-existing non-work-related issues could have been the cause of her development of bilateral carpal tunnel syndrome just as easily or likely as any work activities, Dr. Sobeski responded that he thought those would all be potential factors in her disease process. When asked whether it was fair to say that he would need to know how much gripping, how often Petitioner gripped and what type of other specifics she was doing on a daily basis for her job in order to be able to provide specifics as to whether or not that could have contributed to the development of carpal tunnel, Dr. Sobeski testified that it would probably help some. When asked whether he would agree that based on the hypothetical all that he could say was that work could have been a possibility to have been a contributing factor but that that was all, Dr. Sobeski responded that he thought with all the other factors that were mentioned they were all possible causative factors, and that they all probably played a small part. When asked whether they were all equally plausible as causative, Dr. Sobeski responded that he did not think that he could answer that question. (PX1).

On cross examination when asked based on the hypothetical that was given to him that it was possible that Petitioner's work might have just made her symptomatic rather than having caused or aggravated it, Dr. Sobeski responded that he thought that was possible. (PX1).

On cross examination when asked how long Petitioner would have needed to be off work after the initial surgery, Dr. Sobeski responded that he did not have the paperwork with him but that generally with carpal tunnel patients they kept them off completely for 10-14 days and then usually returned them to light duty for about a month, and that generally at about six weeks most were back to their regular jobs. He testified that typically, maximum medical improvement would be at three months. (PX1).

On cross examination when asked whether a patient had the condition of carpal tunnel that they believed was because of work that they reported that to him on the initial visit, Dr. Sobeski responded that it was "all over the map." (PX1).

On redirect when asked whether the fact that Petitioner's job duties were not mentioned in his first visit altered his opinion in any way as to whether her hypothetical job duties could have caused her condition of ill-being, Dr. Sobeski responded that it did not. When asked whether the fact that Petitioner had depression and whether her job duties still contributed to her carpal tunnel condition, Dr. Sobeski responded that he thought it did at the same level that her depression might, and that all "these things probably add up." He testified that he did not have any independent recollection or anything in his notes about any outside work or hobbies that involved any heavy gripping. (PX1).

On redirect, Dr. Sobeski agreed that he had both personal and professional knowledge of the job duties of a CNA. When asked whether he could state that it was more likely true than not that the job duties described caused Petitioner's condition of ill-being, Dr. Sobeski responded that he thought that some of the heavy gripping that was talked about was a cause in the global multi-factorial issues that were discussed. When asked whether it was also true that Petitioner's job duties could have caused her actual condition and not just the symptoms, Dr. Sobeski responded that he thought that they could in part, but that he did not think so in total. He testified that it could have been exacerbated. (PX1).

On further cross examination, Dr. Sobeski agreed that the deposition was taken some four years after the initial diagnosis and a few years after surgery. He agreed that he was given a hypothetical as to

what Petitioner alleged she was doing on a daily basis for the first time. He agreed that during his treatment of Petitioner at no time did she ever mention work, complained of work and attributed to work as the cause of her bilateral carpal tunnel. (PX1).

The office note of Frances Nelson Health Center dated February 20, 2014 were entered into evidence at the time of arbitration as Petitioner's Exhibit 2. The records reflect that Petitioner was seen on February 20, 2014, at which time it was noted that she was seen for follow-up on fatigue, that she was getting chest pains mostly when she was at work, that she had bilateral hand numbness and that she stated that she had begun to drop things. The assessment was noted to be that of fatigue, bilateral hand numbness and chest pain. It was noted that Petitioner was to undergo an EMG. (PX2).

The office note of Frances Nelson Health Center dated March 27, 2014 was entered into evidence at the time of arbitration as Petitioner's Exhibit 3. The records reflect that Petitioner was seen on March 27, 2014, at which time it was noted that she had had an EMG consistent with carpal tunnel and that she had not had a referral to hand surgery yet. The assessment was noted to be that of bilateral carpal tunnel syndrome, fatigue/malaise and obesity. Petitioner was to be given a referral for a hand surgeon for a consult. It was noted that Petitioner reported that she wanted a refill of her Tramadol. (PX3).

The EMG Report was entered into evidence at the time of arbitration as Petitioner's Exhibit 4. The records reflect that Petitioner underwent an EMG at Carle Physicians Group on March 5, 2014, which was interpreted as consistent with bilateral carpal tunnel syndrome. (PX4).

The Operative Report dated May 27, 2014 was entered into evidence at the time of arbitration as Petitioner's Exhibit 5. The records reflect that Petitioner underwent surgery by Dr. Sobeski at Carle Foundation Hospital on May 27, 2014, which consisted of a right carpal tunnel release for a pre- and post-operative diagnosis of right carpal tunnel syndrome. (PX5).

The Operative Report dated June 27, 2014 was entered into evidence at the time of arbitration as Petitioner's Exhibit 6. The records reflect that Petitioner underwent surgery by Dr. Sobeski at Carle Foundation Hospital on June 27, 2014, which consisted of a left carpal tunnel release for a pre- and post-operative diagnosis of left carpal tunnel syndrome. (PX6).

The medical records of Dr. Sobeski/Carle Physician Group were entered into evidence at the time of arbitration as Petitioner's Exhibit 7. The records reflect that Petitioner underwent a pre-operative history and physical on May 8, 2014. It was noted that Petitioner was scheduled for right carpal tunnel release and that she was currently experiencing numbness and tingling in both hands, right greater than left, and that her symptoms were worse at night and were exacerbated when driving. It was noted that Petitioner had constant numbness of the 2nd and 3rd fingers of her right hand and that she had some difficulty picking up and holding objects in her right hand. (PX7).

The records of Dr. Sobeski reflect that Petitioner was seen on June 9, 2014, at which time it was noted that she stated that she was doing well, that she had her stitches removed on that date and that her palm was a little tender and sore, but that she had had definite improvement in the tingling sensation and the numbness that she had had in the right hand prior to surgery. It was noted that Petitioner stated that the numbness did not seem to be completely gone but was definitely improved, and that she had no complaints and felt that she was doing well on the right hand. It was noted that Petitioner took the summer off from her CNA work because she knew by EMG that she had bilateral carpal tunnel syndrome and that she wanted to have it taken care of. It was noted that Petitioner continued to be symptomatic on the left waking her up at night, that she had symptoms while driving in that left hand, and that she had failed conservative management and wished to proceed with scheduling a left carpal tunnel syndrome several weeks from then when her right palm was feeling a bit better. The assessment was noted to be that of (1) 13 days post right

carpal tunnel release with improvement in pre-treatment symptoms; (2) left carpal tunnel syndrome requesting surgery. (PX7).

The records of Dr. Sobeski reflect that Petitioner underwent a pre-operative history and physical on June 16, 2014. At the time of the July 10, 2014 visit, it was noted that Petitioner indicated that all the numbness and tingling in both hands had resolved completely, that her right palm at six weeks still was a bit tender and sore, and that she was doing scar massage as instructed and desensitization. It was noted that as to the left carpal tunnel release, Petitioner's pain was fairly well-controlled and that she rated it as a 4/10, but that it also included some knee pain and low back pain. It was noted that Petitioner was using Ibuprofen to control her pain and that it was working well for her, and that she had no more night numbness and tingling in either hand. It was noted that Petitioner was sleeping through the night and that the palm was tender and sore as expected. It was noted that a discussion was had regarding return to work and that Petitioner stated that she had enough leave and wanted to her bilateral hands healed and well before returning to work. The assessment was noted to be that of (1) two weeks post left carpal tunnel release with pre-treatment symptoms resolved; (2) six weeks post right carpal tunnel release with pre-treatment symptoms resolved. It was noted that Petitioner was still experiencing tenderness, pain and swelling post-procedure, and that she requested a full six weeks of recovery time before returning to her duties. (PX7).

The records of Dr. Sobeski reflect that Petitioner was seen on August 11, 2014, at which time it was noted that she reported her pain in the left palm between 3-4/10 and no numbness or tingling. It was noted that Petitioner's bilateral proximal palms had well-healed closed scars from the carpal tunnel releases, that the scars were just mildly thickened, that Dr. Galloway did not appreciate any tenderness on palpation, that there was minimal swelling, that she had excellent range of motion of her wrist, that full flexion and extension of all of her fingers were without any evidence of triggering, and that she had sensation to light touch and was intact in the radial and ulnar aspects of her radial and ulnar fingers. The assessment was noted to be that of six weeks post left carpal tunnel release and eight weeks post right carpal tunnel release with complete resolution of pre-treatment symptoms. Petitioner was released to full duties without restriction and was recommended to return as needed. It was noted that Petitioner was informed that she may have some tenderness and pain after working a full day but that she would not "undo" the surgery that she had, and that she could utilize Ibuprofen and/or intermittent ice 10-15 minutes a couple of times per day.

The records of Dr. Sobeski reflect that Petitioner was seen on September 21, 2016, at which time it was noted that her left side was doing fine, that she stated that she occasionally got numbness and tingling on the right side and that it started a couple of months ago, and that for about two years she stated that her symptoms were completely gone. It was noted that a discussion was had that it was possible that she was having a recurrence and that it would typically be treated with a steroid injection, potentially repeat surgery or just leave it be and live with it. It was noted that for now Petitioner did not think that it bothered her enough to treat, so she was to return as needed. (PX7).

The Medical Bills Exhibit was entered into evidence at the time of arbitration as Petitioner's Exhibit 8.

The IME Report of Dr. Joshua Alpert dated January 29, 2018 was entered into evidence at the time of arbitration as Respondent's Exhibit 1. The report reflects that Petitioner was seen for an IME on January 9, 2018, at which time it was noted that she was a 35-year-old right hand dominant female who worked at Farmers [*sic*] City Rehab and Health Care as a CNA and had for the past nine years. It was noted that Petitioner reported that sometime in 2014 she got right and left wrist carpal tunnel syndrome from doing repetitive motion, that the right was worse than the left, that she could not sleep on it and that she also noted that she had a "pinched nerve" in her neck. It was noted that Petitioner had had an EMG and was told that she had carpal tunnel syndrome bilaterally and had had bilateral wrist carpal tunnel releases. It was also noted that Petitioner had a lot of relief from the surgery and that she noted that overall it went well. (RX1).

The report reflects that Petitioner reported that her hands sometimes got cold and sometimes got sore, that as to the left hand she otherwise had no complaints and was doing well, and that as to the right hand when it got cold occasionally it went numb. It was noted that Petitioner was currently working full duty without any restrictions. (RX1).

The report reflects that Dr. Alpert opined that Petitioner's current diagnosis was that of status post carpal tunnel surgery bilaterally and doing well. It was noted that Dr. Alpert opined that Petitioner's carpal tunnel syndrome was a result of her co-morbid conditions, including her obesity and polycystic ovarian disease, that she did not have a job where she had to do repetitive flexion/extension of her wrists with heavy force or use vibratory tools, and that she was at maximum medical improvement for her bilateral carpal tunnel syndrome. It was also noted that an impairment rating was performed pursuant to the Sixth Edition of the AMA Guides to the Evaluation of Permanent Impairment, and that Petitioner had 1% upper extremity impairment on the right which was equivalent to 1% whole person impairment, and that she had 0% upper extremity impairment on the left which was equivalent to 0% whole person impairment. (RX1).

The transcript of the deposition of Dr. Joshua Alpert taken on November 2, 2018 was entered into evidence at the time of arbitration as Respondent's Exhibit 2. Dr. Alpert testified that he is a general orthopedic surgeon with a subspecialty in sports medicine focused on the shoulder and the knee, and that he is board-certified. (RX2).

Dr. Alpert testified that he saw Petitioner for an IME on January 9, 2018. He testified that Petitioner gave a history that she was 35 years of age, that she was right-hand dominant, that she worked at Farmer City Rehab & Healthcare as a CNA for the past nine years, that she noted that sometime in 2014 she got right and left wrist carpal tunnel syndrome from doing repetitive motion, and that the right was worse than the left. He testified that Petitioner could not sleep on it, that she noted that she had a pinched nerve in her neck, that she had an EMG and was told that she had bilateral wrist carpal tunnel syndrome, and that she had bilateral carpal tunnel releases. He testified that Petitioner had a lot of relief from the surgery and overall stated that it went well. He testified that Petitioner stated that currently her hands sometimes got cold and sometimes got sore, that as to her left hand she otherwise had no complaints and was doing well and that as to her right hand, when it got cold it occasionally went numb. He testified that Petitioner reported that she was currently working full duty without restrictions. (RX2).

Dr. Alpert testified that on physical examination, Petitioner had a normal exam for both her right and left wrists. When asked of the significance of Petitioner's height and weight, Dr. Alpert responded that it was well known that patients who were overweight had an increased risk of developing carpal tunnel syndrome. He testified that Petitioner was considered overweight or obese. He testified that he was familiar with the job duties of a CNA and that he saw what CNAs did in hospital, rehab and office settings and how they assisted nursing staff. (RX2).

Dr. Alpert testified that it was his opinion that Petitioner's activities as a CNA were not in any way a causative factor in the development of her bilateral carpal tunnel. He testified that more than 80% of patients who developed carpal tunnel syndrome developed it idiopathically regardless of cause. He testified that what were also known causes and increased risks to develop carpal tunnel syndrome were patients who were obese, women, pregnant and patients with endocrine disease. He testified that given Petitioner's obesity, polycystic ovarian disease and the fact that she was a woman, those were all risk factors to develop carpal tunnel syndrome. He testified that the only real occupational job activity that was known in the orthopedic literature to cause carpal tunnel syndrome was when a patient was doing repetitive hyperflexion-extension activities of the wrists with heavy force or using vibratory tools, that Petitioner's job as a CNA would not be heavy force repetitive flexion or using vibratory tools, and that he did not think her job as a CNA caused her bilateral carpal tunnel syndrome. (RX2).

Dr. Alpert denied that Petitioner told him exactly what her job entailed, nor did he note in any of the records her indicating what her job entailed. He testified that pregnancy was a known contributing factor to the development of carpal tunnel. He testified that the fact that Petitioner had five children significantly increased her chances of developing carpal tunnel. He testified that depression was also a known risk factor for the development of carpal tunnel. (RX2).

Dr. Alpert testified the CNA job duties including assisting with patient care, doing some writing and handing out supplies was not forceful enough with repetitive heavy forceful hyperflexion with or without using vibratory tools, so he did not see how the job of a CNA put any person at increased risk to develop carpal tunnel syndrome. He testified that he felt that Petitioner was at maximum medical improvement at the time of the IME and that he did not believe that she needed any treatment as it pertained to her bilateral carpal tunnel going forward from the date of the IME. He testified that generally an individual reached maximum medical improvement after carpal tunnel surgery 6-12 weeks post-operatively, and that that would have applied in this case. He testified that he did not believe that Petitioner needed any type of restrictions as it pertained to the bilateral carpal tunnel. He further testified that he performed an AMA Impairment Rating and that he used the Sixth Edition, and that Petitioner had a 1% rating on the right and a 0% rating on the left. (RX2).

After having been shown a hypothetical that was given to Dr. Sobeski during his deposition as to what Petitioner claimed her job duties entailed at the time of the development of carpal tunnel, Dr. Alpert testified that it did not alter his opinion. (RX2).

On cross examination, Dr. Alpert agreed that he was basing in part his opinions on his specific knowledge of what a CNA did. He agreed that the use of vibratory tools was an exception for him in terms of causation. When asked whether repetitive flexion and extension of the wrists could cause carpal tunnel, Dr. Alpert responded that it could with doing so repetitively multiple times in an hour with heavy force. He agreed that nursing homes had more disabled residents than others and that it might require lifting. He testified that it was not his opinion that any CNA position could never cause carpal tunnel from work activities, and that it would depend on the CNA-type job description. He testified that if there was some CNA job that did repetitive hyperflexion of the wrist with heavy forces many times in an hour that he had personally never seen, then he would say that it was possible. He testified that if gripping activity was with hyperflexion with heavy force or if one were gripping something that were vibrating, then gripping activities could contribute to the development of carpal tunnel. (RX2).

On cross examination when asked whether pinching activities could contribute to the development of carpal tunnel, Dr. Alpert responded that would depend on what one was pinching, how often one was pinching and how heavy one was using it. He testified that if one were pinching and flexing the wrist down, that was putting increased stresses into the carpal tunnel area. When asked if pulling activities could contribute to the development of carpal tunnel, Dr. Alpert responded that if one were pulling one and was hyperflexing the wrist with heavy force or if one was pulling something and flexing the wrist with vibration, then the answer was in the affirmative. (RX2).

On cross examination when asked once a child was born how long the pregnancy would affect the increased risk of developing carpal tunnel, Dr. Alpert responded that he did not know the exact answer and that normally when the baby arrived the carpal tunnel syndrome resolved, but that it did not always occur. (RX2).

On redirect, Dr. Alpert testified that in reviewing the job description as outlined in the hypothetical, nothing in the description or hypothetical lead him to assume that Petitioner's work activities would have been sufficient to cause or contribute to her carpal tunnel. He testified that as far as he knew based on his understanding of what a CNA did, there was no type of activity short of using vibratory tools all that day long that would have caused any carpal tunnel issues. (RX2).

The *C.V.* of Dr. Alpert was entered into evidence at the time of arbitration as Respondent's Exhibit 3.

The May 8, 2014 office note of Dr. Sobeski was entered into evidence at the time of arbitration as Respondent's Exhibit 7. The records reflect that Petitioner was seen on May 8, 2014, at which time it was noted that she was referred by Simone Hampton, that she had numbness and tingling in both hands, right hand worse than the left, and that it bothered the thumb, index and middle finger primarily. It was noted that Petitioner had some nighttime symptoms as well, that an EMG showed evidence of carpal tunnel syndrome, and that she denied any history of diabetes or thyroid problems. The assessment was noted to be that of bilateral carpal tunnel syndrome, right worse than left, nighttime worse than daytime. It was noted that Petitioner wished to pursue surgery. (RX7).

Petitioner's Prior WC Claims were entered into evidence at the time of arbitration as Respondent's Exhibit 8. The records reflect that a settlement contract was approved in case number 11 WC 8899 on December 22, 2014 and that the case was settled for 7.5% loss of use of the person-as-a-whole. (RX8).

CONCLUSIONS OF LAW

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

The Arbitrator finds that Petitioner has failed to prove that she sustained accidental injuries that arose out of and in the course of her employment with Respondent on March 5, 2014, and that her current condition of ill-being is causally related to her work activities.

At the outset, the Arbitrator notes that the alleged manifestation date corresponds with an EMG at Carle Physicians Group on March 5, 2014, which was interpreted as consistent with bilateral carpal tunnel syndrome. (PX4). However, the Arbitrator also notes the medical records leading up to that date included no mention that Petitioner's bilateral carpal tunnel syndrome was in any way work-related, either via a subjective description from Petitioner or a medical causal connection opinion from any provider. (PX2). These same medical records further made no mention of Petitioner having suggested that she experienced any symptoms during the course of performing her job duties for Respondent. (*Id.*).

In so concluding that Petitioner failed to prove that she sustained accidental injuries that arose out of and in the course of her employment with Respondent, the Arbitrator finds the opinions of Dr. Alpert to be more persuasive than the opinions provided by Dr. Sobeski. The Arbitrator finds to be persuasive in this case Dr. Alpert's indication that Petitioner's multiple co-morbid conditions placed her at an increased risk of the development of carpal tunnel syndrome, including her obesity and polycystic ovarian disease, and the Arbitrator further notes that even Dr. Sobeski on cross examination when asked to consider that Petitioner had five children including one miscarriage, that she was obese, that she had depression and whether he believed that these pre-existing non-work-related issues could have been the cause of her development of bilateral carpal tunnel syndrome just as easily or likely as any work activities, Dr. Sobeski responded that he thought those would all be potential factors in her disease process. (RX1; RX2; PX1). Similar to Dr. Alpert in this case, the Arbitrator finds that Petitioner's work duties did not involve vibration and involved various tasks which did not require any repetitive forceful gripping, pinching, or holding her hands in any awkward positions for any sustained period of time. As a result thereof, the Arbitrator finds that Petitioner failed to prove that she sustained accidental injuries that arose out of and in the course of her employment with Respondent.

Based upon the foregoing and the record as a whole, the Arbitrator concludes that Petitioner has failed to prove that she sustained accidental injuries that arose out of and in the course of her employment with Respondent on March 5, 2014, and that her current condition of ill-being is causally related to her work activities. All benefits are denied. The remaining issues of notice, medical bills, temporary total disability and the nature and extent of the injuries are moot, and the Arbitrator makes no conclusions as to those issues.

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

Karen McKnight,

Petitioner,

vs.

NO: 04 WC 48909

19IWCC0516

Stateville Correctional Center,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, medical expenses, temporary total disability, nature and extent, penalties and credit, being advised of the facts and law, reverses the Decision of the Arbitrator as stated below.

Findings of Fact

Petitioner filed three claims with three different dates of injury, and the Arbitrator issued three separate decisions in this matter. The Commission notes that the Findings of Fact contained in the present decision shall address all three dates of injury, and is incorporated by reference in the two remaining decisions, to issue separately and concurrently.

Petitioner, a 65-year old (at the time of the first alleged accident) mailroom office assistant, testified that her job entailed "… pick[ing] up the mail bags down on the main floor in the penitentiary. So you had to drag them up to the elevator if it worked. And then from the elevator to your office. These bags were really heavy because it was all of the units in the whole penitentiary, all their mail coming in. A lot of them were packages and magazines. And I know some of the bags were a hundred pounds. You had to get the mail up there so you can process it." (T.11-12*). She also noted that "… you had to put the vouchers all in a postal basket. And some of those baskets I would say on the average weighed some of them 75 pounds. Then after

* The Commission notes that pages from the 10/4/16 transcript will be designated by the letter "T", while pages from the 10/7/16 transcript will be designated by the letter "R."

you processed the vouchers, you have to take them down to another office and then go back and pick them up again. And so you are carrying a lot of weight, yes." (T.12-13).

Petitioner agreed that her job title was office assistant in the mail room. (T.49-50). Petitioner was shown RX8, the position description. (T.50). She indicated that she did not disagree with what was on there, although she claimed that she "... did do some other jobs besides this though there", such as training people, which she claimed took up more than 5 percent of her day. (T.50-51).

Petitioner testified that on 8/1/03 (04 WC 48909) she was holding the door open for an officer who had his hands full "[b]ut when I did, there was like a hole in the wall like this, about this wide. And so I opened the door further so that he could have more room to get his things in. When I did, I stepped off that little edge because there was repair work done there. I stepped off that edge and I fell in the hole. When I did I hit the back of my head on the cement and then – and my back. And I lost consciousness for probably a minute, two minutes. And he stayed there with me." (T.13-14). Petitioner agreed that she had a couple of MRIs and treated with Dr. Couri, among others. (T.14). She noted that following this accident she experienced pain in her back and legs, which she described as "... between 4 and 5" on a scale from 1 to 10. (T.19).

On cross examination, Petitioner testified that "[w]hen I say ledge, ... it was like a drop off about like this... probably 8 [inches]. And what I did was because I was trying to make him have more room, I moved back. And when I did my – I lost my balance and fell in the hole as I call it because it needs repair and that is when I hit my head on the cement and my back and then I was unconscious for about two minutes probably." (T.36). She agreed there was nothing unusual or defective about the door. (T.36). She denied telling Dr. Couri that she got dizzy and fell down, noting that "... I was dizzy afterwards but I was not at first. I was just standing there." (T.37). She indicated that she was going out the door at the time, and that she was "... going to the front box as I will call it. We called it that there also. And it was because they called me there for a reason." (T.38-39). She noted that she was not holding something when she opened the door. (T.39).

In a CMS "Workers' Compensation Employee's Notice of Injury" form signed and dated 8/1/03, Petitioner noted that she injured "[m]y head and lower back" on 8/1/03 at 1:40 pm while "[h]olding door open for C.O. from Stateville." (PX1; RX1). She noted that "I was holding the door for C.O. and I was standing against ledge and I fell back wards, hit my head hard on back marble behind and hit on back." (PX1; RX1).

In a CMS/Stateville Corr. Center E.R. "Initial Worker's Compensation Medical Report" dated 8/1/03, it was recorded that the patient "[f]ell back wards while holding door for C.O. hitting my head, and my back against the ledge." (PX1). The following diagnosis was noted: "bumped back of head and tail bone on floor." (PX1).

In an "Adult and Juvenile Divisions Incident Report" signed by Louis Hopkins on 8/1/03, the following witness statement was recorded: "On the above date [8/1/03] & approx. time [1:40] I C/O Hopkins 2687 witness[ed] Karen McKnight trip & fall on a door ledge leading into the main office building as she was holding the door for me to push the mail carts in. She trip[ped]

and hit the back of her head on the wall behind her. She sat there for a minute because she said she was a little dizzy from the fall, I told her to take her time getting up. As she was getting up she was holding her head saying she was dizzy, and I escorted her & the mail carts back to the 4th floor mail room. End report." (PX1; PX17).

In a CMS "Supervisor's Report of Accident" dated 8/5/03, Acting Clinical Supervisor/Mail Room VC Russell noted that Petitioner alleged an accident on 8/1/03 at 1:40 pm and that the "[e]mployee states she was holding the door open for a correctional officer, standing against a ledge & fell back & hit her head." (PX1). The injury was described as involving the head and lower back. (PX1; PX17).

Petitioner acknowledged she worked full duty immediately following the first accident, although she noted that "[t]here was some days I did really have to take off because of my back and I just knew my back hurts I was not on like Norco or anything like that. And I did take a few days off in between..." (T.41-42). She was unable to say when those days were. (T.43).

Petitioner visited her primary care physician Dr. Patricia O'Connor on 2/24/04 with complaints of "headaches, back pain" as well as "tightness" in the back of her neck. (PX3).

X-rays of the cervical spine performed on 3/8/04 revealed "[n]o fractures or malalignments. Prominent degenerative disc changes C4 through C7 levels and marked impingement upon the foramina bilaterally C5 through C7 levels. Degenerative joint changes of the facet joints also noted." (PX3).

An MRI of the cervical spine performed on 4/13/04 revealed "[c]ervical spondylosis with spinal stenosis at the levels of C4-C5, C5-C6 and C6-C7. Possible disc herniation into the right lateral recess at the level of C6-C7 is suggested." (PX3).

In a letter to Dr. O'Connor dated 5/20/04, CINN's Dr. Brian Couri recorded that "... in August of 2003, [the patient] was holding a door open at the Stateville Prison where she worked and the next thing she knew she was on the floor. She thought that maybe she had gotten dizzy and fell down but she is not sure exactly why she fell. She states that she fell backwards, she hit her head on the concrete wall and her low back hit the edge of some marble on the floor. She believes that she did have a brief loss of consciousness but was not entirely certain... The patient thought that she would get better and, therefore, she did not seek any further medical care. She did not get any better then and then saw you, Dr. O'Connor, for some sinus problems. She stated that she was having a headache going from her posterior skull forward." (PX3). Dr. Couri noted the patient "... has central neck pain rating it a 4/10 out of 10. It is a dull ache. When it is bad she tends to get the headaches. She does have bilateral low back pain, evening is worse than morning. Going from sitting to standing gives her bilateral knee pain. She has to go up seven steps to her apartment and she has difficulty secondary to her knee pain. Sitting is worse than standing. Her pain is a 4/10, it is an aching sensation in her back..." (PX3). Dr. Couri's assessment was "1. Low back pain. I question whether or not it might be discogenic in nature. She does appear to have a right L5 radiculopathy and this would be consistent with the discogenic nature of the patient's current back symptoms. 2. Cervical pain. 3. Suboccipital headaches. 4. Bilateral C4-5, C5-6 and C6-7 zygapophyseal joint/facet syndrome. Although she

had many diffuse joints of the cervical spine that were tender on palpation, I believe that these are most likely the main culprits of her cervical pain." (PX3). Dr. Couri recommended an MRI of the lumbar spine as well as bilateral C4-5, C5-6 and C6-7 zygapophyseal joint injections, provided physical therapy fails to relieve her symptoms. (PX3). Dr. Couri also noted that "I have given her a note to be off work to see if this can help her recover better." (PX3).

An MRI of the lumbar spine performed on 6/4/04 revealed "1. Chronic degenerative changes of the disc spaces of the lumbar spine with loss of disc space height at L4-L5 and to a lesser extent L3-L4 noted. 2. Bulging discs are identified at multiple levels and there is question of possible right lateral recess disc protrusion/herniation at the level of L3-L4 and left paramidline disc bulge with possible protrusion and effacement of the left lateral recess and neural foramen at L4-L5. 3. Mild subluxation of L3 posteriorly on L4 is identified and most likely on the basis of degenerative facet and disc changes." (PX3).

On 6/29/04, Dr. Couri administered a bilateral C4-5, C5-6 and C6-7 zygapophyseal joint injection under fluoroscopic guidance with contrast enhancement. (PX3). The pre and post-operative diagnoses were 1. Cervical pain; 2. Suboccipital headaches; and 3. Bilateral C4-5, C5-6 and C6-7 facet syndrome. (PX3).

X-rays of the lumbar spine performed on 7/3/04 revealed "[i]ntact lumbar spine on lateral flexion extension views. Disc space narrowing at L3-4 correlates with previous MRI lumbar spine." (PX3).

In a Chart Note dated 7/6/04, Dr. Couri recorded that the patient "... is 40% better since these injections. She is still having some neck pain and headaches and she still continues to have low back pain, especially when going from sitting to standing." (PX3). Dr. Couri's assessment was 1. Right L3-4 and left L4-5 herniated discs; 2. Low back pain; 3. Slight movement on flexion/extension views of L5 on S1; 4. Bilateral C2-3 zygapophyseal joint pain; 5. Bilateral C1-2 zygapophyseal joint pain; 6. Cervical pain with suboccipital headaches probably caused from the zygapophyseal joint irritation. (PX3). Dr. Couri's plan was to "... continue treating her neck until we get it under somewhat better control or she plateaus with the care and at that time we'll start addressing more of the back issues." (PX3). Dr. Couri also continued to keep Petitioner off work at that time. (PX4).

In a CMS form filled out and signed by Dr. Couri on 7/13/04, it was noted that Petitioner was last seen on 7/6/04 with a diagnosis of cervical herniated disc C5-6, cervical spondylosis, facet syndrome lumbar spine. (PX1). Dr. Couri also noted that Petitioner was off work and temporarily totally disabled from her regular occupation. (PX1).

An MRI of the lumbar spine performed on 8/5/04 was interpreted as revealing "[m]ultiple lumbar disc bulges. Spinal stenosis at L4-5 and to a lesser degree L3-4. Right-sided intervertebral disc protrusion (herniation) at L3-4 to the right of the midline and extending into the right lateral recess and foramen region. Only mild disc bulging extending to the left side at L2-3 and minimal left-sided disc bulge also seen. Lumbar facet joint degenerative changes greatest on the left at L5-S1. The appearance of the MRI of the lumbar spine is similar to the previous examination of 6/4/04." (PX3).

On 8/24/04, Dr. Couri administered a bilateral C2-3 zypapophyseal joint injection under fluoroscopic guidance with contrast enhancement. (PX3). The pre and post-operative diagnoses were 1. Suboccipital headaches; 2. Cervical pain; and 3. Bilateral C2-3 facet syndrome. (PX3).

In a Chart Note dated 9/20/04, Dr. Couri noted that the injections "... helped her 95%. She states she does get a catch in her neck when she turns her head to the left at end range. She no longer has the bad headaches. She states she does have the pain at the base of her neck on the left side and that is where her catch is.... Her biggest problem [indecipherable] is her low back pain... radiating to bilateral buttocks, posterior thighs, and then goes into the anterior knees and stops there." (PX3). Dr. Couri's assessment was "1. Resolved bilateral C2-3 zygapophyseal joint syndrome with suboccipital headaches. 2. Left C6-7 zygapophyseal joint/facet syndrome causing her to have the little bit of left-sided base of her neck pain currently. 3. Low back pain with slight movement of her lumbar spine on flexion/extension views at L5-S1. 4. Right L5 radiculopathy. 5. Left, what appears to be, L5 radiculitis. 6. Right L3-4 and left L4-5 herniated discs." (PX3). Dr. Couri's plan was to "... get her into physical therapy for lumbar stabilization... If the patient does not respond to the physical therapy in about a month to six weeks, the patient will undergo bilateral L5 transforaminal epidural steroid injections..." (PX3).

In a separate Progress Note dated 9/20/04, Dr. Couri's office indicated that Petitioner was given modified restrictions and could start working half days now. (PX4). In a CMS form dated 9/21/04, Dr. Couri noted Petitioner was able to work ½ days at light duty as of that day. (PX1).

In a §12 report dated 9/27/04, Dr. Andrew Zelby noted that "Ms. McKnight reports an injury at work. Her diagnostic studies revealed only degenerative changes, except perhaps the small right-sided disc protrusion at L3-4. She does not have any signs or symptoms of a right L4 radiculopathy, and this radiographic abnormality is clinically silent. The patient has been employed at her job following her injury until July 2004 when she was taken off work by Dr. Couri. Based on the patient's evaluation, her symptoms and the review of her diagnostic studies, her injury was a cervical and lumbar strain, as well as an exacerbation of a pre-existing degenerative condition. Her ability to work for several months following her injury indicates the modest nature of this injury, and the treatment she has received has been excessive, particularly the numerous injections. She is neurologically completely normal. She has had more than adequate treatment for her complaints, and requires no further diagnostic studies or directed treatment. Any continued complaints of pain are exclusively related to her degenerative condition, and are completely unrelated to her work injury. The patient is completely qualified to return to all her vocational activities without restriction. She has been qualified to do this work since her injury and remains qualified to do so. She has reached maximum medical improvement." (RX4).

In a work status report dated 10/26/04, Dr. Couri indicated that "patient can do a trial of full duty/no restrictions, however, if symptoms worsen, then she should remain off work. Patient should not lift greater than 10 lbs. She should do limited bending and twisting." (PX4).

When asked whether she had completely recovered from the first accident by the time of the second accident in October of 2004, Petitioner responded: "I was still having some side effects." (T.15).

Petitioner testified that on 10/28/04 (04 WC 59752) she was "… down on the floor trying to pick up the mail to put in a basket. And then I couldn't get back up again because my back hurt and somebody had helped me up, lift me up." (T.16). She agreed that there was an increase in back pain when she was bent over, and that she then went to see Dr. Couri again after the incident. (T.16). She noted that following this second accident "… I had hurt my back, my legs, because from my back it was just like radiating down my legs, and on that is when I had to have help to even get up. I would say my pain at that time was between a 7 and 8." (T.19).

On cross examination, Petitioner stated that "… once I got down and I started picking up mail to throw in a basket which I had let go over the end, then I was sitting on the floor and I couldn't get up. My back was hurting and my legs and I couldn't get up and so somebody had to come over and lift me up." (T.43). She agreed that she fell on her buttocks. (T.43). When asked if she told Dr. Chmell that she bent over to pick up mail and literally could not stand up from a stooped position, Petitioner responded: "Yeah. I wasn't in a stooped position. I was just on the floor but yes. I didn't use the word stoop." (T.43-44). She went on to state that "I might have [told him that], but I couldn't stoop. I just was on the floor. So if I did tell Dr. Chmell that I stooped, he probably understood because I probably had more on because this was when I couldn't get up myself, so he would have to know I wasn't in a stooping position because I had told him somebody had to get me up so it was probably my fault if I did use that word then." (T.44).

In a CMS "Workers' Compensation Employee's Notice of Injury" form signed and dated 10/28/04, Petitioner noted that she injured her "[b]ack/[n]eck" on 10/28/04 at 9:30 am while "[r]unning off mail dropped some on floor." (PX1; PX17; RX2). She noted that "I dropped some mail on floor[,] stooped to pick it up, fell on buttocks/legs [and] could not get up. Robert Drzik, employee[,] pick me up to my feet." (PX1; PX17; RX2).

In a CMS "Initial Worker's Compensation Medical Report" dated 10/28/04 it was recorded that on that date Petitioner "… was stooping to pick up something from the floor and fell down on the floor on her butt." (PX1). It was noted that Petitioner complained of "… pain LBP & pain below her knees, a little pain in neck." (PX1). Petitioner was diagnosed with "back & neck injury" and referred to her own physician. (PX1).

In an undated CMS "Supervisor's Report of Injury or Illness" form, Vennette Covin Russell recorded that Petitioner alleged a date of accident of 10/28/04 at 9:30 am when "[m]ail dropped on floor & employee stooped to pick it up & fell", injuring her back and neck. (PX1; PX17). It was noted that the incident was witnessed by "Rober [sic] Drzik." (PX1; PX17).

In a CMS "Workers' Compensation Witness Report" dated 10/28/04, Robert Drzik recorded the following statement: "Ms. McKnight was operating the postage machine. I noticed that she had dropped numerous pieces of completed mail and that she was in the process of picking them up in a squatting position. I went to a squatting position to assist her in picking up the mail. Upon completion, I stood up. Ms. McKnight attempt[ed] to stand up from her squatting position, but was unable to. I assisted her to a standing position and she resumed her duties." (PX1).

In a Progress Note dated 10/29/04, Dr. O'Connor's office recorded that the patient "[f]ell @ work 10/28/04, wrkmn comp sent pt. here to follow-up." (PX3). Dr. O'Connor noted that the patient "saw Dr. Couri for back & neck pain s/p epidural injections went back to work Oct 25th b/c State MD sent Pt back to work full duty. Yesterday dropped mail on floor – stooped over to (bent @ knees) to pick up the dropped [mail]". (PX3).

In a Chart Note dated 11/1/04, Dr. Couri noted "[t]he patient states that she has had a new work-related injury. She was at work stooping over to pick up some mail off the floor last Thursday and she was unable to get up secondary to a significant low back pain." (PX3). Dr. Couri's assessment was "1. A left L5 radiculopathy. 2. A right L5 radiculitis. 3. Worsening of the patient's symptoms due to a new work-related injury as of last Thursday when she bent over in the mail room. 4. Right L3-4 and left L4-5 herniated discs. 5. Slight movement on flexion-extension x-rays at L5-S1 of her lumber spine. 6. Cervical facet syndrome which currently is not as problematic for her as her low back." (PX3). Dr. Couri's recommened physical therapy and epidural steroid injections. (PX3). Dr. Couri also noted that "[a]s far as work goes, we will keep her off work at least until Monday and at that time reassess where things go." (PX3).

In a work status report dated 11/8/04, Dr. Couri noted a date of injury of 8/1/03 (not 10/28/04) and that "Pt was off work 10/29/2004, 11/1/04 through 11/5/2004. She may return to work light duty on 11/8/04. (PX4).

On 12/14/04, Dr. Couri performed a bilateral L5 transforaminal epidural steroid injection under fluoroscopic contrast enhancement. (PX3). The pre and post-operative diagnosis was 1. Left L4-5 herniated nucleus pulposus, 2. Right L3-4 herniated nucleus pulposus, 3. L5-S1 spondylolisthesis, and 4. Bilateral L5 radiculitis/radiculopathy. (PX3).

In a Chart Note dated 1/4/05, Dr. Couri recorded that the injections "... helped about 10% with her low back pain. They did not help at all with her leg pain, but on further questioning it appears that most of her leg pain is in her bilateral knees." (PX3). Dr. Couri's assessment was "1. Bilateral knee pain and I suspect significant osteoarthritic changes of bilateral knees being the cause of both of her knee pain which is probably the cause of most of her leg symptoms. 2. Low back pain that I believe to be zygapophyseal joint/facet joint mediated specifically at bilateral L4-5 and L5-S1 zygapophyseal joints. 3. The patient does have a left L5 radiculopathy and a right L5 radiculitis, but I wonder how much of this might be a result of the joint irritation versus not being causes of any of the patient's current symptoms. 4. A right L3-4 and a left L4-5 herniated disc. Once again, I am uncertain as to how much this is contributing to the patient's current pain. 5. A slight movement on flexion-extension x-rays at the L5-S1 level of her lumbar spine. 6. Cervical facet syndrome which is currently resolved." (PX3). Dr. Couri recommended bilateral L4-5 and L5-S1 zygapophyseal injections, Hydrotrac physical therapy for her knees and x-rays of both knees. (PX3). He noted that "[a]s far as her work is concerned, her restrictions are unchanged from her last visit." (PX3).

Bilateral x-rays of Petitioner's knees performed on 2/21/05 revealed "[o]steoarthrtic joint changes, most prominently involving the patella femoral condylar joint and much less involvement of the medial joint compartments bilaterally. No acute injuries." (PX3).

In a Work Status Form dated 5/6/05, Dr. Couri noted the following "modified" restrictions: "Activity Restrictions: Low (Light/Sedentary) Weight Range: Low (5-10 lbs. – Occasional Between waist + shoulder) Position: Low (Changes as needed. 40-60 min. max at time) Balance: Low (Avoid ladders, slippery, uneven surfaces/hts) Bend Twist/Turn: Low (Rare) Comments: work status will be readdress[ed] on 6/2/2005." (PX4). Dr. Couri provided the very same restrictions at the time of his examination on 6/2/05. (PX4).

On 5/10/05, Dr. Couri administered "[b]ilateral L4-5 and L5-S1 zygapophyseal joint injections under fluoroscopic guidance with contrast enhancement." (PX3). The pre and post-operative diagnosis was 1. Low back pain, 2. Lumbar facet joint syndrome. (PX3).

In a Chart Note dated 6/2/05, Dr. Couri recorded that "... since the injection, she has been bathing herself. She feels that her back has felt better, but since she has been bathing herself, she is not sure if it is because of this or because of the injection... She states she currently has no low back pain... She also is still having pain in her knees. She did try some aqua therapy for her knees, which did not help. She states she is unable to stoop because of her knee pain." (PX3). Dr. Couri's assessment was "1. Resolved bilateral L4-5 and L5-S1 zygapophyseal joint/facet syndrome. 2. Low back pain that seem[s] to be significantly improved after undergoing bilateral L4-5 and L5-S1 zygapophyseal joint injections. 3. The patient does have a history of a left L5 radiculopathy which currently seems to be asymptomatic for her and a right L5 radiculitis, once again asymptomatic. 4. The patient has right L3-4 and left L4-5 herniated disc, but at this time I am uncertain how much this is contributing to her current symptoms. 5. The patient does have slight movement on flexion/extension x-rays of the L5-S1 level, but once again I am uncertain this is contributing to her symptoms. 6. Bilateral knee pain with osteoarthritic changes." (PX3). Dr. Couri's plan was for Petitioner to continue doing her light duty job and to be more active. (PX3). He also referred her to Dr. Giridhar Burra for her knees. (PX3).

In a letter dated 6/2/05, Dr. Couri noted that "[a]lthough, there was a significant lapse in time between [the first accident in] August 2003 and then when I originally started to treat the patient [in May of 2004]. She was apparently trying to seek care, at least for the cervical complaints at that point in time because they were [her] biggest complaint... When the joints were appropriately treated with zygapophyseal joint injections, the patient's symptoms did resolve. The fall [on 8/1/03] did the [sic] cause the degeneration in her neck, but did exacerbate the degeneration to cause the joint degeneration and now be symptomatic for her. The injections did alleviate these symptoms. As far as her low back pain goes, apparently part is degeneration and apparently part was aggravated by the fall. The neck far outweighed the back when I initially saw her and that is why the neck was treated first and not the back. There would be some question as to why she did not seek care for her back during the period of time that she was seeking treatment for her neck and it might just have been that her neck pain was so much greater than her back pain and so much more debilitating that after the neck pain was taken care of, that it was just the back pain that was causing her symptoms. By the time of my initial visit with me, she was complaining of both." (PX4).

With respect to the second claimed date of injury in October of 2004, Dr. Couri noted that "[a]s stated, the initial fall [on 8/1/03] very easily would aggravate the joints in her neck and

in her low back causing the condition of ill-being, but then stooping over to pick up some mail off the floor [on 10/28/04] and was unable to get up because of significant low back pain and it appears that the back pain is mostly zygapophyseal joint related, at least at this point in time, being that she did not respond to the epidural injection but did respond to the zygapophyseal joint injections and apparently was not having great response to the physical therapy which seemed to indicate that it was more arthritic or joint related. Once again, she was having some of the back pain. We [were] in the process of trying to take care of it when she was released back to work full duty work by Dr. Zelby. Therefore, she had an exacerbation of it when she bent over at work. The bending over would just [be] a re-exacerbated [sic] why she was having pain in the first place, which was an exacerbation of a pre-existing condition, which was an exacerbation of a degeneration that she had in the back. Therefore, yes, she did have degeneration, yes it was a pre-existing condition, yes it was exacerbated by her initial work injury. The second just bending over episode at work exacerbated her pain. Is it a work-related incident? Well, it was not due to anything inherent to her work, it was just the act of her bending over, but initially it was exacerbated by her work incident, so it goes back to actually the first injury as opposed to the second." (PX4).

In addition, Dr. Couri agreed with Dr. Zelby that Petitioner has degeneration of her back, but that he disagrees that she has had excessive treatment. (PX4). He also agreed "... with the degeneration being preexisting in both her cervical spine and her lumbar spine. I disagree with him in stating that the work [accident on 8/1/03] did [not] exacerbate it..." (PX4).

In an office note dated 6/15/05, Dr. Giridhar Burra recorded that Petitioner was a 67-year old female with bilateral knee pain, and that "[t]he pain is worse with any activity and particularly so when she goes down the stairs or attempts any squatting activities. She relates this to a fall that she sustained, along with complaints of back and neck injuries. These are under management by Dr. Couri. She does not report any giving out of her knees. She does not report any locking or catching episodes." (PX3). Following his examination and review of x-rays, Dr. Burra's impression was "DJD knee." (PX3). Dr. Burra noted that he "... identified the options of treatment, conservative versus operative. Conservative would include physical therapy and possible Synvisc injections. Operative intervention for her at her age group for bone-on-bone changes would be total knee replacement." (PX3).

In a letter to Dr. O'Connor dated 6/23/05, Dr. Couri recorded that the patient "... states that her low back feels much better. She is doing more now but she has left greater than right-sided low back pain... She has not been doing any heavy lifting. She states that her job could require her to lift 60 or 80 pounds, but no one at her work has been letting her do that. They all have been taking care of her. She did see Dr. Burra for her knees, and he recommended therapy for them." (PX4). Dr. Couri's assessment was as follows: "1. Left much greater than right L5-S1 zygapophyseal joint/facet syndrome causing her to have low back pain, which is under very good control currently. 2. She does have a history of a left L5 radiculopathy, which is asymptomatic for her. 3. She has a right L3-4 and left L4-5 herniated disc, but these are not contributing to her current symptoms. 4. She did have some slight movement on flexion and extension x-rays of L5-S1 level, but once again, I am uncertain how much this is contributing to her pain. 5. She had bilateral knee pain with significant osteoarthritic changes." (PX4). Dr. Couri noted that "[m]y plan for the patient at this point in time is to followup with me on an as-needed basis." (PX4).

In a Work Status Form dated 6/23/05, Dr. Couri noted "[p]ermanent [r]estrictions" of 5-10 pounds frequently and up to 30 pounds occasionally "[k]nees to head." (PX4).

In an office note dated 9/6/05, Dr. William J. Farrell recorded that the patient "... is seen in Dr. Burns'[sic] departure regarding bilateral knee degenerative joint disease. I read Dr. Burns' [sic] note dated June 15, 2005. She does have evidence of bone-on-bone deformity in the patellofemoral compartments of both knees. Both knees bother her to the same degree." (PX5). Dr. Farrell noted that "[t]he long and short of [it is] that there is a possibility of injections, mainly Synvisc. She has been in physical therapy. She understands the appropriate exercises as recommended by the therapist. The patient will check as to whether Synvisc is a covered entity with respect to her insurance. She will follow back with me in the office if that is indeed the case and we will initiate treatment for both knees." (PX5).

In an office note dated 10/6/05, Dr. Farrell recorded that "Karen is here to start the series of Synvisc injections in both knees." (PX5).

In an office note dated 10/13/05, Dr. Farrell indicated that the patient presented for the second series of Synvisc injections in both knees, and that she was injected without event. (PX5).

In an office note dated 10/20/05, Dr. Farrell stated that "Karen is here for the third and final Synvisc injection in her knees. She was injected without event... The patient will continue with a home exercise program. I will see her back in a month's time. If she is improved, we will consider further options, as discussed today, but at present, she has bilateral knee arthrosis and it is too soon to say whether it has been responsive or not, helpful or not." (PX5).

In an office note dated 11/17/05, Dr. Farrell recorded that the Synvisc injections "... did not seem to help her with long-term pain. The long and short is that she inquired about injection of cortisone, which has not been done in the past... Certainly, this is reasonable... She will obtain the appropriate referral through Dr. O'Connor, her primary care physician." (PX5).

In an office note dated 12/15/05, Dr. Farrell indicated that "Karen is here for followup injection in both knees. The Synvisc did not help her. She currently fell at work, injured her back and injured her knees... Nonetheless, the patient was injected today with Depo-Medrol and 1% Xylocaine in both knees." (PX5).

With respect to the third and final alleged accident (06 WC 9735), Petitioner testified that 2/6/06 "... was a Monday morning, we're always extremely busy on Monday. So [on that date] I went into the other room and picked up a basket from the post office, and then I had something else in my other hand which I don't remember right now. And when I came back, I got tangled up in the boxes and the tape and I started to fall forward. But instead of me letting loose of the basket and what I had in my right hand, I held onto it which I should have just dropped. So I fell forward and I had tape around me and some of the tape was on the boxes and then I fell forward and then I went backwards on my back." (T.17-18). She noted that "[w]hen I tripped over the tape that was the highest pain I had, and I would have to say it was between 9 and 10." (T.19). She indicated that the pain was "[i]n my back, in my legs and probably a little in my arms and that but it was mostly my back and also my legs... I had knee pain, too, also." (T.20).

On cross examination, Petitioner agreed that she fell onto her knees and back. (T.47). She noted that the girls who worked on Saturday had opened a lot of boxes with a lot of heavy tape, which they were supposed to dispose of and didn't, and "... when I came back up, there's like a little dip and a hill. I got tangled up in the tape and some of the tape was on the boxes and so I couldn't get myself untangled. But instead of letting loose what I did have in my hands I fell forward and then I just fell backwards." (T.47-48). She agreed that her knees struck the ground first and that she then fell over to her back. (T.48). When asked whether it was true that she told Dr. Couri that she fell on her knees and abdomen, Petitioner replied: "[o]n my stomach... because I fell forwards, yes I remember." (T.48). She noted that "... when I tried to get up and then I fell backwards... [b]ecause I was kind of entangled in tape plus boxes hanging onto the tape and that's what happens." (T.49).

In a CMS "Workers' Compensation Employee's Notice of Injury" form signed and dated 2/6/06, Petitioner noted that she injured her "... knees and back" on that date while "[g]etting a basket for sorting mail." (PX1; PX17; RX3). She indicated that "I was carrying basket; mailroom tore up due to painting[.] An employee left white [b]inding material on floor and as I was walking my feet got tangled in [b]inding, fell, hurt knees, back." (PX1; PX17; RX3). She noted that there were no witnesses to this incident. (PX1; PX17; RX3).

In a CMS "Initial Worker's Compensation Medical Report" dated 2/6/06 it was recorded that on that date "[w]hile walking in mailroom, [Petitioner's] foot got tangled in plastic binder which was on the floor and fell." (PX1). The nurse recorded that "[n]o visible injuries noted, employee states she is in pain [in] knees and [increasing] back and radiation down legs." (PX1). She was instructed to follow up with primary physician. (PX1).

Bilateral x-rays of the knees performed on 2/13/06 revealed "1. Osteopenia with bilateral degenerative joint disease slightly worse on the right with no significant change. 2. Subtle lucency across the most proximal portion of the fibula likely artifactually related, correlate with point tenderness to exclude the possibility of any fracture." (PX3).

An MRI of the right knee performed on 3/31/06 revealed "1. Mild subchondral bone marrow edema involving the anterior aspect of the right lateral femoral condyle. The exact etiology of this is uncertain, but may be related to degenerative changes or posttraumatic in origin. 2. Small amount of right knee joint effusion. 3. Probable mild pre-patellar bursitis. 4. No fracture of the head of the right fibula." (PX3).

In an off-work slip dated 4/11/06, Dr. O'Connor's office noted that "[d]ue to injury, Karen is to be off work until evaluation by spinal specialist." (PX3).

In a §12 report dated 4/18/06, Dr. Thomas Gleason diagnosed Petitioner with effusion of the right knee with chondromalacia of the patella bilaterally, right greater than the left. (RX5). Dr. Gleason opined that "[p]resently, this individual is capable of full time regular work without restrictions according to the guidelines listed in the physician's description effective date June 1, 2002 for mailroom/RNC Center Stateville Correction Center. A regular home exercise program is encouraged. Provided no contraindications either a non-steroidal anti-inflammatory medication or occasional over the counter use of medication may be of benefit. Periodic

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orthopaedic follow-up are with consideration of a cortisone injection, no more frequently than every three to four months could be considered, if beneficial. No additional complaints or further treatment would be anticipated or recommended. This individual is at maximum medical improvement otherwise. The current diagnosis and associated treatment is not causally related to the alleged industrial accident." (RX5).

In a Chart Note dated 5/23/06, Dr. Couri recorded that "[t]he patient states that she fell on February 6, 2006 at work… [S]he was carrying a basket that weighed about 3-to-5 lb[s], her feet got tangled up in some plastic tape that was on the floor. She twisted her right shoulder forward and landed on her knees and then on her abdomen… She had had some low back pain before the fall; but then, after the fall, she developed increased bilateral knee pain and bilateral thigh pain going into her low back. The pain was from her waist down." (PX4). Dr. Couri noted current symptoms of "[c]entral low back pain and bilateral low back pain which radiates into the bilateral lateral thighs and down to the bilateral knees. She rates her pain at a 7.5 out of 10. The low back pain is worse than the knee pain." (PX4). Following his examination and review of diagnositic studies, Dr. Couri's assessment was "1. Low back pain with bilateral leg pain. 2. Bilateral knee pain. 3. February 13, 2006: X-ray report and x-ray showing bilateral pars defects at L5. There is no history of the patient having these in the past. 4. Decreased disc-height space at L3-4 with slight retrolisthesis. 5. History of bilateral knee osteoarthritis with a small effusion noted on the MRI scan of her right knee with decreased joint space noted and meniscal degeneration. 6. History of left L5 radiculopathy with the patient currently having weakness of her left hamstring muscles which would correspond to the left S1 radiculopathy. 7. History of right L3-4 and left L4-5 herniated discs. 8. The patient did have some slight movement on flexion-extension x-rays at L5-S1 in the past." (PX4). Dr. Couri ordered a new lumbar MRI "… to better assess the discs, also looking for bony edema that would go along with the more recent fracture." (PX4). He also prescribed a bone scan with SPECT "… to see if the fractures have occurred within 6 months. If the fractures did occur with the patient's more recent fall, that would have been 3 months ago, and the MRI scan may not pick it up. I also want to look for changes in any disc pathology from what she has had in the past to what she is currently having." (PX4). In addition, Dr. Couri kept Petitioner off work and asked her to follow up after the MRI and bone scan. (PX4).

In a letter to Dr. O'Connor dated 7/10/06, Dr. Couri recorded that "[t]he patient states that her condition is worse than what it was when she was last here [on 5/23/06]. She states she spends most of her day laying down. She is unable to sit for long periods of time or stand for long periods of time. Even standing to make her meals is difficult for her. She has to go and sit down." (PX3). Dr. Couri's assessment was "1. Recent MRI scan does not show any significant definite evidence of bilateral pars defects but it is of poor quality and therefore cannot be trusted on these images to assess whether or not pars defects are present or absent. 2. Low back pain with bilateral leg pain. 3. Bilateral knee pain. 4. L4-5 having moderate to severe central spinal stenosis with a left far lateral herniated nucleus pulposus which I believe is new on this MRI scan compared to old MRI scans, although I do not have the old MRI scans here for direct comparison. 5. L3-4 grade I retrolisthesis with a right-sided herniated disc into the intervertebral neural foramen. I believe that the retrolisthesis at L3-4 is now new, something that was not present in the past. Once again, I need the old film present for comparison. 6. Slight retrolisthesis of L2-3 appears to be new as well and the L1-2 left small protruding disc also

19IWCC0516

appears to be new. 7. The patient has an exacerbation of her low back pain and leg pain due to the recent fall, uncertain to tell whether or not any new injury occurred versus just a worsening of her old injury." (PX3). Dr. Couri recommended the patient undergo bilateral L5 transforaminal epidural steroid injections and "... continue off work if her condition has worsened, from a pain standpoint, until after the epidural steroid injections have been performed, at which time I hope to progress the patient back to working her current job." (PX3).

An MRI of the lumbar spine performed on 8/19/06 was interpreted as revealing the following: "Based on the findings described in the previous report, there has probably not been any significant change. There is spine stenosis at L4-5, left greater than right, due to facet arthrosis and slight bulging of the intervertebral disc. At L3-4, there is an eccentric right posterolateral disc protrusion with small adjacent endplate osteophytes and right facet arthrosis which causes a moderate right lateral recess and mild right neuroforaminal stenosis." (PX6).

In a Chart Note dated 9/1/06, Dr. Couri reviewed the diagnostic studies and noted that comparison with "[a]n MRI scan from 08/05/04 shows that the bulging at L3-4 has gotten worse. The retrolisthesis of L3-L4 is more pronounced now. At L4-5, the disc bulging appears to be to be more pronounced as well. On axial view, there was a central bulging at L5-S1. This x-ray from 2004 is of higher quality than the one from 2006 and therefore it is difficult for me to say whether there has been any significant change here." (PX4).

In a Chart Note dated 9/26/06, Dr. Couri stated that "[a]pparently her case has been getting denied since I never stated that her condition was worsened after her fall... Her big question is if her fall [on 2/6/06] hurt her back." (PX4). After reviewing the records and comparing the MRIs and x-rays, Dr. Couri noted that "... it appears that the patient had some worsening of her prior back condition. Whether or not the visible changes are due to degeneration or are due to a fall is unable to be determined at this time. However, I can determine that the worsening of her symptoms was caused by the fall – so that would have exacerbated what in her spine would be causing her normal back condition. I believe what is causing her back condition is the disc pathology in her back, and therefore I believe that the fall has caused a worsening of the disc pathology causing her to have a worsening of her symptoms. Therefore, it would all be related to her work-related fall." (PX4). Dr. Couri's assessment included 1. Worsening of lumbar condition with the patient still having right L3-4 foraminal herniated disc, L4-5 central stenosis with left-sided bulging disc causing moderate foraminal stenosis, some instability on flexion-extension x-rays at L3-4 and at L5-S1, 2. Right L5 radiculopathy with some weakness in the right hip flexor as well, and 3. Left-sided radiculitis symptoms. (PX4). Dr. Couri once again recommended bilateral L5 transforaminal epidural steroid injections and made no changes to her work recommendations. (PX4).

On 1/27/07, Dr. Couri administered bilateral L5 transforaminal epidural steroid injections under fluoroscopic guidance with contrast enhancement. (PX4). The pre and post-operative diagnosis was 1. L4-L5 spinal stenosis; 2. Bilateral lumbar radiculitis/radiculopathy. (PX4).

In a Chart Note dated 2/20/07, Dr. Couri recorded that the patient related "... that the injections did not help her symptoms at all. She reports that the symptoms in her low back and bilateral buttocks and legs remain as they were at her last visit. She currently rates her pain at a

7-1/2 out of 10." (PX4). Dr. Couri's assessment was 1. History of a right L3-4 foraminal herniated disc; 2. L4-5 central stenosis with left-sided bulging disc causing moderate foraminal stenosis; 3. Some instability on flexion-extension x-rays at L3-4 and L5-S1; and 4. Bilateral L5 radiculopathies. (PX4). Dr. Couri did not recommend further injections given the workups for other medical conditions that she was undergoing. (PX4). He also noted that "I am continuing to keep her off of work until I have seen the bone scan results." (PX4).

In a Chart Note dated 3/5/07, Dr. Couri recorded that what he thought was going to be a bone scan was apparently only a bone density scan, and that "[s]he is still complaining of the low back pain and bilateral leg pain. She states the Vicodin is not helping her pain at all. She is currently seeing a psychiatrist for the depressive symptoms that she is having." (PX4). Dr. Couri's assessment was 1. Osteopenia and osteoporosis, most noted in the lumbar spine; 2. History of right L3-4 foraminal herniated disc; 3. L4-5 central spinal stenosis with left-sided bulging disc causing moderate foraminal stenosis; 4. Some instability on flexion-extension x-rays at L3-4 and L5-S1; and 5. Bilateral L5 radiculopathies. (PX4). Dr. Couri ordered a bone scan and prescribed physical therapy. (PX4).

In a slip dated 5/29/07, Dr. Couri noted that "[t]he patient's work status from 3/5/07 remains the same until follow up visit on 5/31/07." (PX4).

In a Chart Note dated 5/31/07, Dr. Couri noted the 4/26/07 bone scan was "... consistent with degenerative changes in the joints of her upper and lower extremities, but no abnormal activity was noted in the cervical, thoracic, or lumbar spines." (PX4). Dr. Couri recommended continued physical therapy, bilateral L3-4, L4-5 and L5-S1 zygapophyseal joint injections and "... a neurological consultation regarding whether or not any sort of surgery would be an option for her... [S]ince I am not a surgeon, I cannot make this determination." (PX4).

A bone scan on 4/26/07 revealed "[d]egenerative changes in the joints of upper and lower extremity. No abnormal activity in the cervical, thoracic or lumbar spine." (PX3).

In a separate "Occupational Health Clinical Patient Status Form" dated 5/31/07, Dr. Couri noted that Petitioner was off work. (PX4).

On 8/31/07, Dr. Couri administered bilateral L3-L4, L4-L5 and L5-S1 zygapophyseal joint injections under fluoroscopic guidance with contrast enhancement. (PX4). The diagnosis was 1. Low back pain; 2. Lumbar zygapophyseal joint/facet syndrome. (PX4).

In a Chart Note dated 10/9/07, Dr. Couri recorded that the patient "... states that her symptoms were only 20% better for the first couple of days after the injections. She reports that her bilateral leg pain is the same as it was before the injections." (PX4). The assessment was 1. Osteopenia/osteoporosis most noted in the lumbar extremities; 2. History of right L3-4 foraminal herniated disc; 3. L4-5 central stenosis with a left-sided bulging disc causing moderate foraminal stenosis; 4. Some instability on flexion-extension x-rays at L3-4 and L5-S1; 5. History of bilateral L5 radicular symptoms. (PX4). Petitioner was to be evaluated by Dr. J. Thomas Brown regarding possible surgical intervention and was to see a doctor at Loyola for a second opinion. (PX4). She was to follow up with Dr. Couri on an as-needed basis. (PX4).

In a CINN Chart Note dated 10/25/07, Dr. J. Thomas Brown recorded that Petitioner "... used to work in an office at Stateville Prison, though she says her work often involved some fairly heavy lifting. She says she has had no back problems until August of 2004 when she fell at work and injured her back and developed symptoms of bilateral lumbar radiculopathy. She improved with three epidural steroid injections per Dr. Couri and was able to return to work. She fell again in the spring of 2005 and her back pain increased though her leg symptoms did not change. She underwent another epidural and did not miss any work at that time. Her last fall at work was in February of 2006 and after that event, both her back and bilateral leg pain increased, and this time have not improved with extensive conservative treatment. At one time, Dr. Couri apparently sent her back to work with restrictions, though she says her employer would not allow her to work with restrictions, and she has not worked since February of 2006. Bilateral L5 transforaminal epidurals in January of this year and bilateral L3 to S1 facet injections August 31st had not helped, nor has further PT." (PX4). Dr. Brown noted that "[a]t this time, she continues to note constant, progressive, bilateral back pain going into the buttocks and down the legs ..." (PX4). Following his examination, Dr. Brown stated that "[i]t is my impression that Mrs. McKnight has chronic progressive symptoms of bilateral lumbar radiculopathy, right equal to left, though her exam is satisfactory. Since her last MRI is rather dated, I recommended a repeat study..." (PX4).

An MRI of the lumbar spine performed on 11/20/07 was interpreted as follows: "1. Overall stable appearance of the lumbar spine MRI since prior exam of 8-6-2004, including Grade 1 L2-L3, and L3-L4 retrolistheses. 2. Stable mild to moderate L4-L5, and mild L3-L4 central canal stenosis secondary to disc disease. Right L3-L4 disc protrusion exending into the right neural foramen yielding mild right neural foraminal stenosis." (PX3).

In a report dated 11/29/07, Dr. Brown noted that "[p]er the [11/20/07 MRI] report, it is unchanged compared to a prior MRI apparently done at Silver Cross Hospital August 6, 2004. I do not have that MRI for comparison, but the current study shows mild retrolisthesis at L2-3 and L3-4 and a mild levoscoliosis. There are diffuse disc degenerative changes, mainly at L3-4, with significant narrowing of the disc space. There is moderate symmetric stenosis at L2-3, and mild stenosis at L3-4, right more than left, and mild stenosis at L4-5, left more than right. At L5-S1, there is a symmetric disc bulge without stenosis. Plain films from February 13, 2006, show similar findings..." (PX4). Dr. Brown stated that he did not believe "... the MRI findings warrant a decompressive laminectomy from L2 to L5, particularly in view of the fact that her neurologic exam is normal. I think the treatment should remain conservative and for that she should follow up with Dr. Couri. I did encourage her to get another opinion and she says she is to see Dr. Nockels at Loyola in February." (PX4).

In a Chart Note dated 3/27/08, Dr. Couri recorded the patient was evaluated by Dr. Brown "... who did not recommend any surgical intervention for her. The patient got another opinion from Dr. Nockels at Loyola University Medical Center... The patient states that she has been having the neck pain since her last fall, and Dr. Nockels agreed that she hurt her neck during her last fall... [Dr. Nockels] recommended that she see a cardiologist, and recommended a lumbar surgery pending results of the above-stated testing... Now, the patient's bilateral knee pain is increased. She has difficulty going from sitting to standing." (PX4). Dr. Couri noted he was "... a little concerned about the fact that the amitriptyline has been added to the patient's

medication regimen… I would prefer to see the dose of the Cymbalta increased as opposed to her taking the amitriptyline which could potentially cause more interactions with the medications." (PX4). Dr. Couri told the patient to follow up with Dr. Nockels concerning back surgery. (PX4).

An MRI of the cervical spine on 4/9/08 revealed multilevel spondylosis, most advanced at C6-7, where it was observed that "a posterior disc osteophyte deforms the anterior cord and causes severe central spinal stenosis. There is severe bilateral foraminal stenosis." (PX8).

In a Chart Note dated 4/28/08, Dr. Couri noted that "[t]he patient states that her low back pain and leg pain are getting worse… The patient states that she has some neck pain, that right rotation tends to increase her right-sided neck pain, and that left rotation gives her some left-sided neck pain. But apparently her leg pain and low back pain are the worst for her." (PX4). Dr. Couri's assessment was "1. C6-7 severe central and bilateral foraminal stenosis as per an MRI report from April 9, 2008, 2. Hyperreflexia of the bilateral lower extremities, and I wonder if the patient has very mild myelopathic findings which could explain the worsening in her leg symptoms. 3. Osteopenia/osteoporosis most prominent in the lumbar spine. 4. History of right L3-4 foraminal herniated disc. 5. L4-5 central spinal stenosis with left-sided bulging disc causing moderate foraminal stenosis. 6. Some instability on flexion-extension x-rays at L3-4 and at L5-S1. 7. History of bilateral L5 radicular symptoms. 8. The patient has not responded to conservative care, physical therapy, or epidural steroid injections to her lumbar spine." (PX4). Dr. Couri noted that "I told the patient that she needs to have her pain medications filled by only one doctor, either by me or someone else, and apparently the patient has opted for me to be the doctor to solely fill her pain medications." (PX4).

On 10/20/08 Petitioner underwent surgery at the hands of Dr. Nockels in the form of 1. L2 through L5 laminectomies and decompressive medial facetectomies; 2. L3 through L5 intertransverse autografted arthrodesis, L4 Smith-Peterson osteotomy; and 3. A posterior segmental instrumentation with correction of deformity from L3 to L5. (PX8). The pre and post-operative diagnosis was segmental lumbar stenosis with lumbar spondylolisthesis. (PX8).

In a Progress Note Report dated 6/11/09, Erin Schilling, APN recorded that "Karen returns eight months s/p L3[-]5 fusion. She recently had a CT and xrays and is here for review. Patient states that her pain has returned to the same as she experienced before surgery. She has constant, aching pain in her low back and has decreased her activity level due to intolerance to standing and walking. She has aching pain in BLE but no specific radicular pattern." (PX8). Ms. Schilling noted that "Dr. Nockels discussed further surgery for correction of her deformity. Recommends T12-L5 fusion. Scheduled for 8/17/09." (PX8).

On 8/17/09 Petitioner underwent surgery at the hands of Dr. Nockels in the form of "[b]ilateral T12-L5 laminectomy with decompressive medial fasciectomies, bilateral T12-L5 foraminotomies with reoperation at L3, L4, and L5 bilaterally, posterior segmental instrumentation utilizing pedicle screws and rods from T12 to L5 with correction of kyphoscolotic deformity, posterior autograft and allograft arthrodesis of T12 to L5 utilizing bone morphogenic protein." (PX8). The pre and post-operative diagnosis was "[s]tatus-post L3-L5 lumbar decompression and fusion with progressive kyphoscoliotic deformity." (PX8).

Petitioner agreed that she underwent lumbar fusion surgery at the hands of Dr. Nochels in October of 2008, and that she had a second fusion surgery at T12-L5 in August of 2009. (T.20-21). She indicated that eventually "... they had to take everything out of my back, my lower back and redo it" and extend it. (T.21). She stated that she did not feel there was any improvement after the second fusion. (T.22).

In a Progress Note Report dated 12/21/09, Erin Schilling, APN recorded that "[p]atient returns four months s/p revision surgery for scoliosis, T12-L5 fusion. She is doing well. She states that although she still has some back pain, it is much [i]mproved from before surgery. She is in PT three times per week. She takes 3 Norco per day and [T]ylenol. No c/o radicular pain. We had the patient obtain xrays today which show normal alignment and stabilization of the instrumentation. Given Rx for Ibuprofen. Continue PT. RTC three months." (PX8).

In a Progress Note Report dated 3/25/10, Erin Schilling, APN recorded that "[p]atient returns seven months s/p thoracolumbar fusion. She is doing fairly well although she still c/o back pain. PT has helped her endurance and back pain and she wishes to continue. She feels that her lower extremities are stronger from it as well. She takes Voltaren BID and PRN Norco which helps the back pain. She has no c/o leg pain. She should continue with PT and RTC in five months for new xrays and further evaluation." (PX8).

In an SRS Disability Medical Report dated 8/31/10, Dr. Nockels noted that Petitioner's diagnosis was lumbar spondylosis s/p thoracolumbar fusion, and that "patient cannot return to work. She is disabled." (PX8).

In a Progress Note Report dated 3/3/11, Erin Schilling-Doyle recorded that "[p]atient returns s/p T12-L5 fusion 9/09. Doing fairly well although has c/o pain with any type of physical activity. Needs to rest frequently for relief of pain. No radicular symptoms. We had the patient obtain x-rays today which show normal alignment and stabilization of the instrumentation. Filled out work forms, patient permanently disabled. RTC one year." (PX8).

In a letter "to whom it may concern" dated 10/3/13, Dr. Nockels indicated that "Mrs. McKnight is under my care for chronic back pain following multiple spine surgeries and will require lifelong narcotic administration." (PX8).

In a letter "to whom it may concern" dated 11/15/13, nurse practitioner Erin Schilling stated "[t]his is to clarify patient's current work status. She has been permanently disabled. She has a history of multiple lumbar fusions and is no longer able to be gainfully employed. Her symptoms of pain began after a work injury and are a causative factor in her status of permanent disability." (PX8).

In a Pain Treatment Centers of Illinois "History and Physical Report" dated 2/10/14, Dr. Donald Roland recorded "[t]he patient presents to the office with back pain, radiating to bilateral lower extremities. The patient states that she had a fall at work. The patient described her pain as constant aching. Her pain is aggravated by any physical activity such as sitting, standing, walking, stress, weather changes, coughing/sneezing." (PX12). The assessment was lumbar radiculopathy. (PX12). Epidural steroid injections and a lumbar MRI were ordered. (PX12).

An MRI of the lumbar spine performed on 2/19/14 was interpreted as finding: 1. Extensive postsurgical changes of lumbar spine; 2. Low signal intensity soft tissue material protrudes centrally at L3-4, similar to that seen on the prior study [from 6/19/06]. This probably represents a tiny recurrent disk protrusion, however, evaluation of recurrent disk protrusion versus postoperative scar is somewhat limited by the lack of contrast. No significant stenosis is identified, however; 3. Mild disk bulge and bony degenerative changes cause minimal to mild foraminal stenosis, greater on the left, at L4-L5; 4. Degenerative disk disease has mildly progressed. Minimal retrolisthesis is present at L1-L2 and L2-L3. There is mild rotatory lumbar levoscoliosis. (PX6).

In a "History and Physical Report" dated 4/22/14, Dr. Roland's staff recorded that Petitioner "... presents for her third thoracic (T 11-12) and caudal epidural steroid infection [sic]. She reports 0% reduction in pain symptoms on today's visit. Pain is located down the entire spine from cervical to lumbar area... She is unsure if she wants to proceed with a third injection at this time." (PX12). Dr. Roland noted that "[a]t this point the patient is a candidate for medication management therapy[.] I will recommend the patient see Dr. Hurly for his recommendation regarding any physical modalities that might be of benefit for this patient." (PX12).

In a Primary Medical Group progress note dated 5/8/14, Dr. Zafer Jawich recorded that Petitioner "here as a new pt; legs back pain, falls, back pain on [N]orco 2-3 per day." (PX13).

In a "History and Physical Report" dated 6/18/14, Dr. Larry Najera noted that Petitioner is a "... patient of Dr. Roland who I was consulted to make further recommendations after two epidural injections with no relief." (PX12). Dr. Najera's assessment was post-laminectomy syndrome, depression, myofascial pain, knee osteoarthritis for which she was referred to physical therapy, evaluation and follow up. (PX12).

In a "History and Physical Report" dated 7/8/14, Dr. Roland noted that Petitioner "... presents for follow up for back pain, radiating down both legs to ankles." (PX12). Dr. Ronald's assessment was lumbar radiculopathy and knee osteoarthritis. (PX12). He ordered x-rays of both knees and indicated that he was considering bilateral Synvisc injections for the patient. (PX12).

X-rays of the bilateral knees revealed 1. No acute fracture or dislocation; 2. Osteopenia and degenerative changes; and 3. Chondrocalcinosis bilaterally. (PX12).

Dr. Roland subsequently ordered Synvisc injections which were performed on 7/15/14, 7/22/14 and 8/5/14. (PX12).

In a progress note dated 8/6/14, Dr. Jawich recorded that Petitioner "had knee injection bilateral, better now..." (PX13). Dr. Jawich noted that "Pt is stable, no need for further intervention at this time, FU in 3 months unless new symptoms or problems." (PX13).

In a "History and Physical Report" dated 9/2/14, Dr. Roland's staff recorded that "[p]atient reports 95% improvement from the injections. She describes the pain as an ache. The injections helped her pain. Laying down make[s] her pain worse." (PX12). Dr. Roland's

assessment was post-laminectomy syndrome, myofascial pain, knee osteoarthritis, and lumbar radiculopathy. (PX12). Dr. Roland noted that the "[p]ain the patient is experiencing in her knee is markedly improved. There is no swelling, no tenderness and good range of motion. The patient [is] still having pain in her lower back. Patient had previous back surgery... The patient will continue on her current medication regimen." (PX12).

An MRI of the lumbar spine performed on 12/8/14 and interpreted by Dr. Ian Fisher noted "... mild rotary lumbar levoscoliosis, stable. Posterior fusion with bilateral pedicle screw, vertical rods and horizontal stabilizing bars with laminectomy changes are again noted at L12-L5. There is mild ill-defined enhancing granulation tissue seen throughout the operative bed. Slight posterior slippage of L1 on L2 and L2 on L3 appears stable. A probable hemangioma is noted in the T11 vertebral body, stable. Diffuse degenerative disc disease is again noted with moderate loss of disc space height at L1-2 through L4-5, relatively stable. The conus medullary this [sic] is unremarkable, terminating at the T12-L1 level. A small left renal cyst is noted." (PX14). Dr. Fisher's conclusion was "1. Extensive postsurgical changes of the lumbar spine, as detailed above. 2. Non[-]enhancing soft tissue protrudes centrally at L3-4, stable. Again, this probably represents a tiny recurrent disc protrusion, however, no significant stenosis is identified. 3. Minor disc bulge has progressed at L5-S1, without significant stenosis. 4. Changes at L4-5 causes minimal to mild foraminal stenosis, stable." (PX14).

In a progress note dated 12/18/14, Dr. Jawich recorded that "pt states that she has fallen and lost her balance three times in the last three weeks, pt states that her body aches from the falls." (PX13).

In a progress note dated 8/11/15, Dr. Jawich recorded that the patient "here for norco refil. [S]tates she has been out for weeks, last dose 3 weeks ago. [D]id borrow some of her sister[']s. [H]as chronic upper and lower back pain, multiple surgeries with rods and screws in spine. [S]tates her leukemia is in remission. [R]ecent sickness for which she saw [D]r. Walsh for. [D]enies fall, no cp, sob. [S]till drives." (PX13).

In a progress note dated 8/19/15, Dr. M. Kamran Khan recorded that the patient complained of "... upper / lower back pain /bilat leg pain; Denies numbness or paresthesia; no urine or bowel incontinence; pt does admit to frequent fall; No recent imaging at this clinical visit; pt here for evaluation." (PX15). Dr. Khan's assessment was 1. Chronic back pain and 2. Hx of spinal surgery. (PX15). Dr. Khan ordered x-rays of the cervical, thoracic and lumbar spine and recommended Petitioner "continue present management." (PX15).

In a progress note dated 10/29/15, Dr. Khan recorded that the "[p]atient continues to have severe low back pain. She denies significant radiculopathy. She does admit to a recent history of neck pain and falls with 'wobbly' gait. She states these symptoms are intermittent and her falls have only occurred twice in the past year... X-ray imaging of her spine was obtained showing significant DDD of the cervical spine and intact fusion from thoracic to lumbar spine." (PX15). The diagnosis was chronic back pain, and Petitioner was advised to continue with her home exercise program. (PX15).

In a progress note dated 1/27/16, Dr. Khan recorded that the patient presented "... with

history of spine surgery / chronic back pain / failed back syndrome here for routine follow. She denies new radicular pains down the legs… She requests for [sic] pain medications; pt had been on Norco for pain; xrays reviewed; She states she does not do much around the house; States her back pain becomes severe with certain activities / like twisting and bending; Here for routine follow up; No new weakness to the lower legs." (PX15). Dr. Khan refilled Petitioner's prescription for Norco/Methocarb, discussed medical management options and recommended she continue with home exercises. (PX15).

In a progress note dated 7/27/16, Dr. Khan recorded that the patient complained of "… worsening leg pain and back pain. Pain is severe to left anterior thigh; She is taking [N]orco for pain; She denies recent injury or fall." (PX15). Dr. Khan prescribed medication and recommended physical therapy. (PX15).

In a progress note dated 9/14/16, Dr. Khan recorded that the patient complained of "… left leg pain from lower leg/travels up to groin; she has done physical therapy; and states it helps he symptoms; She continues to take medications; discussed continue medical management/ diet/exercise. Here for routine follow up." (PX15). Dr. Khan recommended that Petitioner continue with present management and physical therapy. (PX15).

Currently, Petitioner noted that since the accidents "[m]y whole life has changed, and I have not really accepted that well because when you were used to being independent, doing everything for yourself. I walked five miles a day every day practically… I'm lucky if I can walk 3 blocks… I have to hire practically everything done in my apartment. Cleaning. My sister does my washing. And if the bathroom still runs over, all I do is throw towels on the side and then I call up Diane… And I ask her would you come down to really clean it up, because when I bent over like that my back just won't take it. So to sum it up about how my life is now, I don't like it. I can't change it. But I can tell you this. Practically only work that I really do in my apartment I use a lot of paper plates, paper cups, microwave cooking. I wash up some things that might be in the sink, wipe off the counters. As far as dusting and when you have to bend for different things and all that. I don't do any of that anymore." (T.22-23). Petitioner also noted she does not go to a lot of places anymore "… because of my driving. I don't drive like I used to because my back is hurting and then I get squirmy in the car and I don't want to get in an accident. I have to have somebody take me a lot of times to get my groceries, to buy clothes, to help carry out stuff. Then when I go by myself I have them put it in the car. I leave them in the car until somebody can help me take them out. Now if it's not a lot, I'll make like three or four trips and put stuff like so much in a bag and carry it in like that because basically I'm not supposed to pick up anything heavier than a gallon of milk. That's in my restrictions." (T.23-24).

Petitioner indicated that her job with Respondent was not light work and that she "[a]bsolutely [could] not" return to that prior job. (T.27). Specifically, she stated that she "… couldn't drag the mail bags. I couldn't be lifting the postal baskets that involves I usually always had to do all the vouchers. Probably the only thing that I can really go back and do and I really couldn't do it very long because I can't stand, only a certain length of time, and then I have to sit down, is run off mail. And I would … not be good at that at all." (T.28).

Petitioner indicated she was 78 years old at the time of the hearing at arbitration. (T.28). She indicated that the State has not offered her any type of light duty, or her former job, in the last few years since they cut off her benefits. (T.28-29). She stated the reason they gave her as to why they cut off her benefits was "... because they thought I should go back to work." (T.29).

Petitioner agreed that following the 2006 accident she first visited Dr. O'Connor on 2/10/06. (T.53-54). She likewise agreed that Dr. O'Connor gave her restrictions of no lifting, pushing or pulling more than 10 pounds, no bending, stooping or climbing and no continuous standing over one hour. (T.54). She later acknowledged that she did not see if Respondent could accommodate these restrictions. (T.76).

Petitioner indicated that she has not worked anywhere since 5/6/06 and that she has not searched anywhere for a job "... because I know I can't." (T.69). Petitioner claimed that she "... would love to go back to work. I miss work. But I am not capable..." (T.69). She agreed that she retired from Stateville on 5/31/14 and that she is currently receiving her pension. (T.69-70). She believed that she started receiving her pension in June of 2014 and that she is receiving a little over $1,500.00 per month along with $785.00 in Social Security. (T.70-71).

Dr. Brian Couri testified that he is board certified in physical medicine, rehabilitation and pain medicine. (PX23, p.3). He noted that Petitioner was referred to him by her PCP and that he first saw her on 5/20/04. (PX23, p.4). He testified that "[w]hen I last saw her on June 2, 2005, I have diagnosed her with resolved bilateral L4-5 and L5-S1 zygapophyseal joint/facet syndrome. Number 2, was low back pain that seemed to be significantly improved after undergoing bilateral L4-5 and L5-S1 zygapophyseal seal [sic] joint injection. The L5 radiculopathy on the left side was currently asymptomatic and she had a right L5 radiculitis at one time, and that was asymptomatic as of June 2, 2005." (PX23, pp.5-6).

Dr. Couri opined that the second accident "... seemed to aggravate the preexisting" condition, and that "[a]s I recall her symptoms from the first accident hadn't been totally resolved. So that would have come into play somewhat." (PX23, p.7). He agreed that she was in a somewhat weakened condition and then had a second incident that reaggravated things. (PX23, p.7). He noted that he had treated her with cervical zygapophyseal or injections and that "... as per the last time I saw her, from my handwritten note I told her to follow up as needed." (PX23, p.9). He also indicated that "[s]he was having problems with her knees and was seeing an orthopedic surgeon for those." (PX23, p.9). He stated that as of the last time he saw her "[s]he had some pain on her back, but it was manageable." (PX23, p.9). The Commission notes that Dr. Couri's deposition took place on 8/9/05, or prior to the third and final accident on 2/6/06.

Dr. Couri testified that "[t]he cervical and lumbar symptoms I related to her accident... The cervical and lumbar were both from the first one. She had an exacerbation of the lumbar with the second one." (PX23, p.10). He also noted that when he last saw her he placed her on "... light duty work, lifting five to ten pounds, lifting up to 30 pounds occasionally. Basically I just put her on a 30 pound lifting restriction." (PX23, p.11). He indicated that he expected this to be permanent "[g]iven her size and body habitus..." (PX23, p.11). He also noted he wouldn't have any future treatment recommendations if Petitioner came back in three months and was feeling as well as the last time he saw her. (PX23, pp.11-12).

When asked to explain the mechanism of the first injury, Dr. Couri testified that "[i]t's hard to know exactly how because we don't know exactly how she fell. But it makes a whole lot of sense that if she fell backwards she would have a whiplash-type syndrome. Whiplash is the most common reason that people – the most common specific diagnosis under the general diagnosis of whiplash is cervical facet syndrome. So it makes perfect sense that she would have irritated some of the joints in her neck with the fall and hitting her head. As far as hitting her back, that would make a lot of sense, too, if she fell and hit her back to offset the joints in her back and cause irritation to them as well." (PX23, p.12).

Dr. Couri testified that he did not believe Dr. O'Connor, the PCP, ever forwarded her notes; thus, he only had his own records to review. (PX23, p.13).

Dr. Couri testified that he believed the treatment he provided has been reasonable and necessary with respect to this work-related accident, and that the charges were customary. (PX23, p.13). He also noted that he found Petitioner credible and did not find any evidence of malingering or exaggerating of symptoms. (PX23, p.13).

On cross examination, Dr. Couri reiterated that he did not have any medical records available, although he noted that he did get an IME report from Dr. Zelby as well as "… the stuff I ordered on the patient from Silver Cross Hospital" regarding the diagnostic tests and injections that were performed there. (PX23, p.17). He also noted that Petitioner "… did not indicate to me that she was getting treatment for any of those conditions [he treated her for] prior to seeing me. She indicated that she was quite active prior to all of this." (PX23, p.23).

When asked whether Petitioner gave him a history of injuring her knees at the time of the first accident, Dr. Couri responded: "I do not have any knee injury recorded." (PX23, p.30).

Dr. Couri testified that he had actually seen Petitioner again since early June, and that that visit occurred on 6/23/05, "I just don't have the typed up note in here, I have my handwritten notes in here." (PX23, p.31). He agreed that he was still imposing a 30 pound lifting restriction at that time, and that he instructed her to come back as needed. (PX23, p.31).

In a report dated 5/12/11, certified rehabilitation counselor and licensed clinical professional counselor Susan Entenberg opined that "… Ms. McKnight cannot return to her prior occupation as an office assistant. It is further my opinion that she is not a candidate for a vocational rehabilitation program nor does a stable labor market exist for her." (PX20).

Ms. Entenberg testified via evidence deposition on 5/20/14. (PX24). She indicated that at the request of Petitioner's counsel she prepared a vocational rehabilitation report dated 5/12/11. (PX24, pp.4-5). She noted that she interviewed Petitioner over Skype. (PX24, p.7).

Ms. Entenberg concluded Petitioner "… would not be able to perform her past work… [b]ecause her doctor had not released her to any work… [T]his was after she had a significant amount of physical therapy and after two surgeries. So she would not be able to perform her past work." (PX24, pp.9-10). She noted Petitioner's former job "… was actually a medium to heavy job because of the UPS boxes and the mailbags weighing 65 to 70 pounds." (PX24, p.10).

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Ms. Entenberg testified that she "… didn't really make any vocational rehabilitation recommendations, because I felt she was not a candidate. At the time that I had seen her she was 73. She is now 76. She had worked for Stateville for 23 years, but had not worked in many years prior to our meeting. She was not released by her treating physician. She was very limited in her physical tolerances in that she can't sit, stand or walk for any length of time, demonstrated during our interview when she was constantly changing position. She doesn't even have the tolerance to perform what we would consider sedentary work, as that requires prolonged sitting, and she couldn't sit for any length of time. She indicated she could sit for about 25 minutes and then had to change position, which would not allow for sedentary type of work." (PX24, pp.10-11).

As a result, Ms. Entenberg opined that "… based on her age, her work experience, the fact that the doctor had not released her to any work, she was very limited in her physical tolerances. I did not feel that there would be a stable labor market for her and I did not feel that she would be a good candidate for vocational rehabilitation. The prognosis for placement would be very poor given all those vocational factors." (PX24, p.11).

On cross examination, Ms. Entenberg noted the only time she met with Petitioner was via Skype on 3/10/11 and that she wrote the report on 5/12/11. (PX24, pp.12-13). She also conceded that she has not seen any medical records for Petitioner subsequent to 3/3/11. (PX24, p.13).

She agreed that her conclusion that Petitioner is precluded from performing her past work is based on Dr. Nockles not having released her "[a]nd also in review of the physical therapy records up until that point, which indicated that, you know, they were basically working on activity of daily living skills... and felt that she had never really progressed to a point, and then they stopped it. So a combination of looking at both of it, but Dr. Nockles was the ultimate conclusion." (PX24, p.18). She agreed that if Dr. Nockles "… released her within the limitation that are required to perform the job, yes, it may change my opinion, sure." (PX24, p.19).

Ms. Entenberg indicated that she did not do a survey of available jobs "… because you have to have releases. You have to have limitations that that person can work under, and if you don't have that you can't even begin to do a labor market survey." (PX24, p.28).

Board certified orthopedic surgeon Dr. Samuel Chmell testified via evidence deposition on 5/12/16. (PX25). Dr. Chmell indicated that he treats and performs surgery on the lumbar and cervical spine as well as the knees. (PX25, pp.4-6). He noted that he examined Petitioner on 4/18/15 and reviewed the medical record, including the IME reports of Drs. Phillips and Verma. (PX25, p.8).

Dr. Chmell noted that Petitioner "… first related an injury that she sustained in 2006 while working in the mail room where she had worked for about 23 years." (PX25, p.10). He indicated that at that time "… she was carrying a basket and the mail room was littered with heavy binder tape and other debris. She tripped and fell on her knees, injuring her knees and low back." (PX25, p.10). Dr. Chmell also noted that "… she said that she was injured at work in 2003 when she was holding some doors open and pushing a cart through into the mailroom. She fell back and struck her low back and head and fell in a contorted fashion. In this episode she

injured her neck, her low back and both knees." (PX25, p.11). Dr. Chmell indicated that she "... received treatment, was off of work intermittently, but did return back to work in 2004. She was running off mail in the mailroom and had to bend and stoop to the floor to pick up some mail that had dropped, and her back locked up. She said she literally could not stand up in a stooped position, and another employee had to help her up. This was the second injury that she sustained. She had low back pain with radiation into her legs and swelling into both knees." (PX25, pp.11-12).

Dr. Chmell testified that currently Petitioner "... had persistent back pain with radiation of her back pain down her legs. She had swelling in both knees. She had had several falls due to the weakness in her legs and giving out of her knees. She said that actually she broke her nose in one of the falls." (PX25, p.12). Dr. Chmell also noted that Petitioner uses a quad cane and often has severe pain "... that requires narcotic medication, which she does take." (PX25, p.12). He indicated that "... the side effects of these medications would include dizziness, lightheadedness, sleepiness, inability to concentrate, inability to focus, sometimes depression." (PX25, p.13).

Following his examination and review of the medical records, Dr. Chmell diagnosed Petitioner with "... traumatic aggravation of osteoarthritis both knees" which he agreed was causally related to Petitioner's work injuries. (PX25, pp.20-21). Dr. Chmell explained that "... this diagnosis takes into account she likely had underlying osteoarthritis in her knees. When I saw her she was 77. When she had these falls they were approximately ten years earlier. She would be around 67. Many women age 67, as well as many men age 67, has osteoarthritis in her knees. They are competent causes of aggravation of osteoarthritis in her knees, and medical records reflect treatment for injuries to her knees, which I would term best a traumatic aggravation of osteoarthritis." (PX25, p.21).

In addition, Dr. Chmell diagnosed Petitioner with "[t]raumatic aggravation of degenerative disk disease of the lumbosacral spine. Status post laminectomies, osteotomy, internal fixation and subsequent removal of some of the fixation. And then subsequent fusion with repeat fixation." (PX25, p.22). Finally, Dr. Chmell diagnosed "[f]ailed lumbar spine syndrome secondary to number two", the aggravation of the lumbosacral spine. (PX25, p.22).

Dr. Chmell opined that these three diagnoses were causally related to the work injuries, noting that "[a] fall is a competent cause of injury to the lumbar spine, such as the case here. Bending, crouching are also competent causes of injury to the lumbar spine. And that's her history as she gave it to me and in the records." (PX25, pp.22-23). He indicated that Petitioner's failure to improve from these surgeries does not mean that they weren't necessary or related to the work injuries. (PX25, p.24).

In addition, Dr. Chmell noted that he diagnosed "[t]raumatic aggravation of degenerative disc disease of the cervical spine." (PX25, p.24). He indicated that he felt that this was also related to her work injuries, noting that "I think that that diagnosis is causally related to her 8-1-03 work injury when she fell and struck her head at work, and striking one's head, especially falling, a fall is a competent and unfortunately common cause of injury to the cervical spine. That was the history she gave me. The records reflect that. She indicated, and the records indicate she may have had a loss of consciousness, even with the treatment she received

thereafter, which was for an injury to the cervical spine." (PX25, pp.24-25).

Dr. Chmell opined that Petitioner had reached MMI with respect to the cervical spine, and that she has suffered permanent impairment as a result of the injury to her cervical spine. (PX25, pp.25-26). Likewise, Dr. Chmell felt that Petitioner had reached MMI and suffered permanent impairment with respect to her lumbar spine. (PX25, pp.26-27). In addition, he noted that "I don't recommend any specific treatment focused on the knees, but rather continued pain treatment", including narcotics. (PX25, p.27). He indicated that bilateral total knee replacement is a treatment option. (PX25, p.28). However, he noted that "[i]n light of the fact that she has this failed back syndrome, it's a consideration but it needs to be probably held off on because of the potential less than favorable outcome she would have." (PX25, p.28). He agreed if she did not undergo further treatment for her knees she would be at MMI. (PX25, p.28). He also agreed she had suffered permanent impairment as a result of her bilateral knee injuries. (PX25, p.28).

Taking all these injuries into account, Dr. Chmell did not believe that Petitioner could return to work in the mailroom as a mailroom laborer, noting that "... she physically would be a fall risk. She has demonstrated that she can fall in the mailroom even without this impairment and disability. So it would be a great risk for her to fall. Secondly, she's got weakness in her legs. She's got reduced motion in her back, decreased ability to bend, lift and carry. It's not a fit for her in terms of a job." (PX25, p.29). Dr. Chmell also opined that Petitioner was "... fully disabled from gainful employment", noting her decreased ability to walk, stand, bend or sit for long periods of time due to her low back condition. (PX25, pp.29-30). He also pointed out that Dr. Nockles indicated Petitioner was fully disabled from gainful employment. (PX25, pp.30-31). Dr. Chmell noted that he had reviewed the diagnostic studies – specifically the films -- of the lumbar and thoracic spine as well as the knees. (PX25, pp.31-32). He indicated his review of these records did not change any of his diagnoses or opinions, but instead "... further supported them." (PX25, pp.33-34).

With respect to the IME report of Dr. Verma, Dr. Chmell testified that "I agree with Dr. Verma that there's underlying osteoarthritis of the knees. I think though that that was aggravated, that condition of osteoarthritis of her knees was aggravated with injury and, therefore, her condition ultimately is causally related to the injuries that she sustained at work to her knees. That is a traumatic aggravation of osteoarthritis." (PX25, p.35). He also disagreed with Dr. Verma in that he believed Petitioner needs ongoing pain treatment, including for the knees, among other things. (PX25, p.36).

With respect to the IME report of Dr. Phillips, Dr. Chmell disagreed with the former's opinion to the effect that Petitioner suffered only a lumbar strain or sprain and that her ongoing complaints were related to a degenerative condition, and not her work injuries. (PX25, p.37). Along these lines, Dr. Chmell believed that Petitioner's underlying degenerative disease "... was significantly aggravated with her work injuries, and I base that on the history she gave me and the medical records. The back problems started with injuries at work, and the injuries aggravated her underlying degenerative disc disease." (PX25, p.37). He also noted that he partially agreed with Dr. Phillips' opinion as to the cervical spine, stating that Petitioner's gait disturbance is "... partially due to the lumbar spine problem but also likely due to the condition of her cervical spine. However, I disagree that there's no causal relationship. I think she injured

her cervical spine at work, and the aggravation of the degenerative disc disease [has] affected her gait. So I agree with him with everything other than causation. I think causation, there is a causative effect from the cervical spine related to her injury." (PX25, pp.37-38). However, he agreed that she was at MMI in 2015 with regard to her 2006 work injury. (PX25, p.38). Finally, Dr. Chmell "... agree[d] with Dr. Phillips that she's fully disabled, but I think I disagree with him when he says it's not causally related to her work injuries. I think her full disability for gainful employment is causally related to her work injuries." (PX25, pp.38-39).

Dr. Chmell believed that Petitioner's treatment was "... reasonable, necessary and attributable to the work occurrences", and that her work restrictions were appropriate and related to her work injuries in 2003, 2004 and 2006. (PX25, p.39).

On cross examination, Dr. Chmell noted he was not aware of any pre-existing knee or back problems. (PX25, p.43). He agreed it is possible that people can have back pain without specific trauma. (PX25, p.43). Dr. Chmell indicated that he believed Petitioner had restrictions on her ability to sit, specifically "[h]alf an hour sitting, and then she needs to change positions." (PX25, p.44). He also believed that she had restrictions on her ability to stand, given that she's a fall risk and "[y]ou can fall even when you're just standing if your legs give out or if your back gives out. So I would say in terms of a job, and the only question, an issue being standing, she shouldn't have a job where she stands to perform any tasks." (PX25, pp.44-45). He also recommended that Petitioner use a walker or quad cane when she's on her feet "[t]hen I think that I would let her stand as long as she could stand. I think she would reach a point she would fall. She's weak in her legs, so I would tell her to sit down just before she falls." (PX25, p.45).

When asked whether any of the injuries caused structural damage to Petitioner's lumbar spine, Dr. Chmell stated: "I think that the injuries caused disc protrusion" at L3-4, L4-5 and L5-S1. (PX25, pp.50-51). However, he could not say with a reasonable degree of certainty if the accidents caused any structural damage to the cervical spine. (PX25, p.51). He noted he agreed "somewhat" that his understanding of the injury is solely based on the Petitioner's description of the accident, noting that "[i]t's based on her description to me, but also her description to other providers earlier in time. For example, Dr. Couri again who she saw in 2004 and many times thereafter." (PX25, p.51). When asked whether her current symptoms could be related to any of the other falls she has reported, Dr. Chmell replied: "[i]t's possible." (PX25, p.52).

Dr. Chmell testified that "... the cervical spine would require restrictions, but that in and of itself, if that were her only problem, she would be able to work." (PX25, p.58). He indicated that she would not be able to work regularly due to pain and medications, noting that "... there would be times when she would require strict bedrest for her pain, and the medications would preclude her ability to stay on task, think and concentrate." (PX25, p.58). He agreed that he would use these medications as long-term pain management. (PX25, p.58). He indicated that he believed Petitioner reached MMI with respect to the lumbar spine "... as of about six months after her second surgery." (PX25, p.59). He also indicated that if Petitioner undergoes no more treatment for the knees she reached MMI for that condition on 3/27/08, noting that "... up until that time she was being managed for her knees and doing about the same. At that time on March 27, 2008, her knee pain started increasing... She had been getting knee injections on a regular basis and doing same until that time." (PX25, p.59).

On re-direct examination, Dr. Chmell indicated that the conditions he opined were related to her work injuries were the type of conditions that can cause weakness in the legs, and that those conditions can lead to falling. (PX25, p.60). He agreed that to a reasonable degree of medical and surgical certainty that is what happened here. (PX25, p.60).

With respect to restrictions, Dr. Chmell noted that "... first of all I take into account all of their work injuries, and I have to separate that out from other conditions that are not work related. But, for example, here there [are] multiple work related injuries. I look at all of them and I look at the person and the medications that they are taking that can have an effect on their emotional, mental and physical capacity." (PX25, p.61). He indicated that that is what he did here. (PX25, p.61).

Dr. Chmell stated that MMI "... means they are as good as they are going to get. No further improvement is likely." (PX25, p.61). He indicated that while Petitioner is at MMI she will still require pain medication and pain management going forward. (PX25, p.61).

Board certified orthopedic surgeon Dr. Frank Phillips testified via evidence deposition on 6/2/15. (RX6). Dr. Phillips noted that at the request of Respondent he performed a §12 examination of Petitioner on 1/20/15. (RX6, pp.5,8). He noted that he was asked to focus on the lumbar and cervical spine, and that Petitioner appeared at the exam in a wheelchair. (RX6, p.10). He indicated that he reviewed the following films: 11/20/07 lumbar MRI, 4/9/08 cervical MRI, 10/22/08 lumbar x-rays and 2/19 and 12/8/14 lumbar MRIs. (RX6, p.12). He did not think he was provided with the 4/13/04 cervical MRI. (RX6, p.12). He indicated that he reviewed the reports of the 6/4/04 lumbar MRI and the 8/4/04 MRI. (RX6, p.12).

Dr. Phillips opined that Petitioner suffered a spinal sprain/strain as it relates to the incident in 2003 "... based on a combination of a description of her complaints at that time, notes of some of the physicians she saw, and also the reports of the MRI imaging studies including MRIs." (RX6, pp.16-17). He also believed that "... some physical therapy and injections [following the 8/1/03 incident] would be reasonable. I think, obviously, the excessive amount of injections went beyond being reasonable where she received really many, many seemingly random injections." (RX6, p.17). Dr. Phillips also felt the surgery was "... reasonable to address her subjective complaints. I don't believe it specifically addressed any injuries suffered in her accident." (RX6, p.17). In addition, Dr. Phillips did not believe that the work-related accident [on 8/1/03] led to the abnormalities shown in the 6/4/04 lumbar MRI. (RX6, p.20). The same can be said of the abnormal findings noted in the 8/5/04 lumbar MRI. (RX6, pp.20-21).

Dr. Phillips indicated he agreed with the diagnosis of lumbar and cervical strain made by Dr. Zelby in his 9/27/04 report. (RX6, p.21). He also agreed that Petitioner "exasperated [sic]" a pre-existing degenerative condition, noting that "I'm assuming you mean symptoms related to the preexisting condition..." (RX6, pp.21-22). Likewise, he agreed with Dr. Zelby that the treatment was excessive and Petitioner had reached MMI as of 9/27/04. (RX6, p.22). However, he noted "... I don't think the fact that she worked after the accident would point towards them being work-related or not. It would tend to point towards the fact that she was – her symptoms were not severe enough that they prohibited her from working." (RX6, p.22).

Dr. Phillips noted the 6/19/06 lumbar MRI showed "... there had been no significant change since the prior study. So it's essentially the same findings, spinal stenosis L4-5 due to facet arthrosis, which is degeneration and bulging of the disc. Again, a protrusion – a small protrusion of a disc at L3-4 coupled with spurs and facet arthritis causing some right-sided narrowing or stenosis." (RX6, p.23). Dr. Phillips did not believe the work-related accident [presumably all three accidents] caused these abnormal findings. (RX6, p.23). Dr. Phillips agreed with Dr. Gleason that Petitioner had reached MMI as of the date of his IME, 4/18/06, at least as it relates to the '03 accident. (RX6, pp.23-24). Likewise, he agreed with Dr. Gleason that Petitioner's current condition was not related to the incident of 2/6/06. (RX6, p.24).

With respect to the 11/2007 lumbar MRI, Dr. Phillips noted "... a stable appearance and no significant change since the 8/6/04 study." (RX6, p.25). He indicated, once again, that he did not believe that the work-related accident caused these abnormal findings. (RX6, p.25). Likewise, Dr. Phillips did not believe the work-related accident caused the findings contained in the 4/9/08 cervical MRI. (RX6, pp.25-26). He indicated he felt the L2-5 decompression and L3-5 fusion surgery was reasonable "... because she says her back hurts, but I don't know it addressed any injury or pathology from her work-related injury." (RX6, p.26).

Dr. Phillips noted that Petitioner has underlying lumbar and cervical spondylosis, which he stated is "... a fancy word for degenerative changes, wear and tear changes" which he noted are due to "[e]very day activity, wear and tear, probably some genetic component to it." (RX6, p.26). He indicated that this could explain her current symptoms, as well as the failed back symptoms. (RX6, pp.26-27). He agreed that he is of the opinion that the structural damage to Petitioner's spine is not causally related to her work activities. (RX6, p.27). He noted that "... pre-dating the surgery, she had relatively mild changes, just to clarify. But, yeah, they're very typical degenerative wear and tear every day changes we see as the spine ages." (RX6, p.27). He also indicated that the fact that Petitioner had little or no response to the surgery (i.e. improvement "... would tend to support the surgery, probably didn't really address any specific structural abnormality that was responsible for her back pain." (RX6, p.28).

Dr. Phillips did not believe that Petitioner was capable of returning to work at the time of his IME, noting that "... the issues related to having a fusion – a multilevel fusion in her low back, and failing to – failed back surgery syndrome, I think that would prohibit her from working." (RX6, pp.28-29). He did feel that Petitioner had reached MMI at the time of his examination on 1/20/15 based "... on review of the records, review of the opinions of the doctor she was seeing, and the imaging study reports." (RX6, p.29).

On cross examination, Dr. Phillips agreed that it's fair to say that as people get older they are more at risk for developing degenerative disc disease. (RX6, p.34). He also agreed that a pre-existing degenerative spine condition can become symptomatic after, say, trauma from a fall. (RX6, p.34). Dr. Phillips indicated that he did not find any Waddell signs with Petitioner during his examination, and that he did believe that she was lying with respect to her complaints of pain. (RX6, p.35). He also conceded that to his knowledge Petitioner was not complaining of back pain before 2003, and that after 2003 up to the time he saw her she was complaining of same. (RX6, p.36). He also agreed that Petitioner continued to have some degree of symptoms subsequent to the 2/6/06 accident. (RX6, p.38).

Dr. Phillips agreed that he was never given a specific job description by the parties, and that it was fair to say that at least as of the time he saw Petitioner she was not capable of returning to her prior job. (RX6, p.39). He also agreed that he was not asked to provide any opinions regarding Petitioner's knees. (RX6, p.39). Furthermore, he testified that "[m]y position is there's no evidence of malpractice being committed in this case." (RX6, p.42).

On re-cross examination, Dr. Phillips testified "[i]f you've got some underlying degenerative changes with trauma, you'd be at a higher risk of may[]be developing pain than someone who has a normal spine." (RX6, p.46).

Board certified orthopedic surgeon Dr. Nikhil Verma testified via evidence deposition on 6/10/15. (RX7). Dr. Verma noted that he primarily treats knee and shoulder conditions, and occasionally elbow symptoms. (RX7, pp.5-6). Dr. Verma examined Petitioner at the request of Respondent on 1/28/15. (RX7, pp.8-9). He noted that the focus of his exam was her bilateral knees; he did not examine her back or spine at all. (RX7, p.10). He noted that Petitioner "... was a fairly poor historian, but she reported a history of injury that occurred per her report sometime in 2003 where she tripped and fell landing onto the anterior aspects of both knees." (RX7, p.12). He also indicated that Petitioner did not disclose any pre-existing knee problems, but that he "... did identify preexisting knee problems within the medical records." (RX7, p.14).

Following his examination and review of the records, including imaging studies, Dr. Verma diagnosed "[b]ilatral knee degenerative arthritis." (RX7, p.14). He noted that this was based on "[t]he age of the patient, the radiographic examination depicting classic changes of osteoarthritis, and her physical exam findings." (RX7, p.15). He indicated that her treatment as to her knee osteoarthritis was medically necessary and reasonable. (RX7, p.15).

Dr. Verma believed Petitioner's osteoarthritis, based on the mechanism of injury, was not work related. (RX7, p.15). He opined that "... her injury appears consistent with a contusion, but that her ongoing complaints of pain are consistent with her underlying degenerative arthritis." (RX7, p.16). He also agreed that Dr. Gleason's diagnosis of effusion of the right knee with chondromalacia of the patellae bilaterally, right greater than left, was appropriate. (RX7, p.17). Likewise, he agreed with Dr. Gleason's opinion that Petitioner was capable of full-time work without restrictions at that time, and that she was at MMI as of 4/18/06. (RX7, p.18).

Dr. Verma noted that the records show Petitioner had injections in her knees about a year prior to the 2006 work injury. (RX7, p.19). He indicated that he felt these injections were reasonable and necessary, but that they were related to her underlying arthritis. (RX7, p.19). Dr. Verma did not believe that Petitioner would have any permanent restrictions as to her knees, and that at the time of his examination on 1/28/15 she had reached MMI. (RX7, pp.19-20). He stated that "[s]he may require additional treatment in regards to her osteoarthritis, but I do not see any additional treatment that's required in regards to her alleged work injury of 2006." (RX7, p.20). He also noted that the grinding she reported at the time of his exam was consistent with osteoarthritis. (RX7, p.20).

On cross examination, Dr. Verma agreed that it would be fair to say that he is not aware if the records he received represent a fully complete set. (RX7, p.22). He also agreed that it was

fair to say that the older one gets the more likely one is to have some degenerative condition in one's knees, and that not all of those degenerations will be pain generators or symptomatic. (RX7, p.27). Likewise, hypothetically speaking, he agreed that a traumatic incident can take a previously asymptomatic knee condition and make it symptomatic and painful. (RX7, pp.27-28). He noted such traumas could include fractures, meniscal injuries and structural deviations. (RX7, p.28). He also agreed, hypothetically, that someone falling on the knee could cause an increase in pain, although he did not see any evidence of that in this case. (RX7, p.28).

Dr. Verma conceded that he did not review any records prior to her 2003 accident, and that he did not have any evidence that there were any prior MRIs or that she complained of knee pain before the 2003 injury. (RX7, pp.29-30). He agreed that Petitioner had knee symptoms prior to the 2006 incident, and that she therefore had some knee complaints after the 2003 injury. (RX7, p.30). However, he noted that "... I didn't see any relationship or description of a knee injury at that time." (RX7, p.30). He also agreed that she had some knee complaints following her second knee injury in 2004, and that she was able to go back to work with this pain. (RX7, p.31). He likewise agreed that she has not been back to work since the 2006 accident, although he noted that that is related to her back. (RX7, p.31).

Dr. Verma testified that it typically takes 12 weeks for a knee contusion to resolve. (RX7, p.32). Dr. Verma noted that he did not have "... any disagreement that [Petitioner] had symptoms after a fall consistent with a contusion. I just don't see any evidence that there was an aggravation[,] worsening or change in her arthritic condition beyond the normal natural history." (RX7, p.33). Dr. Verma agreed that he believes Petitioner can return to work with no restrictions with regard to her knees. (RX7, p.34). He indicated that he reviewed a job description that was provided to him by the State in this case, and agreed that he based his opinion as to whether Petitioner could return to work based on that document. (RX7, pp.34-35). He also noted that Petitioner's job was sedentary, based off the job description. (RX7, p.35).

Dr. Verma agreed that Petitioner at least suffered some injury to her knee when she fell in 2006, and that the subjective complaints she had on the date of his exam were consistent with the objective findings that he made at that time. (RX7, p.36). He agreed that she may need additional treatment for her knee condition in the future in the form of injections, but that it is unknown whether she would possibly need a knee replacement. (RX7, pp.36-37). He noted that the injections "... worked for the last ten years. I don't have any basis to opine that they wouldn't continue to work." (RX7, p.37).

Conclusions of Law

"It has long been recognized that, in preexisting condition cases, recovery will depend on the employee's ability to show that a work-related accidental injury aggravated or accelerated the preexisting disease such that the employee's current condition of ill-being can be said to have been causally-connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *Sisbro, Inc. v. Industrial Commission*, 207 Ill.2d 193, 204-206, 797 N.E.2d 665, ___, 278 Ill.Dec. 70, ___ (2003); citing *Caterpillar Tractor Co. v. Industrial Commission*, 92 Ill. 2d 30, 36-37, 65 Ill. Dec. 6, 440 N.E.2d 861 (1982); *Caradco Window & Door v. Industrial Comm'n*, 86 Ill. 2d 92, 99, 56 Ill. Dec. 1, 427 N.E.2d 81

19IWCC0516

(1981); *Azzarelli Construction Co. v. Industrial Comm'n*, 84 Ill. 2d 262, 266, 49 Ill. Dec. 702, 418 N.E.2d 722 (1981); *Fitrro v. Industrial Comm'n*, 377 Ill. 532, 537, 37 N.E.2d 161 (1941). 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. *Sisbro*, 797 N.E.2d at 673, citing *Rock Road Construction Co. v. Industrial Comm'n*, 37 Ill. 2d 123, 127, 227 N.E.2d 65 (1967).

In the present case, the incident reports and medical records consistently reflect a history of injury on the date in question while Petitioner was attempting to hold a door open for an officer who had his hands full when she stepped back onto a ledge, lost her balance and fell, striking her head and back in the process. Accordingly, the Commission affirms the Arbitrator's finding that Petitioner sustained accidental injuries arising out of and in the course of her employment on 8/1/03.

However, the Commission reverses the Arbitrator on the question of causation and finds that a causal relationship existed between the accident on 8/1/03 and Petitioner's subsequent condition of ill-being and need for treatment relative to her cervical and lumbar spine and bilateral knee condition. Along these lines, the Commission finds the opinions of Drs. Couri and Chmell to be more persuasive than those offered by Respondent's §12 examining physicians, Drs. Zelby and Phillips. Furthermore, there is no evidence to suggest Petitioner was off work or received treatment for her cervical/lumbar spine or knees during the period leading up to the 8/1/03 accident. Petitioner also immediately sought treatment at the Stateville Correctional Center E.R. on the date of the accident at which time she was given a diagnosis of "bumped back of head and tail bone on floor". (PX1). Petitioner credibly testified that she continued to work full duty thereafter, taking a few days off here and there for her ongoing back pain. (T.41-42). She eventually visited her primary care physician, Dr. Patricia O'Connor, on 2/24/04 with complaints of "headaches, back pain" as well as "tightness" in the back of her neck. (PX3). X-rays and an MRI of the cervical spine were subsequently performed, and Petitioner came under the care of Dr. Brian Couri.

In an office note dated 5/20/04, Dr. Couri recorded that "[t]he patient thought that she would get better and, therefore, she did not seek any further medical care. She did not get any better ..." (PX3). In addition, in a letter dated 6/2/05, Dr. Couri noted that "[a]lthough, there was a significant lapse in time between [the first accident in] August 2003 and then when I originally started to treat the patient [in May of 2004]. She was apparently trying to seek care, at least for the cervical complaints at that point in time because they were [her] biggest complaint, by seeing an ENT and being worked up for headaches when it was eventually found that her headaches were coming from her cervical spine and not from any other medical conditions, but she had [been] trying to find out why she was having the problems that she was having. When the joints were appropriately treated with zygapophyseal joint injections, the patient's symptoms did resolve. The fall in and of itself [on 8/1/03] did [not] cause the degeneration in her neck, but did exacerbate the degeneration ... As far as her low back pain goes, apparently part is degeneration and apparently part was aggravated by the fall. The neck far outweighed the back when I initially saw her and that is why the neck was treated first and not the back. There would be some question as to why she did not seek care for her back during the period of time that she was seeking treatment for her neck and it might just have been that her neck pain was so much

greater than her back pain and so much more debilitating that after the neck pain was taken care of, that it was just the back pain that was causing her symptoms. By the time of my initial visit with her, she was complaining of both." (PX4). The Commission finds this a reasonable explanation for the delay in treatment, particularly with respect to the lower back.

Dr. Couri also opined that "... the initial fall [on 8/1/03] very easily would aggravate the joints in her neck and in her low back causing the condition of ill-being, but then [she] stoop[ed] over to pick up some mail off the floor [on 10/28/04] and was unable to get up because of significant low back pain ... Once again, she was having some of the back pain. We [were] in the process of trying to take care of it when she was released back to work full duty work by Dr. Zelby. Therefore, she had an exacerbation of it when she bent over at work. The bending over would just [be] a re-exacerbated [sic] why she was having pain in the first place, which was an exacerbation of a pre-existing condition, which was an exacerbation of a degeneration that she had in the back. Therefore, yes, she did have degeneration, yes it was a pre-existing condition, yes it was exacerbated by her initial work injury. The second just bending over episode at work exacerbated her pain. Is it a work-related incident? Well, it was not due to anything inherent to her work, it was just the act of her bending over, but initially it was exacerbated by her work incident, so it goes back to actually the first injury as opposed to the second." (PX4).

For her part, Petitioner testified that she "... was still having some side effects" and had not completely recovered from the first accident by the time of the second accident in October of 2004. (T.15).

In addition, Dr. Couri opined that the second accident "... seemed to aggravate the preexisting" condition, and that "[a]s I recall her symptoms from the first accident hadn't been totally resolved. So that would have come into play somewhat." (PX23, p.7). He agreed that it appears she was in a somewhat weakened condition and then had a second incident that reaggravated things. (PX23, p.7). Dr. Couri also stated that "[t]he cervical and lumbar symptoms I related to her accident... The cervical and lumbar were both from the first one. She had an exacerbation of the lumbar with the second one." (PX23, p.10).

Furthermore, Dr. Chmell opined that Petitioner had suffered traumatic aggravation of degenerative disk disease of both the lumbosacral and cervical spine, noting that "[a] fall is a competent cause of injury to the lumbar spine, such as the case here..." and that Petitioner's cervical spine diagnosis was likewise "... causally related to her 8-1-03 work injury when she fell and struck her head at work ..." (PX25, pp.24-25). Dr. Chmell also diagnosed Petitioner with traumatic aggravation of osteoarthritis in both knees which he opined were causally related to Petitioner's work injuries. (PX25, pp.20-21).

Based on the above, and the record taken as a whole, the Commission finds that Petitioner sustained an aggravation of her pre-existing cervical and lumbar spine condition as well as her bilateral knee condition on 8/1/03, and that a causal relationship existed between said accident and Petitioner's subsequent need for treatment up through the date of the third and final accident on 2/6/06.

The Commission further finds, as discussed in the decision with respect to companion claim 04 WC 59752, that the episode of back pain while reaching down to pick up mail on 10/28/04 was more akin to a manifestation or continuation of Petitioner's ongoing lumbar spine condition, and not a separate and distinct accident. This finding is based on the record taken as a whole as well as the opinion of Dr. Couri, as set forth above.

As a result, the Commission finds that Petitioner was entitled to reasonable and necessary medical expenses as contained in PX27 and incurred from 8/1/03 through the day prior to the third and final accident on 2/6/06, pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act. The Commission further finds that Respondent shall be entitled to a credit for any and all payments made on account of this injury pursuant to §8(j) of the Act, and that Petitioner will be held harmless from any claims or demands by any providers for which Respondent is receiving credit under this order.

In addition, the Commission finds that Petitioner is entitled to temporary total disability benefits from 5/21/04, when Dr. Couri took Ms. McKnight off work, through 10/26/04, when Dr. Couri released her to a trial of full duty work (22-5/7 weeks) and from 10/29/04 through 11/7/04, per Dr. Couri (1-3/7 weeks), for a total of 24-1/7 weeks.

Finally, the Commission finds that any permanency award relative to Petitioner's cervical and lumbar spine condition as well as her bilateral knee condition is more appropriately awarded with respect to the third and final date of injury, on 2/6/06 (the subject of claim 06 WC 9735), given the ongoing nature of Petitioner's complaints and treatment up through the date of arbitration. Accordingly, the Commission declines to award permanency in the present claim.

All else is otherwise affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that that Respondent pay to Petitioner the sum of $417.49 per week for a period of 24-1/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner reasonable and necessary medical expenses incurred from 8/1/03 through 2/5/06 and as set forth in PX27, pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that any award for permanent disability is more appropriately made in the third and final claim, 06 WC 9735, a decision and opinion to issue separately and concurrently with the present claim.

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; 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.

19IWCC0516

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

DATED: SEP 18 2019
o: 7/23/19
TJT/pmo
51

Thomas J. Tyrrell

Maria E. Portela

L. Elizabeth Coppoletti

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Karen McKnight,

Petitioner,

vs. NO: 04 WC 59752

Stateville Correctional Center,

19IWCC0517

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission affirms the Arbitrator's finding that Petitioner failed to prove that she sustained accidental injuries arising out of and in the course of her employment on 10/28/04. However, the Commission's rationale differs from that of the Arbitrator's in that the Commission bases this finding on that fact that the incident in question was more akin to a manifestation or continuation of Petitioner's ongoing lower back condition sustained as a result of the prior injury on 8/1/03, the subject of companion claim 04 WC 48909 – a separate decision to issue concurrently with the present claim, and the findings of fact and conclusions of law for which are incorporated by reference herein.

The Commission also finds that Petitioner failed to prove that her current condition of ill-being is causally related to the incident on 10/28/04 based on Petitioner's testimony and the opinion of Dr. Couri who related Petitioner's complaints following said incident on 10/28/04 to the original injury on 8/1/03. Along these lines, Dr. Couri noted, in a letter dated 6/2/05, that they had been in the process of "… trying to take care of [her lower back condition] when she

was released back to work full duty work by Dr. Zelby. Therefore, she had an exacerbation of it when she bent over at work [on 10/28/04]. The bending over would just [have]… re-exacerbated why she was having pain in the first place, which was an exacerbation of a pre-existing condition, which was an exacerbation of a degeneration that she had in the back. Therefore, yes, she did have degeneration, yes it was a pre-existing condition, yes it was exacerbated by her initial work injury. The second just bending over episode at work exacerbated her pain. Is it a work-related incident? Well, it was not due to anything inherent to her work, it was just the act of her bending over, but initially it was exacerbated by her work incident, so it goes back to actually the first injury as opposed to the second." (PX4).

Dr. Couri reiterated this opinion during the course of his deposition when he testified that the second accident "… seemed to aggravate the preexisting" condition, and that "[a]s I recall her symptoms from the first accident hadn't been totally resolved. So that would have come into play somewhat." (PX23, p.7). Petitioner confirmed this when she testified that she was "… still having some side effects" and had not completely recovered from the first accident by the time of the second accident in October of 2004. (T.15).

Thus, the Commission finds that the incident at work on 10/28/04 wherein Petitioner reached down to pick up mail off the floor when she experienced pain in her back was simply a continuation of her ongoing symptoms relative to the injury she sustained to her lower back on 8/1/03, after having, in hindsight, been released to full-duty work prematurely.

Accordingly, the Commission finds that Petitioner's claim for benefits associated with the claimed injury at work on 10/28/04 is more properly related to the injury sustained on 8/1/03, the subject of claim 04 WC 48909. As a result, compensation in claim 04 WC 59752 is hereby denied.

All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed 11/2/16, as modified herein, is hereby affirmed and adopted.

DATED: SEP 18 2019
o: 7/23/19
TJT/pmo
51

Thomas J. Tyrrell

Maria E. Portela

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

McKNIGHT, KAREN
Employee/Petitioner

Case# **04WC059752**

STATEVILLE CORRECTIONAL CENTER
Employer/Respondent

19IWCC0517

On 11/2/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.50% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0274 HORWITZ HORWITZ & ASSOC
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5661 ASSISTANT ATTORNEY GENERAL
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0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

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

NOV 2 - 2016

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

Karen McKnight,
Employee/Petitioner
v.
Stateville Correctional Center
Employer/Respondent

Case # **04** WC **59752**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert Falcioni**, Arbitrator of the Commission, in the city of **New Lenox**, on **10/4/16 and 10/7/16**. 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. ☒ 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 –Permanent Total Disability

FINDINGS

On **10/28/04**, 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 $**35,845.68**; the average weekly wage was $**626.24**.

On the date of accident, Petitioner was **66** years of age, ***single*** with **0** dependent child.

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

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

ORDER

Petitioner did not sustain an accident that arose out of and in the course of her employment. For that reason, the undersigned Arbitrator awards no benefits in Petitioner's favor.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the 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 1, 2016
Date

NOV 2 - 2016

19IWCC0517

STATE OF ILLINOIS)
)
COUNTY OF WILL)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Karen McKnight,
Employee/Petitioner,

Case # **04** WC **59752**

v.

New Lenox – Arbitrator Robert Falcioni

Stateville Correctional Center,
Employer/Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

Karen McKnight (the "Petitioner) seeks relief from the Respondent-Employer, Stateville Correctional Center (the "Respondent"), for the Petitioner's alleged work-related accidents on August 1, 2013, October 28, 2014, and February 6, 2006, pursuant to the Illinois Workers' Compensation Act (the "Act"). On October 4, 2016 and October 7, 2016, a hearing on the disputed issues was held before Arbitrator Robert Falcioni in New Lenox, Illinois. The disputed issues are accident, causation, bills, TTD, nature and extent, and penalties and fees.

Petitioner's Testimony and Medical Care

Petitioner testified that she worked for Respondent Stateville Correctional Center as an office assistant in the mail room. Her job required, in part, that she receive and sort incoming and outgoing mail, complete incident reports for contraband, drag mail bags that weighed up to 100 pounds, lift vouchers that weighed up to 75 pounds, and train new employees. (*See* Resp. Ex. 8).

Prior to any alleged accident, in February of 2001, Petitioner underwent a CT of her back and spine. (Pet. Ex. 3).

Petitioner claims that on August 1, 2003, she was holding a door open for a correctional officer who was carrying a lot of things. Petitioner testified that while holding the door open, she fell off of a little ledge, hitting the back of her head on cement. She lost consciousness for 1-2 minutes but did not go to the ER.

Petitioner worked full duty following her accident until she was taken off work effective May 21, 2004. Respondent paid TTD from May 21, 2004 until October 26, 2004 for a total of $8,881.73. (Resp. Ex. 10).

On June 29, 2004, Petitioner underwent bilateral C4-5, C5-6, and C6-7 zygapophyseal joint injections, which provided 40% relief. She continued to have low back pain, especially when going from sitting to standing. Petitioner also treated with physical therapy for her lumbar spine.

Petitioner underwent an MRI of the lumbar spine on August 5, 2004. The MRI revealed: degenerative disc disease most prominent at L3-4; there are broad-based bulging discs and posterior element hypertrophy at L2-3, L3-4 and L4-5; mild canal and lateral recess stenosis at L2-3 and L3-4, with mild-moderate stenosis at L4-5; at L3-4, there is a small paracentral right disc protrusion or posterior vertebral osteophyte with resultant moderate right lateral recess and foraminal stenosis.

Petitioner alleges a second work-related accident on October 28, 2004. Petitioner testified that she was delivering mail when she dropped it. She testified in several different ways as to what happened next, and the documentary evidence that was entered into the record also varies in the accounts contained therein on what occurred. On direct examination she first testified that she was running mail and some mail fell on the floor, and that she was down on the floor trying get the mail and couldn't get back up due to a sudden increase in back pain. Shortly thereafter, she testified that she as bent over attempting to pick up the mail when she experienced increased back pain. On cross examination she testified that she was on the floor picking up the mail and could not get up due to the increased pain, and that she did not fall all the way to the floor. She also stated tht at this time she fell back onto her buttocks. RX2, the accident report she filled out shortly after the incident, states that the mail had fallen on the floor, Petitioner had stooped over to pick it up, and fell onto her buttocks and lower back. She reported to her treating doctor, Dr. Couri that "..."she was at work stooping over to pick

up some mail off the floor and was unable to get up secondary to a significant low back pain." (TX 6, lines 21-24).

Lastly, when shown Dr. Chmell's report which recorded a history given by Petitioner to that doctor which stated "..bent over to pick up mail and couldn't get up from stooped position..", she agreed that she might have said same to Dr. Chmell, but added that she was actually on the floor when the accident occurred. Dr. Chmell was hired by Petitioner to perform an independent medical examination on April 18, 2015 She further testified that A co-worker came over and helped her stand up. After this incident Petitioner experienced an increase to her back pain.

Petitioner continued to treat with Dr. Couri after this second injury. Dr. Couri diagnosed her with new left L5 radiculopathy and continuing right L5 radiculopathy.

On December 14, 2004, Petitioner underwent bilateral L5 transforaminal epidural steroid injections. Petitioner reported a 10% improvement with the injections. She continued to have pain to the low back while bending. Squatting and stairs gave her significant bilateral knee pain. On May 10, 2005, Petitioner underwent bilateral L4-5 and L5-S1 zygapophyseal joint injections.

On September 6, 2005, Dr. Farrell diagnosed Petitioner with bone-on-bone deformity in the patellofemoral compartments of both knees. (Pet. Ex. 5).

Petitioner alleges a third work-related accident on February 6, 2006. Petitioner claims that she was carrying a mail basket when she tripped over tape in the mailroom. She fell forwards onto her knees and then backwards onto her back. She reported pain to her knees and back.

Petitioner reported to her primary care doctor, Dr. Patricia O'Connor, on February 10, 2006. Dr. O'Connor imposed work restrictions of unable to lift, push, or pull more than 10 pounds, unable to bend, stoop, or climb, and unable to exceed 1 hour of continuous standing. Petitioner followed-up on February 17, 2006 and her restriction was reduced to 5 pounds. Petitioner was not given a total work restriction until she saw Dr. Couri on ay 23, 2006.

On October 20, 2008, Petitioner underwent surgery consisting of L3-5 decompression and fusion.

On August 17, 2009, Petitioner underwent a second surgery consisting of bilateral T12-L5 laminectomy with decompressive medial fascietomies, bilateral T12-L5 foraminotomies with reoperation at L3, L4, and L5 bilaterally, posterior segmental instrumentation utilizing pedicle screws and rods from T12-L5 with correction of kyphoscolotic deformity, posterior removal of segmental instrumentation from L3 to L5, posterior autograft and allograft arthrodesis of T12 to L5 utilizing bone morphogenic protein.

Petitioner's treatment also consisted of narcotic pain medication, injections, and physical therapy.

Petitioner has not returned to work since her February 6, 2006 accident. Respondent paid benefits from June 1, 2006 through March 5, 2015 for a total amount of $203,632.72. (Resp. Ex. 10). Petitioner retired effective May 31, 2014.

Since her three accidents, Petitioner has reported various dizzy spells. On December 2, 2013, Petitioner reported dizziness to Dr. Farrell. (Pet. Ex. 11). Dr. Farrell noted that petitioner was off-balance and diagnosed her with an equilibrium problem. He observed her stumbling down the hall had having trouble getting on the scale. Petitioner reported 2 falls in the past month. She also reported a fainting episode six weeks prior where she woke up on the floor.

Petitioner also reported dizzy spells to Dr. Jawich on June 26, 2014. She stated that the dizzy spells had been ongoing for about the past 5 months and she had suffered various falls.

Petitioner also suffers from tremors to her hands. Petitioner testified that due to her hand tremors, she sometimes cannot even pick up a glass of pop. Her hand shaking also results in sloppy eating. She is only sometimes able to hold a magazine. Petitioner testified that she is unable to write a check due to her hands.

Petitioner lives alone. She hires people to do the cleaning. She uses paper plates and cups and uses the microwave for cooking. She can wipe counters but she cannot bend over to dust. Petitioner still drives but her back starts to hurt if she is sitting for too long. Petitioner does her own grocery shopping but cannot lift heavier than a gallon of milk. Petitioner goes shopping and can walk around a shopping mall until her back starts to hurt.

Petitioner testified that she is unable to return to work because she would be unable to drag the mail bag, lift voucher bags, stand for too long, run off the mail, or write incident reports.

At the time of hearing, Petitioner was 78 years old.

CONCLUSIONS OF LAW

With regard to issue "C", whether Petitioner sustained an accident that arose out of and in the course of her employment, the Arbitrator finds as follows:

The Arbitrator first notes the line of cases beginning with *Greater Peoria Mass Transit District v. Industrial Commission* , 81 Ill.2d. 38, 405 NE.2d 796, 39 Ill.Dec. 817 (1980). Based on the record as a whole, and noting the line of cases setting forth the criteria to be met to prove that a Petitioner has sustained a compensable injury when mere stooping or bending are alleged, the Arbitrator finds that inconsistencies in the various accounts of what exactly happened to Petitioner at the time of her alleged injury make it impossible to determine what exactly Petitioner was doing at the time of her injury, and therefore to assess whether said activity exposed Petitioner to a risk of injury greater than that to which the general public would be exposed. Based on these finding the Arbitrator therefore finds that Petitioner has failed to prove that sustained an accident arising out of and in the course of her employment with Responded as alleged herein. All other issues are therefore moot and all benefits are denied.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Karen McKnight,

Petitioner,

vs. NO: 06 WC 9735

Stateville Correctional Center,

19IWCC0518

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, temporary total disability, nature and extent and penalties, affirms the Decision of the Arbitrator with changes/clarification 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 clerical errors in the decision of the Arbitrator at p.2 of the form decision and p.10 of the Findings of Fact and Conclusions of Law to show that Petitioner is entitled to temporary total disability benefits from 2/7/06 through 3/2/11, for a period of 264-1/7 weeks (not 264-2/7 weeks).

The Commission also clarifies the Arbitrator's award as to MMI and medical expenses. The Commission notes that while the Arbitrator found that Petitioner had reached MMI as of 3/2/11, and that "... Petitioner's medical care through March 2, 2011 was reasonable and necessary", he then goes on to award medical bills that include expenses incurred thereafter. The Commission finds that while the holding may not have been fully explained, it is not necessarily inconsistent with the Arbitrator's determination that Petitioner's current condition of ill-being remains causally related to the accident on 2/6/06. Thus, the Commission affirms the Arbitrator's award of medical expenses as set forth in PX27 while at the same time holding that Petitioner reached MMI as of 3/2/11 with respect to her entitlement to temporary disability

benefits, with permanent total disability benefits to commence the following day, on 3/3/11.

All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator in 06 WC 9735 filed 11/2/16, with corrections/clarification, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that that Respondent pay to Petitioner the sum of $444.85 per week for a period of 264-1/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner reasonable and necessary medical expenses subsequent to 2/6/06 as set forth in PX27, pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing 3/3/11 Respondent pay to Petitioner the sum of $444.85 per week for life under §8(f) of the Act for the reason that the injuries sustained caused the total permanent disability of Petitioner.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury; 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 the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

DATED: SEP 18 2019
o: 7/23/19
TJT/pmo
51

Thomas J. Tyrrell

Maria E. Portela

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

McKNIGHT, KAREN
Employee/Petitioner

Case# **06WC009735**

04WC048909
04WC055975

STATEVILLE CORRECTIONAL CENTER
Employer/Respondent

19IWCC0518

On 11/2/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.50% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0274 HORWITZ HORWITZ & ASSOC
MARK WEISSBURG
25 E WASHINGTON ST SUITE 900
CHICAGO, IL 60602

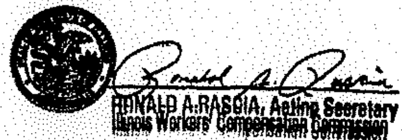
5661 STATE OF ILLINOIS
MALLORY ZIMET
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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

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

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

NOV 2 - 2016



19IWCC0518

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

Karen McKnight
Employee/Petitioner
v.
Stateville Correctional Center
Employer/Respondent

Case # **06** WC **09735**

Consolidated cases: 04wc48909, 04wc59752

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert Falcioni**, Arbitrator of the Commission, in the city of **New Lenox**, on **10/4/16 and 10/7/16**. 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. ☒ 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 **Permanent total disability**

FINDINGS

On **2/6/6**, 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 $**34,698.00**; the average weekly wage was $**667.27**.

On the date of accident, Petitioner was **67** 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 $**203,632.72** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $444.85/week for 264 2/7 weeks, commencing 2/7/06 through 3/2/11, as provided in Section 8(b) of the Act. Respondent shall be given a credit for temporary total disability benefits that have been paid.

Medical benefits

Respondent shall pay reasonable and necessary medical services of $148,401.67, as provided in Section 8(a) of the Act, all amounts to be paid pursuant to the medical fee schedule and Respondent to receive credit for all sums previously paid hereunder

Permanent Total Disability

Respondent shall pay Petitioner permanent and total disability benefits of $**444.85**/week for life, commencing **3/3/11**, 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.

Penalties

Penalties and attorney fees as requested by Petitioner are denied as set forth more fully herein.

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

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

Robert E. [signature]
Signature of Arbitrator

November 1, 2016
Date

NOV 2 - 2016

STATE OF ILLINOIS)
)
COUNTY OF WILL)

19IWCC0518

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Karen McKnight,
Employee/Petitioner,

Case # 06 WC 9735

v.

New Lenox – Arbitrator Robert Falcioni

Stateville Correctional Center,
Employer/Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

Karen McKnight (the "Petitioner) seeks relief from the Respondent-Employer, Stateville Correctional Center (the "Respondent"), for the Petitioner's alleged work-related accidents on August 1, 2013, October 28, 2014, and February 6, 2006, pursuant to the Illinois Workers' Compensation Act (the "Act"). On October 4, 2016 and October 7, 2016, a hearing on the disputed issues was held before Arbitrator Robert Falcioni in New Lenox, Illinois. The disputed issues are accident, causation, bills, TTD, TPD, credit, nature and extent, and penalties and fees. The Arbitrator incorporates by reference thereto the findings previously made in the companion cases of 04 WC 48909 and 04 WC 59752.

Petitioner's Testimony and Medical Care

Petitioner testified that she worked for Respondent Stateville Correctional Center as an office assistant in the mail room. Her job required, in part, that she receive and sort incoming and outgoing mail, complete incident reports for contraband, drag mail bags that weighed up to 100 pounds, lift vouchers that weighed up to 75 pounds, and train new employees. (*See* Resp. Ex. 8).

Prior to any alleged accident, in February of 2001, Petitioner underwent a CT of her back and spine. (Pet. Ex. 3).

Petitioner claims that on August 1, 2003, she was holding a door open for a correctional officer who was carrying a lot of things. Petitioner testified that while holding the door open, she fell off of a little ledge, hitting the back of her head on cement. She lost consciousness for 1-2 minutes but did not go to the ER.

Petitioner worked full duty following her accident until she was taken off work effective May 21, 2004. Respondent paid TTD from May 21, 2004 until October 26, 2004 for a total of $8,881.73. (Resp. Ex. 10).

On June 29, 2004, Petitioner underwent bilateral C4-5, C5-6, and C6-7 zygapophyseal joint injections, which provided 40% relief. She continued to have low back pain, especially when going from sitting to standing. Petitioner also treated with physical therapy for her lumbar spine.

Petitioner underwent an MRI of the lumbar spine on August 5, 2004. The MRI revealed: degenerative disc disease most prominent at L3-4; broad-based bulging discs and posterior element hypertrophy at L2-3, L3-4 and L4-5; mild canal and lateral recess stenosis at L2-3 and L3-4, with mild-moderate stenosis at L4-5; at L3-4, and a small paracentral right disc protrusion or posterior vertebral osteophyte with resultant moderate right lateral recess and foraminal stenosis.

Petitioner alleges a second work-related accident on October 28, 2004. Petitioner claims that she was delivering mail when she dropped it. She either stooped down to pick it up but had trouble getting up, or was on the floor picking it up and noticed increased low back pain. A co-worker came over and helped her stand up. After this incident Petitioner experienced an increase to her back pain.

Petitioner continued to treat with Dr. Couri after this second injury. Dr. Couri diagnosed her with new left L5 radiculopathy and continuing right L5 radiculopathy.

On December 14, 2004, Petitioner underwent bilateral L5 transforaminal epidural steroid injections. Petitioner reported a 10% improvement with the injections. She continued to have pain to the low back while bending. Squatting and stairs gave her significant bilateral knee pain. On May 10, 2005, Petitioner underwent bilateral L4-5 and L5-S1 zygapophyseal joint injections. She continued working full duty.

On September 6, 2005, Dr. Farrell diagnosed Petitioner with bone-on-bone deformity in the patellofemoral compartments of both knees. (Pet. Ex. 5).

Petitioner alleges a third work-related accident on February 6, 2006. Petitioner claims that she was carrying a mail basket when she tripped over tape in the mailroom. She fell forwards onto her knees and then backwards onto her back. She reported pain to her knees and back.

Petitioner reported to her primary care doctor, Dr. Patricia O'Connor, on February 10, 2006. Dr. O'Connor imposed work restrictions of unable to lift, push, or pull more than 10 pounds, unable to bend, stoop, or climb, and unable to exceed 1 hour of continuous standing. Petitioner followed-up on February 17, 2006 and her restriction was reduced to 5 pounds. Petitioner was not given a total work restriction until she saw Dr. Couri on May 23, 2006.

On October 20, 2008, Petitioner underwent surgery consisting of L3-5 decompression and fusion.

On August 17, 2009, Petitioner underwent a second surgery consisting of bilateral T12-L5 laminectomy with decompressive medial fascietomies, bilateral T12-L5 foraminotomies with reoperation at L3, L4, and L5 bilaterally, posterior segmental instrumentation utilizing pedicle screws and rods from T12-L5 with correction of kyphoscolotic deformity, posterior removal of segmental instrumentation from L3 to L5, posterior autograft and allograft arthrodesis of T12 to L5 utilizing bone morphogenic protein.

Petitioner's treatment also consisted of narcotic pain medication, injections, and physical therapy.

Petitioner has not returned to work since her February 6, 2006 accident. Respondent paid benefits from June 1, 2006 through March 5, 2015 for a total amount of $203,632.72. (Resp. Ex. 10). Petitioner retired effective May 31, 2014.

Since her three accidents, Petitioner has reported various dizzy spells. On December 2, 2013, Petitioner reported dizziness to Dr. Farrell. (Pet. Ex. 11). Dr. Farrell noted that petitioner was off-balance and diagnosed her with an equilibrium problem. He observed her stumbling down the hall had having trouble getting on the scale.

Petitioner reported 2 falls in the past month. She also reported a fainting episode six weeks prior where she woke up on the floor.

Petitioner also reported dizzy spells to Dr. Jawich on June 26, 2014. She stated that the dizzy spells had been ongoing for about the past 5 months and she had suffered various falls.

Petitioner also suffers from tremors to her hands. Petitioner testified that due to her hand tremors, she sometimes cannot even pick up a glass of pop. Her hand shaking also results in sloppy eating. She is only sometimes able to hold a magazine. Petitioner testified that she is unable to write a check due to her hands.

Petitioner lives alone. She hires people to do the cleaning. She uses paper plates and cups and uses the microwave for cooking. She can wipe counters but she cannot bend over to dust. Petitioner still drives but her back starts to hurt if she is sitting for too long. Petitioner does her own grocery shopping but cannot lift heavier than a gallon of milk. Petitioner goes shopping and can walk around a shopping mall until her back starts to hurt.

Petitioner testified that she is unable to return to work because she would be unable to drag the mail bag, lift voucher bags, stand for too long, run off the mail, or write incident reports.

At the time of hearing, Petitioner was 78 years old.

Testimony of Dr. Brian Couri

The parties took the evidence deposition of Dr. Brian Couri on August 9, 2005. Dr. Couri is board certified in physical medicine and rehabilitation and pain medicine. Dr. Couri treated Petitioner for her injuries. Dr. Couri testified that Petitioner first came to him on May 20, 2004. Petitioner told him that in August 2003, "she was holding a door open at Stateville Prison where she worked, and the next thing she knew she was on the floor. She thought that maybe she had gotten dizzy and fell down, but she wasn't exactly sure why she fell." (TX 5, lines 6-10). Petitioner believed that she did have a brief loss of consciousness but was not sure.

Petitioner also reported a second work accident, in which "she was at work stooping over to pick up some mail off the floor and was unable to get up secondary to a significant low back pain." (TX 6, lines 21-24).

Petitioner did not report a knee injury to Dr. Couri after either of her injuries. (TX 30, lines 14-17).

When Dr. Couri last saw Petitioner on June 2, 2005, she had resolved bilateral L4-5 and L5-S1 zygapophyseal joint/facet syndrome, low back pain, currently asymptomatic L5 radiculopathy on the left side, and asymptomatic right L5 radiculitis.

Petitioner told Dr. Couri that her job required her to lift up to 40 pounds. (TX 21, line 3). Dr. Couri imposed a 30 pound lifting restriction. He expected this to be permanent given her size and body habitus. Petitioner was able to work full duty within this restriction. (TX 11).

Dr. Couri related the cervical and lumbar symptoms to her first accident and believed the second accident exacerbated the lumbar condition. (TX 10). His testimony was taken prior to the date of the accident alleged herein and so therefore did not address said accident or its sequalae.

Testimony of Dr. Samuel Chmell

On May 12, 2016, the parties took the evidence deposition of Dr. Samuel Chmell, an orthopedic surgeon. Dr. Chmell was hired by Petitioner to perform an independent medical examination on April 18, 2015.

Petitioner relayed an accident in 2006 "when she was carrying a basket and the mail room was littered with heavy binder tape and other debris. She tripped and fell on her knees, injuring her knees and low back." (TX 10, lines 19-23). Petitioner also relayed accidents in 2003 and 2004. Dr. Chmell stated that these accidents led to injuries in her low back, knees, and cervical spine. (TX 12, lines 9-10).

Dr. Chmell diagnosed Petitioner with traumatic aggravation of osteoarthritis both knees, traumatic aggravation of degenerative disk disease of the lumbosacral spine, failed lumbar spine syndrome, and traumatic aggravation of degenerative disc disease of the cervical spine. Petitioner's injury to her cervical spine was causally related to her

August 1, 2003 injury. (TX 24, lines 22-23). Dr. Chmell believed that Petitioner's injuries caused disc protrusions to L3-4, L4-5, and L5-S1. (TX 51, lines 1-4).

Dr. Chmell stated that she reached MMI to her lumbar spine 6 months after her second surgery. (TX 59, lines 3-7). He stated that she reached MMI to her knees on March 27, 2008 because on that date her knee pain started increasing. (TX 59, lines 8-16). Although she is at MMI, she will require pain medication and pain management going forward. (TX 61, lines 19-22).

Dr. Chmell stated that Petitioner is permanently and totally disabled from gainful employment. He did not think that Petitioner had any transferable skills because she gets dizzy and lightheaded and her narcotic medication, in general, causes people to not stay on task and concentrate. (TX 54). Dr. Chmell specifically eliminated any jobs that involve driving because Petitioner shouldn't be driving due to her medication. (TX 55).

Dr. Chmell stated that people on hydrocodone cannot stay on task, cannot drive, and have trouble thinking, concentrating, and performing meaningful tasks. Dr. Chmell could not say that this is specific to Petitioner but rather that it is a generalization of the side effects of her medication. (TX 57).

Dr. Chmell stated that Petitioner is a fall risk due to diminished strength and sensation in her legs, ankles, and feet. (TX 20). She needs at home all kinds of protection such as one level surface and to use a cane or a walker. (TX 20). Dr. Chmell recommended that Petitioner use a walker or a quad cane when she's on her feet. (TX 45, lines 10-11). Dr. Chmell did not recommend any specific treatment focused on the knees, but rather continued pain management. (TX 27, lines 21-23).

Dr. Chmell testified that Petitioner has fallen multiple times since her work-related injuries. He stated it is possible that her current symptoms are related to those other falls. (TX 52, lines 13-15).

Testimony of Susan Entenberg

Susan Entenberg is a certified rehabilitation counselor. Ms. Entenberg was hired by Petitioner to write a vocational rehabilitation report on May 12, 2011. Ms. Entenberg

believed that there is no stable labor market for Petitioner because her limitations, age, work experience, education, and difficulty sitting. (TX 22, lines 3-9).

Dr. Nockles had not released Petitioner to any sort of work and stated that she was permanently unable to work on March 3, 2011. (TX 8, lines 6-8). Ms. Entenberg did not review medical records that lay out specific restrictions. (TX 21, lines 13-19). She only knows that she has not been released to work.

Ms. Entenberg opined that Petitioner's mail room job was medium to heavy because it required lifting of 65 to 70 pounds. (TX 8, lines 21-23). Petitioner was not able to even hold a sedentary job due to Petitioner's self-reported restriction of sitting up to 25 minutes. To hold a sedentary job, Ms. Entenberg would want to see someone able to sit for an hour, followed by a small break, and then another hour. (TX 23-24, lines 22-2).

Testimony of Dr. Frank Phillips

Dr. Phillips was hired by Respondent to perform an Independent Medical Examination to Petitioner's spine on January 20, 2015. Petitioner arrived to the appointment in a wheelchair.

Dr. Phillips diagnosed Petitioner with a lumbar sprain or strain as it relates to her 2006 injury. (TX 37, lines 6-10). His basis for this opinion is that Petitioner was complaining of back pain up until her 2006 injury and her complaints of pain did not change after the accident. Dr. Phillips opined Petitioner's work-related sprain resolved in April 2006. (TX 38).

Dr. Phillips opined that Petitioner's leg weakness did not follow the injury because she reported leg weakness more recently and did not follow the injury or treatment. (TX 18).

Dr. Phillips did not believe that the injuries caused the structural damage to her spine. Often people have back pain without a specific cause or trauma. (TX 43, lines 9-10). Her MRI findings are reasonable for someone her age. (TX 44, lines 11-14). Petitioner's two lumbar fusions did not help her, which would suggest that her subjective complaints had nothing to do with the MRI findings at those levels. (TX 41). The

surgery did not address any specific pathology. Those surgeries are never required- they are to address subjective complaints.

Testimony of Dr. Nikhil Verma

Dr. Verma is an orthopedic surgeon hired by Respondent to perform an independent medical examination of Petitioner's bilateral knees. Petitioner arrived for the appointment in a wheelchair and stated that the wheelchair was required for her back.

Petitioner reported that her knee pain started in 2003. During examination, Petitioner walked without a limp and without the use of any assisted devices. At the time of her exam, Petitioner reported soreness in the knees and grinding in front of the knees. This grinding is consistent with osteoarthritis. She had no swelling, walking or mechanical symptoms. She was not on any medication for the knees. Her primary complaint was back pain. (TX 20). At the time of the exam, her symptoms were intermittent and she was receiving no active treatment other than intermittent injections. (TX 14). Dr. Verma did not see any evidence that Petitioner's injury either aggravated or accelerated a degenerative condition. (TX 28, lines 5-9).

Dr. Verma diagnosed Petitioner with bilateral knee degenerative arthritis. (TX 14, lines 22-23). He based this diagnosis on her age, the radiographic examination depicting osteoarthritis, and her physical exam findings. (TX 15, lines 1-3). Based on the mechanism of injury, Dr. Verma believed Petitioner suffered a contusion and her ongoing complaints are consistent with her underlying degenerative arthritis. (TX 16). Petitioner had reached MMI on April 18, 2006. (TX 18). Petitioner does not have any permanent restrictions in regards to the knees. (TX 19, lines 22-23).

CONCLUSIONS OF LAW

With regard to issue "F", whether Petitioner's current condition of ill-being is casually related to the injury, the Arbitrator finds as follows:

Based on the record as a whole, the Arbitrator finds that there is no question that this accident occurred as described and resulted in at the very least, an aggravation of the condition of her low back, and either accelerated the need for or caused the need for the spinal surgery she ultimately underwent.. It is noted that prior to this accident, Petitioner had been working full duty at a meium heavy job in spite of her prior back incidents, had no surgical recommendations and seemed to be functioning well. The Arbitrator further notes that the opinions of both respondent's section 12 doctors are at odds with the plain facts and the bulk of the medical records. Neither addresses the fact that she had a specific traumatic incident at work and that for the first time as a result she had a surgical recommendation, leading to her two fusion surgeries. The arbitrator gives greater weight to the opinion of Dr. Chmell and finds that the accident a factor in her current condition of ill being as testified to and found in the records above. Wherefore the Arbitrator finds that Petitioner's condition of ill being as alleged herein is causally connected to the accident herein.

With regard to issue "J", whether the medical services provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner's medical care through March 2, 2011 was reasonable and necessary. The medical bills total $148,401.67 as set forth on the attachment to ARBX3 and PX27, and Respondent shall pay same and Respondent will hold Petitioner harmless for submitted medical bills incurred through that date and paid by group insurance as set forth below. All bills to be paid pursuant to the medical fee schedule and Respondent to receive credit for all sums previously paid hereunder. The bills are as follows:

The arbitrator finds that the respondent is liable under Section 8(a) for all medical bills incurred as stated in petitioner's exhibit 27. Petitioner has requested payment for the following bill:

Provider	Beginning	Ending	Total Charges	WC Paid	Balance
Allied Anesthesia	12/1/2011	1/26/2012	$1,875.00	$0.00	$1,875.00
Associated Radiologists of Joliet	10/2/2013	8/9/2015	$507.00	$0.00	$507.00

Athletico	8/6/2016	8/15/2016	$666.38	$0.00	$666.38
C & R Medical Group	11/14/2013	2/13/2014	$502.16	$0.00	$502.16
Chicago Institute of Neurosurgery	9/26/2006	4/28/2008	$7,065.00	$0.00	$7,065.00
Dr. Zafer Jawich	5/8/2014	10/29/2015	$1,745.00	$0.00	$1,745.00
EM Strategies	5/14/2008	5/14/2008	$580.00	$0.00	$580.00
JHL Imaging Services	3/18/2014	4/8/2014	$805.00	$0.00	$805.00
Joliet Center for Clinical Research	11/20/2013	7/11/2016	$1,925.00	$0.00	$1,925.00
Loyola Physicians Group	2/8/2008	10/3/2013	$132,559.62	$42,777.90	$64,811.30
Loyola University Medical Center	4/9/2008	10/3/2013	$23,057.38	$0.00	$23,057.38
Northwestern Medicine Regional Group	8/19/2015	7/27/2016	$593.00	$0.00	$593.00
Osco Drug/Out of Pocket	5/10/2007	5/18/2006	$881.13	$0.00	$881.13
Open Advanced MRI	2/19/2014	2/19/2014	$2,420.00	$0.00	$2,420.00
Pain Treatment/Out of Pocket	12/17/2013	9/2/2014	$881.13	$0.00	$220.00
Pain Treatment Centers of IL	12/17/2013	8/5/2014	$13,324.00	$0.00	$13,324.00
Pain Treatment Surgical Suites	3/18/2014	8/5/2014	$16,157.50	$0.00	$16,157.50
Parkview Orthopaedic Group	11/7/2006	5/8/2013	$1,825.00	$0.00	$1,825.00
Progressive Radiology	12/8/2014	12/8/2014	$1,545.00	$0.00	$1,545.00
Silver Cross Hospital	3/20/2013	8/19/2015	$7,899.00	$0.00	$7,896.82
Total			$216,813.30	$42,777.90	$148,401.67

With regard to issue "K", what temporary benefits are in dispute, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner reached MMI on March 2, 2011. She was kept off work or on light duty by her treating physicians during this period and light duty accommodation was never offered by Respondent. Based on the findings set forth above the Arbitrator finds that Respondent shall pay Petitioner TTD from February 7, 2006 until March 2, 2011, subject to any credit awarded, a total representing 264 2/7 weeks, which the arbitrator awards.

With regard to issue "L", what is the nature and extent of the injury, the Arbitrator finds as follows:

Susan Entenberg is a certified rehabilitation counselor. Ms. Entenberg was hired by Petitioner to write a vocational rehabilitation report on May 12, 2011. Ms. Entenberg believed that there is no stable labor market for Petitioner because her limitations, age, work experience, education, and difficulty sitting. (TX 22, lines 3-9).

Ms. Entenberg opined that Petitioner's mail room job was medium to heavy because it required lifting of 65 to 70 pounds. (TX 8, lines 21-23). Petitioner was not able to even hold a sedentary job due to Petitioner's self-reported restriction of sitting up to 25 minutes. To hold a sedentary job, Ms. Entenberg would want to see someone able to sit for an hour, followed by a small break, and then another hour. (TX 23-24, lines 22-2). Entenberg's opnion on Petitioner's employability was unrebutted by any opinions or evidence offered by the Respondent.

Dr. Nockles had not released Petitioner to any sort of work and stated that she was permanently unable to work on March 3, 2011. (TX 8, lines 6-8).

Dr. Chmell stated that Petitioner is permanently and totally disabled from gainful employment.

Petitioner is also suffering from a plethora of health issues that are well-documented in the medical records. Petitioner's hand tremors prevent her from lifting anything heavier than a can of pop. Petitioner's equilibrium problem causes her to get dizzy and fall down.

Petitioner reached MMI on March 2, 2011. She continues to age and she experiences problems that are reasonable for someone of her age. Wherefore based on the record as a whole, the Arbitrator finds that the Petitioner is permanently and totally disabled pursuant to Section 8(f) of the Act, and the arbitrator awards permanent total disability benefits beginning 3/3/11 and to be paid for petitioner's life. Benefits due and owing as of the date proofs were close to be paid to petitioner through in lump sum.

With regard to issue "M", whether penalties and fees should be imposed on Respondent, the Arbitrator finds as follows:

Petitioner must prove Respondent is guilty of unreasonable or vexatious delay, intentional underpayment of compensation benefits or has engaged in frivolous defenses which do not present a real controversy. 820 ILCS 305/16. Based on the record as a whole, the Arbitrator finds that Petitioner has failed to meet such burden.

The Arbitrator finds Petitioner fails to meet her burden under Section 19 for penalties and under Section 16 for attorney's fees. Therefore, none are awarded.

With regard to issue "N", whether Respondent is due any credit, the Arbitrator finds as follows:

The Arbitrator finds that Respondent paid $203,632.72 in benefits and Respondent is due a credit in that amount.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Julie Daniels,

Petitioner,

vs. NO: 07 WC 5820

Aldi,

Respondent.

19IWCC0519

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice provided to all parties, the Commission, after considering the issues of causal relationship, nature and extent of permanent disability and whether Petitioner is permanently totally disabled and if so, as of what date 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.

The Commission affirms the Arbitrator's finding of causal relationship for Petitioner's right sternum/rib and cervical conditions of ill being, based on the law of the case. There is no indication the causal relationship for Petitioner's right sternum/rib and cervical conditions of ill being has ended. Petitioner's lumbar condition was previously determined to not be causally related to the August 10, 2006 accident.

The Commission affirms the Arbitrator's finding Petitioner failed to prove she is permanently totally disabled as a result of the August 10, 2006 accident. No physician has indicated that Petitioner is so disabled or that she cannot work. Therefore, there is no medical evidence to support a claim of total disability.

There are three ways a claimant can demonstrate she is permanently totally disabled: 1) by a preponderance of medical evidence; 2) by showing a diligent, but unsuccessful job search; or 3) by demonstrating that because of her age, training, education, experience and condition, no jobs are available to a person in her circumstances. *ABB C-E Services v. Industrial Commission*, 316 Ill.App.3d 745, 737 N.E.2d 682 (2000). Here, Petitioner is not opined to be medically permanently and totally disabled by any doctor and she did not search for work. Thus, The Commission turns to whether Petitioner has established permanent and total disability under the "odd-lot" theory espoused in the third prong. *Id.*, at 749-50.

The Commission finds Petitioner has failed to prove that because of her age, training, education, experience and condition, no jobs are available to a person in her circumstances. Petitioner was 33 years old at the time of her August 10, 2006 accident and 43 years old at the time of the November 3, 2016 arbitration hearing. Petitioner testified that she graduated high school and attended two to two and a half years of college for pre-nursing and music. T. 35. Her job history includes newspaper circulation manager, nursing home manager, marketing and administration type work. T. 35-36.

Petitioner's original complaints were to her chest and neck. She initially treated with her primary care physician Dr. Oligschlaeger and was referred to pain specialist Dr. Feinberg. Dr. Fienberg performed two iliopsoas compartment blocks and dorsal median nerve blocks, followed by another dorsal medial nerve root block in January and February 2007, which did little to alleviate Petitioner's pain. PX5 (11-30-11 arbitration transcript), PX5. Petitioner was referred to Dr. Patterson, a thoracic surgeon. Dr. Patterson diagnosed costochondritis with rib separation and chronic retractable pain. There was ongoing dislocation of Petitioner's ribs from the second and third right costal cartilage. On August 16, 2007, Dr. Patterson performed a partial excision of the right second and third costal cartilage with Gor-Tex reconstruction. PX5 (11-30-11 arbitration transcript), PX2. Petitioner continued to follow-up with Dr. Feinberg for pain management. On November 29, 2007, Dr. Fienberg noted Petitioner no longer had intense chest pain and gave restrictions of no lifting greater than 10 pounds, no overhead lifting, no work with her arms outstretched, no repetitive movements with her arms and no twisting or rotation. On that date Dr. Feinberg opined, "She could do computer work and or other sedentary work." PX5 (11-30-11 arbitration transcript), PX5.

On January 15, 2008, Dr. Patterson noted Petitioner was doing quite well, but did have some residual numbness over the right anterior chest. He advised her this would progressively decrease in time. She did not have a significant amount of discomfort. Dr. Patterson opined, "I believe that she is capable of returning to work." On July 21, 2008, Petitioner reported to Dr. Patterson she had been troubled by longstanding post-op discomfort and paresthesia. Dr. Patterson noted these symptoms were improving as Petitioner was under the care of a pain manager, Dr. Feinberg. A CT scan done this day evidenced the graft was in good position. Dr. Patterson released Petitioner from his care and did not issue any restrictions. PX5 (11-30-11 arbitration transcript), PX2.

Regarding her neck pain, Petitioner treated with Dr. Pencek. On June 10, 2009, Dr. Pencek performed C4-5 through C5-6 discectomy and fusion. In his September 17, 2009 deposition, Dr. Pencek testified his latest appointment with Petitioner was on September 15, 2009. On cross-examination, Dr. Pencek testified that after cervical surgery, Petitioner reported she was 100 times better and that she was fixed. Petitioner also reported to him on September 15, 2009 that her neck and arm pain were gone. PX5 (11-30-11 arbitration transcript), PX11 (p. 34-35, 37). Petitioner was released from his care on December 15, 2009. Dr. Pencek did not issue any restrictions. PX5 (11-30-11 arbitration transcript), PX2. Petitioner returned to Dr. Pencek on July 15, 2010 and reported her neck felt much better than before cervical surgery. She complained of low back pain, which was determined by the Commission to not be related to the August 10, 2006 accident and this was affirmed by the Appellate Court. Petitioner testified that since the November 30, 2011 hearing, she has continued treatment for her low back, receiving pain management through Dr. Oligschlaeger. T. 59, T. 78. No recent records of Petitioner's treatment have been submitted into evidence. Petitioner reached maximum medical improvement for her chest and cervical conditions prior to her lumbar treatment.

The Commission affirms the Arbitrator's conclusions regarding the opinions of vocational counselor Susan Entenberg. The Commission agrees with the Arbitrator's conclusion that it is unclear how Ms. Entenberg concluded Petitioner has no transferable skills at the sedentary level. Petitioner has at least some experience in administration and management and attended at least two years of college.

The Commission further finds that after undergoing two surgical procedures resulting in a severely debilitating condition that prevents her from pursuing her usual and customary line of employment, as reflected in the Decision of the Arbitrator, the permanency award should be modified to 45% person as a whole under §8(d)2 of the Act.

With regard to the §8(d)1 wage differential language contained in the Arbitrator's decision, the Commission strikes such language and notes that Petitioner did not search for work and vocational counselor Susan Entenberg did not address suitable employment. While Petitioner has proven that she is partially incapacitated from pursuing her usual and customary line of employment, she has failed to prove any amount she is able to earn in suitable employment or business after the accident. Petitioner has failed to present evidence regarding her entitlement to a wage differential award. See *Lenhart v. Ill. Workers' Comp. Comm'n*, 2015 IL 130743WC, ¶ P52, 29 N.E.3d 648.

The Commission affirms all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's February 5, 2018 corrected decision is modified for the reasons stated herein and otherwise affirmed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $260.00 per week for a period of 225 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the permanent disability of the person as a whole to the extent of 45%.

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 Commission notes Respondent previously overpaid $8,596.56 in TTD benefits and is entitled to credit in this amount.

IT IS FURTHER ORDERED BY THE COMMISSION 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 $50,000.00. 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: SEP 1 8 2019
LEC/maw
o06/04/19
43

Barbara Flores

D. Douglas McCarthy

DISSENT

I respectfully dissent as to the award of permanent partial disability benefits. I would affirm the award of 35% loss use of the person as a whole pursuant to Section 8(d)2 of the Act.

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

DANIELS, JULIE Case# **07WC005820**
Employee/Petitioner

ALDI
Employer/Respondent

19IWCC0519

On 2/5/2018, 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:

2333 WOODRUFF JOHNSON & EVANS
RAFAEK GUZMAN
4234 MERIDIAN PKWY SUITE 134
AURORA, IL 60504

0053 LYNN D BARNETT
906 OLIVE ST
SUITE 400
ST LOUIS, MO 63101

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
CORRECTED ARBITRATION DECISION

JULIE DANIELS
Employee/Petitioner

Case # **07** WC **05820**

v.

Consolidated cases: ______

ALDI
Employer/Respondent

19IWCC0519

An *Application for Adjustment 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 **November 3, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Petitioner's earnings?

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

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

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

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

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

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

N. ☐ Is Respondent due any credit?

O. ☒ Other **Credit for TTD overpayment of $8,596.56**

FINDINGS

On **August 10, 2006**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**15,075.32**; the average weekly wage was $**289.91**.

On the date of accident, Petitioner was **33** years of age, ***married*** with **3** dependent children.

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

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

To date, Respondent has paid all TTD and/or for maintenance benefits, and is entitled to a credit for any and all amounts paid. Respondent is entitled to a credit of $**8,596.56** based on an overpayment of TTD benefits.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of **$260.00 per week**, the minimum allowable statutory rate, for **175 weeks**, because the injuries sustained caused the **35% loss of the person as a whole**, as provided in Section 8(d)2 of the Act.

Respondent shall be given a credit of **$8,596.56** for temporary total disability benefits that have been overpaid.

Respondent shall pay Petitioner compensation that has accrued from **December 15, 2009** through **November 3, 2016**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Paul V. Cellini

Signature of Arbitrator

November 28, 2017

Date

FEB 5 - 2018

STATEMENT OF FACTS

The Petitioner sustained accidental injuries on 8/10/06 while working for the Respondent when she was lifting a heavy box of produce to place on a display and felt a pop in her chest with immediate pain. Ultimately, she was treated for rib/sternum and cervical injuries. She underwent surgery on her right ribs on 8/16/07 with Dr. Patterson, and on her cervical spine with Dr. Pencek on 06/10/09. She was released from care for her rib injury by Dr. Patterson in January 2008 and by Dr. Pencek for her neck injury on 12/15/09.

The case was previously heard pursuant to Sections 8(a) and 19(b) of the Act on 11/30/11, with the main issue being the causal connection of and need for surgery with regard to the lumbar spine. On 2/2/12, the Arbitrator determined that the Petitioner's low back condition was not related to the work accident, as well as that Petitioner had reached maximum medical improvement (MMI) regarding her work injury as of 7/21/09. Respondent was awarded a credit of $20,874.00 based on a TTD overpayment. On review of the 19(b) decision, the Illinois Workers' Compensation Commission (the Commission) adopted the decision of the Arbitrator with modifications, including that the Petitioner had reached MMI with regard to the work related conditions on 12/15/09, and that based on this finding, the TTD overpayment was actually $8,596.56. (Rx3). The decision of the Commission was appealed by Petitioner to the Fayette County Circuit Court, which confirmed the decision. Petitioner then appealed to the Appellate Court, and the Court's determined that the Commission's decision was not against the manifest weight of the evidence with regard to the Petitioner's lumbar condition being unrelated to the 8/10/16 accident and regarding the $8,596.56 TTD credit. However, the Appellate Court remanded the case back to the Commission to determine what medical bills remained unpaid for cervical and rib injuries. On 4/16/16, the Commission issued its decision on remand, which clarified the medical expenses the Respondent was and was not responsible for. (Rx4). The matter was then remanded back to the Arbitrator.

The matter came for hearing before this Arbitrator on 11/3/16 for a determination of the nature and extent of Petitioner's work related injuries, and the application of Respondent's credit of $8,596.56 to any award of permanency. (Arbx1). The Arbitrator notes that the parties submitted the transcript of evidence from the prior 11/30/11 hearing as Petitioner's Exhibit 5.

On 11/3/16, the Petitioner testified that following the 8/10/06 accident described above, she ended up blacking out. The next thing she remembered was waking up on the floor. At the emergency room she was treated for her chest and a lump on her head. After treating with her primary physician, Dr. Oligschlaeger, she testified that she eventually came under the care of pain specialist Dr. Feinberg. She then ultimately came under the care of surgeon Dr. Patterson for her chest/rib condition, costochondritis, and he performed surgery on 8/16/07 involving the removal of portions of the right second and third ribs and placement of mesh. On 8/28/07, Dr. Patterson noted the surgery was elective, and that there was no clinical evidence of separation or mobility in the area of the chest/rib injury. (Px5, see Px7). Petitioner testified that Dr. Feinberg gave her permanent restrictions of no lifting more than 10 pounds, no overhead lifting, no outstretched arm reaching in front of her with repetitive motion, and no bending or twisting. These restrictions were issued in her 12/18/07 report, while the 12/8/07 report preceding this states that Petitioner is capable of performing sedentary work. Dr. Feinberg then indicates that Petitioner would be a good candidate for retraining or vocational rehabilitation. (Px5, see Px5). Dr. Patterson's 1/15/08 report releasing her from care notes Petitioner was doing quite well, with some residual right chest numbness that he indicated should improve over time, and stated: "I believe that she is capable of returning to work." (Px5, see Px7). Dr. Patterson released the Petitioner on 1/15/08 with no indication of work restrictions being instituted. (Px5, see Px7).

Petitioner then eventually came under the care of neurosurgeon Dr. Pencek, who on 6/10/09 performed a two level cervical discectomy and fusion at C4/5 and C5/6. On 7/21/09, Dr. Pencek indicated Petitioner reported her pain was "100 times better", with no arm pain, and "I'm fixed." On 9/15/09, Dr. Pencek reported her neck and arm pain were gone. On 11/3/09, Dr. Pencek released her from his care on 12/15/09, and the evidence in the record notes there was no indication of work restrictions, though the Arbitrator was unable to locate this report in the record. The Arbitrator notes that Dr. Pencek reported multiple times in his records that the Petitioner was "reminding" him of her 10 pound restriction. (Px5, see Px10). Dr. Pencek testified that he rarely puts statements in quotes, so when he did on 7/21/09, it was based on direct statements from Petitioner. He did not testify with regard to the Petitioner's abilities to work or need for restrictions prior to the original hearing in this case, but did testify the surgery was successful, and that he released the Petitioner to return as needed. She returned several months later and he began treating her low back at that time. (Px5, see Px12).

Petitioner on cross-examination did not dispute that Dr. Pencek did not put any restrictions on her when he released her. On redirect, she testified that her understanding is that he increased her lifting restriction from 10 pounds to 5 pounds. This is not indicated in the records of Dr. Pencek. Several months later, the Petitioner returned to Dr. Pencek with low back complaints, which, as noted above, have been determined to be unrelated to the work accident, and that is the law of the case. The Petitioner testified that she had treatment after this for the low back, including the placement of a spinal cord stimulator in 2014, but that she also remained in pain management for her work related conditions as well. The Arbitrator notes that most of the medical records regarding lumbar treatment were not submitted into evidence.

Currently, the Petitioner testified that she has constant daily pain, and that every aspect of her life has been altered. This includes grooming, getting out of bed, sleeping, concentration, forgetfulness, showering, getting dressed and completing her chores, noting her husband and parents help her with these activities. She also noted problems with driving/riding in a car, sitting, standing and walking. Petitioner testified the majority of her complaints stem from her chest, with radiation into her spine, arms and head. Petitioner testified she is rarely able to sleep for longer than one hour due to the pain in her chest, and she has to get up and move around. Petitioner testified that, due to the removal of the portion of her ribs and sternum during her chest surgery, her chest can "cave in", such as when she rotates while sleeping, causing significant pain. Anything stronger than over-the-counter Tylenol causes her to vomit, and anti-nausea medication doesn't help. She uses a stuffed animal or pillows in an attempt to support herself while sleeping. Petitioner testified her pain and the lack of continuous sleep causes difficulties with concentration. Generally, she has to change positions at least every 15 minutes or she gets pain. The movement of sitting and rotating to align oneself in a seat in a car causes pain in her chest.

The Petitioner complains of neck pain with computer use that radiates into her head and shoulders. In order to look at the internet, she uses an iPad while lying on her side to prevent tension in her neck. Petitioner testified anything she may need around the house must be placed at arm level so she does not need to reach or lift overhead. Petitioner testified the beds in her home have been placed on lifts in order to allow her to get in and out of bed with less pain, and testified she uses a handicapped toilet for the same reasons. Petitioner testified that she used to be an "outdoors person" prior to the accident, with activities including playing softball, riding bikes and hunting mushrooms, which she no longer does.

The Petitioner testified that she is a high school graduate, with two plus years of college education in nursing and music, but no degree. She has worked as a newspaper circulation manager, and was involved in managing and marketing at a nursing home. She states that she was terminated by the Respondent a year after she initially went off work, and thus had not been offered any work within her restrictions. Since being released by Dr. Pencek on 12/15/09, she has not been offered any work nor has she declined any job opportunities, though she

agreed on cross exam that she has not looked for work since the 8/10/06 work accident. She did meet with vocational counselor Alanna Goestenkors at the request of the Respondent on 1/4/10. However, Ms. Goestenkors' 1/21/10 report is not tremendously helpful in this case because the Petitioner at that time indicated she was still treating for her cervical and lumbar spine. The Petitioner did indicate to her that Dr. Pencek planned to release her with the same restrictions that were indicated by Dr. Feinberg. (Px5, see Px16). The Arbitrator again notes that the records of Dr. Pencek do not reflect the issuance of work restrictions.

The Petitioner was evaluated by vocational counselor Susan Entenberg at the request of her attorney on 1/5/16, and she prepared a 1/21/16 report. (Px1). The evaluation took place by phone, and she noted it was two separate calls on the same day, as the Petitioner indicated she needed to rest after a period on the initial call. She noted a consistent history of Petitioner's educational and vocational histories. Ms. Entenberg referred to records following Dr. Pencek's recommendation of low back surgery, including those of Dr. Ghalambar, Dr. Yadzi and Dr. Espinosa, who implanted the spinal cord stimulator on 8/12/14. Petitioner reported the stimulator helped "a little", but could not be turned up enough to provide relief. Petitioner told Ms. Entenberg that she took hydrocodone and flexeril. She reported suffering from asthma, hypertension and urinary incontinence. Petitioner reported 6/10 daily aching and throbbing neck pain, weakness in the bilateral arms, occasional numbness into the right hand and constant "burning, stabbing, numbing" right sternum pain (7/10), especially with any arm use. She said she was unable to look down for more than a few minutes without neck pain, which hindered computer use. As to the low back, Petitioner reported aching and stabbing pain into both legs (7/10) with left foot numbness. According to Ms. Entenberg, Petitioner denied being able to sit or stand for more than 15 minutes at a time, to walk more than about 30 yards, and denied lifting more than 5 pounds or being able to squat or reach. In her opinion, Petitioner's job with Respondent was at the medium duty level. (Px1).

In terms of work restrictions, Ms. Entenberg indicated she relied on the restrictions indicated by Dr. Feinberg and Dr. Patterson, as well as the Petitioner's own statements regarding her abilities and disabilities. Based on the restrictions, she did not believe the Petitioner could return to her regular job. She noted that a 1/28/16 report of Petitioner's primary care provider, Dr. Oligschlaeger, stated: "She seems to be stable with regards to her back pain but has enough difficulties that I don't think she'll be able to do much going forward. Overall she appears at maximum medical improvement. Overall, it appears that the likelihood of her returning to work at any time in the near future is very poor." Ms. Entenberg opined that Petitioner was not a candidate for vocational rehabilitation, and that there was no stable labor market available to her. She would be a candidate for retraining if: a) she were able to concentrate and b) she was capable of sustained sedentary activity. (Px1).

Ms. Entenberg testified via evidence deposition of 10/6/16. She did not have an independent recollection of speaking with Ms. Daniels, and thus deferred to her report. She agreed she had never met Petitioner in person. Ms. Entenberg reviewed a number of medical records in preparing her evaluation. Ms. Entenberg testified consistently with her report on direct exam. She opined that Petitioner was unable to return to work based on at least Dr. Feinberg's restrictions at a minimum, as they were really sedentary and had difficulty sitting at a computer for any length of time due to her neck problems. (Px2).

In forming her opinions about Petitioner's current working abilities, Ms. Entenberg agreed that she took into consideration all of her current complaints, including the neck, arms and ribs/sternum, as well as her low back pain and the placement of the spinal cord stimulator. There was no way to separate out her back complaints from her other problems. She advised she was not aware of Dr. Patterson's report of 1/18/09 indicating Petitioner could return to work, and agreed the restrictions she relied on came only from Dr. Feinberg. She agreed that Dr. Oligschlaeger did not institute any specific work restrictions on Petitioner, or change any prior restrictions. Ms. Entenberg agreed that if the Petitioner had no medical work restrictions, her opinions about employability could change. (Px2).

The Arbitrator notes that the Respondent objected to some of the opinions of Ms. Entenberg based on the case of *Ghere v. Industrial Comm'n*, 278 Ill.App.3d 840, 663 N.E.2d 1046 (1996).. The objections were taken under advisement. The Arbitrator finds that her report made her opinions clear prior to her deposition, and that the Respondent had the opportunity to obtain any medical records it deemed necessary prior to the deposition. While it is not clear exactly when the Respondent was provided with Entenberg's report, the deposition was noticed to the Respondent on or about 8/15/16 and the deposition did not take place until 10/10/16. As such, the Respondent's objections are overruled, and Px1 and Px2 are admitted. Any specific objections made during the deposition have been ruled on within the deposition transcript (Px2).

On cross examination, the Petitioner agreed that Dr. Feinberg issued permanent restrictions in November of 2007. She also agreed that Dr. Patterson's subsequent 1/15/08 note released her to return to work without any indication of restrictions, but testified it was her understanding that he was leaving her restrictions up to Dr. Feinberg, as Feinberg would be treating all of her pain conditions, including her cervical condition and sequelae. Petitioner agreed that Dr. Pencek's 12/15/09 report releasing her from cervical care did not indicate any work restrictions. She also agreed that none of her physicians issued any specific restrictions on her ability to sit, stand or walk. Petitioner agreed that her symptoms at the time of both hearings included her low back. She testified that a spinal cord stimulator was installed primarily for her low back pain, but that it also helps with her neck and chest pain, noting the leads impact her from the bra line down. She agreed that most of the time it is turned up to a high level for her back pain, and when it is at a high level it impacts her concentration. She agreed that she told Ms. Entenberg that turning the stimulator up high causes her to have difficulty walking and that she has fallen as a result. She also testified on redirect examination, however, that her concentration problems started with her pain at the time of the work accident. Petitioner agreed she told Ms. Entenberg that on that she did not make any complaints or have problems with sitting, standing, or walking for long periods of time prior to being released by Dr. Pencek on 12/15/09. Petitioner testified that since her last testimony in 2011, her treatment has mainly been pain management through her primary provider, Dr. Oligschlaeger, and that the primary focus has been the lumbar condition. At the 2011 hearing, Petitioner testified on cross exam that her neck and chest pain were typically at a 3 or 4 out of 10 level, while her low back pain was "easily a 10." She further testified at that time that her low back pain was preventing her from remaining in one position for very long, including sitting and standing, as well as prolonged walking and lying in bed. (Px5).

The Respondent submitted the deposition of Dr. Petkovich, its Section 12 examined, into evidence as Rx1. The Arbitrator notes is the same deposition that was submitted at the prior hearing as Rx1 (see Px5). Other than his opinion that the Petitioner had reached MMI with regard to her chest and neck conditions by the time of the 6/27/11 deposition, his testimony does not offer any evidence relevant to the issue of the nature and extent of Petitioner's chest and neck conditions.

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:

Based on the law of the case, it has previously been determined that the Petitioner's cervical and right sternum/rib conditions are causally related to the work accident, while the lumbar condition has been determined not to be related. The current Arbitrator is bound by these findings with regard to the current hearing and decision pursuant to the law of the case, and no indication, based on the evidence, that the causal relationship of the costochondritis and cervical conditions ended.

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

The Arbitrator finds that the Petitioner has failed to prove that she is permanently and totally disabled as a result of the 8/10/06 accident.

With regard to the chest injury, while Dr. Feinberg has issued permanent restrictions, it is difficult to give these restrictions full credibility when the surgeon who performed the chest surgery, Dr. Patterson, subsequently released her to return to work without any indication whatsoever of restricting her work activities. The basis for the restrictions issued by Dr. Feinberg are not made clear, and appear to be based almost exclusively on the Petitioner's subjective complaints.

With regard to the cervical spine, there also is no evidence that Dr. Pencek has issued any restrictions to the Petitioner as a result of her two level fusion. While the Petitioner testified that Pencek was aware of the restrictions issued by Dr. Feinberg, this in and of itself does nothing to confirm his agreement with them. She also testified that he increased her restrictions to limit her to only 5 pounds of lifting instead of 10 pounds, but again this is not reflected in either his records of his testimony. A review of his records indicates multiple references that the Petitioner repeatedly "reminded" him of the restrictions issued by Dr. Feinberg. Had he agreed that these restrictions were relevant to the cervical spine, one would have expected he would have at a minimum made reference to their applicability to the cervical condition in his records and/or deposition. There is simply no evidence in his records, or even trough his deposition testimony, which would confirm that he issued restrictions based on the Petitioner's cervical condition.

Additionally, the Arbitrator notes that Dr. Feinberg, with no evidence of any knowledge of the Petitioner's educational or vocational history, nor any evidence of expertise in the vocational area, nevertheless opines that Petitioner should be a retraining or vocational rehabilitation candidate. While her support of her patient is admirable, in the Arbitrator's view this nevertheless smacks of some level of bias in this aspect of her opinions. As such, it is difficult to give her opinions significant weight in this case, particularly in light of the January 2008 report of Dr. Patterson.

The Arbitrator finds that the evidence does not support that the Petitioner has been restricted from all work on a medical basis, as no physician has indicated she cannot work. With regard to an odd lot basis for a permanent total, the Arbitrator finds that the Petitioner has not made out a prima facie case of an inability to work. While Ms. Entenberg attempts to support such a finding, it is clear that her opinions are based in significant part on the Petitioner's stated subjective difficulties, in addition to the questionable work restrictions issued by Dr. Feinberg. Additionally, the Petitioner testified and reported to Ms. Entenberg that she is a high school graduate, has two years of college, and has a vocational history that would certainly include sedentary jobs. There is no indication whatsoever of any restrictions on the Petitioner using a computer, other than her subjective complaints of pain after only minutes of work on a computer. Indeed, even Dr. Feinberg indicated that the Petitioner could perform computer and sedentary work in her 12/8/07 report. Given that Petitioner has at least some experience in administration and management, and as attended two years of college, it is unclear how Ms. Entenberg concludes she has no transferrable skills at the sedentary level. Further, Ms. Entenberg's opinions in this matter were based at least in part on a significant number of medical records which were not submitted into evidence. Ms. Entenberg indicated the Petitioner would be a candidate for retraining if: a) she were able to concentrate and b) she was capable of sustained sedentary activity. It appears that in significant part her lack of concentration is based on the spinal cord stimulator, which is unrelated to this case, and that even Dr. Feinberg

indicated the Petitioner was capable of sedentary work. The underpinnings of Ms. Entenberg's opinions in this case are simply not solid enough to support them.

The Petitioner has failed to prove that she is permanently and totally disabled within the meaning of the Act.

Based on current case law in Illinois, the next question is whether the Petitioner qualifies for a Section 8(d)1 wage differential. Given the fact she was injured lifting a heavy box of produce, it is reasonable to conclude that her job with the Respondent was fairly heavy, and also reasonable to conclude that she would have great difficulty returning to that job. However, even if it were to be determined that she is partially incapacitated from pursuing her usual and customary line of employment, her average weekly wage was $289.91. Any job she would be able to obtain, even at minimum wage, would exceed this average weekly wage. As she has not shown she is unable to work, she cannot show a diminution in wages that would result in an 8(d) 1 award. As such, the Arbitrator finds that Section 8(d)2 is applicable to this case.

While generally the employer takes the employee as it finds him or her, in this case the Petitioner had already been released from care at MMI with regard to her chest and cervical spine when her lumbar troubles began, and thus the ongoing problems she has related to her back are not part of the permanency determination causally related to the work accident. While no recent records of the Petitioner's back treatment have been submitted into evidence, as it has been determined to be a condition that is not causally related to the accident, the report of Dr. Entenberg indicates that the lumbar problems are a significant part of Petitioner's ongoing problems and symptomatic complaints. Thus, the permanency determination must be based only on the causally related cervical and chest conditions, for which she had reached MMI prior to her lumbar treatment.

As this accident occurred prior to 9/1/11, Section 8.1b of the Act is not applicable.

The Arb acknowledges that the Petitioner's chest injury appears to be somewhat unique, at least in terms of the treatment provided. But costochondritis itself is not an unheard of condition, and it is difficult to see how the onerous restrictions instituted by Dr. Feinberg would take precedence over the lack of any restrictions whatsoever being issued by Dr. Patterson with regard to the Petitioner's chest condition. The Petitioner agreed that Dr. Patterson's subsequent 1/15/08 note released her to return to work without any indication of restrictions, but testified it was her understanding that he was leaving her restrictions up to Dr. Feinberg, as Feinberg would be treating all of her pain conditions, including her cervical condition and sequelae. This does not make sense when Patterson's 1/15/08 report specifically states she can return to work, and given that the post-cervical fusion care was not performed by Dr. Feinberg. There is no evidence that indicates Dr. Feinberg's restrictions relate to the Petitioner's cervical injury, and again Dr. Pencek issued no work restrictions with regard to that injury. While the Arbitrator is willing to acknowledge some level of restrictions on the Petitioner's activities as a result of these two injuries, the degree of disability she testifies to does not appear to be related to just these injuries, and as noted above appears to be subjectively excessive versus the objective evidence and lack of work restrictions from the two surgeons.

While the costochondritis surgery appears to be relatively novel, cervical fusion surgery is not, and even taking these conditions together, the Petitioner's testimony is difficult to believe fully since it indicates she is more or less an invalid at this point. Virtually any and every activity causes her pain. She repeatedly "reminds" Dr. Pencek of her restrictions from Feinberg. The Arbitrator believes the Petitioner does, in fact, have pain as a result of these conditions, but the level of pain described by Petitioner appears much more significant than would be expected based on the other evidence in the record. Regardless of the number or types of treatments she has undergone, she appears to have had very little improvement. While the Arbitrator cannot know with certainty the level of Petitioner's pain, the evidence in this case appears to indicate a low tolerance for pain. In

reviewing the evidence from the prior hearing and the decisions in relation thereto, it appears that the prior Arbitrator in this case also questioned the veracity of some of the Petitioner's testimony regarding her lumbar condition as well.

While the Petitioner indicates that her pain is centered on her chest condition, there is an unrelated lumbar condition which has apparently led to the implantation of a spinal cord stimulator. It is impossible for the Arbitrator to completely unwind the intertwined nature of Petitioner's pain complaints in terms of lumbar versus cervical and chest conditions. Ultimately, the Arbitrator finds that the Petitioner does have some level of credible ongoing pain complaints related to these conditions following significant surgeries to both the right ribs and the cervical spine.

Based on the evidentiary record taken as a whole and a review of prior Commission awards with similar injuries and similar outcomes, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 35% loss of use of the person as a whole pursuant to §8(d)2 of the Act.

WITH RESPECT TO ISSUE (O), THE ARBITRATOR FINDS AS FOLLOWS:

The Respondent is entitled to the confirmed TTD credit of $8,596.56 against the permanency award.

STATE OF ILLINOIS	)
	) SS.
COUNTY OF COOK	)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL STITTS,

Petitioner,

19IWCC0520

vs. NO: 17 WC 33270

KOPPERS, INC.; NEW HAMPSHIRE INSURANCE CO.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causation, medical expenses, temporary total disability, and penalties, and being advised of the facts and law, reverses the Decision of the Arbitrator on the issue of accident but incorporates the Statement of Facts contained in the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission vacates the Arbitrator's award of temporary total disability benefits, maintenance benefits, and medical expenses, and denies Petitioner's claim for benefits under the Act.

It is settled law that the burden of proof is upon Petitioner to prove his case by a preponderance of the evidence, "and even though there is evidence in the record which, if undisputed, would sustain a finding for the claimant, such evidence is not sufficient if, upon consideration of all the testimony and circumstances shown in the record, it appears that the manifest weight of the evidence is against such a finding." *Corn Products Refining Co. vs. Industrial Commission*, 6 Ill.2d 439, 443 (1955).

Although Petitioner credibly testified, and the medical records corroborated, that Petitioner was changing a windsock 40-55 feet in the air at the time he suffered the symptoms of a stroke, this stroke was due to a personal risk and not an employment risk. There are three types of risks to which an employee might be exposed: (1) risks distinctly associated with the employment; (2) risks which are personal to the employee, such as idiopathic falls; and (3) neutral risks which have no particular employment or personal characteristic. *Potenzo v. Illinois Workers' Compensation*

Comm'n, 378 Ill. App.3d 113, 116 (2007). Risks are distinctly associated with employment when, at the time of injury, "the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties." *Caterpillar Tractor Co, v. Industrial Comm'n*, 129 Ill.2d 52, 58 (1989). "A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties." *Id.* If an employee is exposed to a risk common to the general public to a greater degree than other persons, the accidental injury is also said to arise out of her employment. However, if the injury results from a hazard to which the employee would have been equally exposed apart from the employment, or a risk personal to the employee, it is not compensable. *Id.*

"For an injury caused by a fall to arise out of the employment, a claimant must present evidence which supports a reasonable inference that the fall stemmed from a risk associated with his employment ... Employment related risks associates with injuries sustained as a consequence of a fall are those to which risk the general public is not exposed, such as the risk of tripping on a defect at the employer's premises, falling on uneven or slippery ground at the workplace, or performing some work related task which contributes to the risk of falling." *First Cash Financial Services v. Industrial Comm'n*, 853 N.E.2d 799, 803-804 (1st Dist. 2006). Obviously, the risk encountered by Petitioner at the top of the tower that was not open to the public is a risk to which the general public is not exposed. However, the condition of the area atop the windsock was not what caused Petitioner's stroke. Rather, the stroke was caused by risks personal to Petitioner. Here, Petitioner has not proved that his accident arose out of his employment with Respondent.

While descending a ladder after changing the windsock, Petitioner suffered slurred speech and facial disfigurement. Additional personnel were called to the area and Petitioner was taken via ambulance to the hospital. Petitioner was later diagnosed with a lacunar infarct. Petitioner testified that he did not have a history of a myriad of personal risk factors prior to the event. The theory of the case seemed to shift between chemical exposure to phthalic anhydride versus the strenuous activity involved in going 40-55 feet into the air and changing the windsock. Although Petitioner did not seem to have many documented risk factors other than cigarette smoking, being of male sex, and a significant family history of heart related disease, Petitioner did not prove that one of the effects of exposure to phthalic anhydride would be stroke or stroke-like symptoms, nor did he prove that the level of exertion he used to climb to the top of the tower and remove the existing wind sock, was at such a level as to cause his blood pressure to spike to such a level as to cause his emergency incident. By his own testimony, he had performed this activity many times before with no similar result. A Petitioner's testimony and records of medical treatment typically provide sufficient circumstantial evidence to prove a Petitioner's case. However, in the instant case, regardless of whether it was the chemical exposure or the physical exertion necessary to complete the task at hand that caused Petitioner's condition of ill-being, Petitioner's stroke was caused by a personal risk, rather than an employment risk. Additionally, there were no causation opinions in the treating records linking Petitioner's stroke to anything other than a personal risk, despite the fact that the stroke took place on the employer's premises at a location not accessible to the general public. Based on the foregoing, Petitioner failed to establish that he sustained an accident arising out of and in the course of his employment.

Additionally, the Arbitrator's reliance on the note of Emergency Department neurologist Dr. Wojcik's notation "he was performing activities that might have increased right-sided pressures and

if he had right to left shunting because of PFO or ASD, it would be nice to know", was misguided. First, the Arbitrator only cited to a portion of the entry. Second, none of Petitioner's treating physicians, including the neurologist he saw on multiple occasions, Dr. Kramer, causally connected the June 8, 2017 episode to work-related activity or exposure. Although the Petitioner's testimony was credible, in the instant case, Petitioner would have either needed an expert to testify that exposure to phthalic anhydride could cause the symptoms that resulted in Petitioner's ultimate diagnosis, or a medical opinion to causally link the level of physical exertion at work to his incident. None of Petitioner's treating physicians causally connected the stroke to Petitioner's work activities. Moreover, Respondent's Section 12 examiner, Dr. Allen, was very persuasive in his testimony regarding the entry of the emergency department physician, Dr. Wojcik on which the Arbitrator relied, when he testified, "In order to answer your question, we'd have to refer to the cardiac study. The cardiac study was done, and it shows that he does not have a hole in his heart which is what Dr. Wojcik was referring to. So I'd like to specifically state that [counsel's] point is moot and incorrect. He did not have a right to left shunt. There was no evidence in the report. ... Therefore, any activity that he did could have increased his right-sided pressure, but it did not cause a shunt because there was no shunt." (Rx6, pp. 105-106). Ultimately, Petitioner did not meet his burden that his accident arose out of his employment.

As Petitioner failed to prove accident, all other issues are deemed moot, and the awards for temporary total disability, maintenance, and medical expenses are vacated.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment on June 8, 2017, and therefore the Decision of the Arbitrator entered on July 31, 2018, is reversed, and Petitioner's claim for benefits is denied.

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

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

DATED: SEP 19 2019

Maria E. Portela

Thomas J. Tyrrell

L. Elizabeth Coppoletti

MEP/dmm
O: 072319
49

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

STITTS, MICHAEL
Employee/Petitioner

Case# **17WC033270**

19IWCC0520

KOPPERS INC NEW HAMPSHIRE INSURANCE CO
Employer/Respondent

On 7/31/2018, 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 2.16% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1876 CZAPLA LAW
EDWARD ADAM CZAPLA
1821 WALDEN OFFICE SQ #400
SCHAUMBURG, IL 60173

0507 RUSIN & MACIOROWSKI LTD
MICHAEL T MANSEAU
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

19IWCC0520

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)

MICHAEL STITTS
Employee/Petitioner

Case # **17** WC **33270**

v.

Consolidated cases: **-------**

KOPPERS, INC.; NEW HAMPSHIRE INSURANCE CO.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles Watts**, Arbitrator of the Commission, in the city of **Chicago**, on 5/16/18. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches 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, 6/8/17, 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 $**71,526.41**the average weekly wage was $**1,509.00**

On the date of accident, Petitioner was **60** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $**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 $**14,040.18** under Section 8(j) of the Act.

ORDER

The Arbitrator finds that Petitioner did sustain an accident on June 8, 2017 that arose out of and in the course of Petitioner's employment with Respondent.

The Arbitrator finds that Petitioner's stroke is causally related to the June 8, 2017 accident at work.

Respondent shall pay Petitioner Temporary Total Disability benefits of $1,006.00/week for 41 weeks commencing on June 9, 2017 through March 22, 2018, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner maintenance benefits of $1,006.00/week for 7 and 6/7 weeks commencing March 23, 2018 through the 19(b) hearing, as provided in Section 8(a) of the Act.

Respondent shall pay to Petitioner the outstanding medical expenses contained in PX.1, PX.2, PX.3, PX.5 and PX.7, pursuant to Section 8(a) and 8.2 of the Act subject to the medical fee schedule.

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

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

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

Signature of Arbitrator

July 31, 2018
Date

JUL 3 1 2018

ARBITRATION DECISION

An Application for Adjustment of Claim was filed in this matter and notice of hearing mailed to each party. The trial was heard on May 16, 2018 by an Arbitrator designated by the Commission in the City of Chicago, County of Cook, and State of Illinois. After hearing the proofs and allegations of the parties and having made careful inquiry into this matter, the Arbitrator concludes as follows:

The parties stipulate that on June 8, 2017, Respondent, Koppers, Inc. was operating under and subject to the provisions of the Illinois Workers' Compensation Act; the relationship of employer and employee existed between Petitioner Michael Stitts and Respondent; at the time of the injury Petitioner was 60 years of age, married, and had no dependent children under 18 years of age.

The parties disagree as to the issues of accident, notice, causation, 52-week earnings, entitlement to medical benefits, entitlement to TTD, entitlement to maintenance benefits, penalties & fees, and credit.

STATEMENT OF FACTS

Petitioner, a 61 year-old maintenance repairman, was employed by Respondent, Koppers, Inc. (Transcript at 8) Respondent is a chemical, tar and phthalic anhydride refinery located in Stickney, Illinois. (Transcript at 9 and 150-151) Petitioner has worked almost 39 years for Respondent. (Transcript at 10)

The last 28 years Petitioner worked as a maintenance mechanic responsible for installing, repairing, and providing preventative maintenance for difference mechanical equipment including pumps, valves, and tanks. (Transcript at 11) The pumps weighed between 75-500 pounds but were lifted with mechanical lifting devices, including fork lift, chain fall, crane and Broderson. (Transcript at 12,16,17) Petitioner worked the 3rd shift from 7:00 a.m. to 3:00 p.m. (Transcript at 13) The maximum Petitioner had to lift over the shoulder was 40-50 pounds. (Transcript at 24)

Petitioner arrived at work about 5:30 a.m. on the morning of June 8, 2017. (Transcript at 25) Petitioner drank coffee, read the paper, started getting ready for his daily tasks and punched in at 6:45a.m. (Transcript at 25-26) Petitioner and a co-worker/trainee, Paul Carenen, were assigned the task of changing out the windsock atop a vessel on the pre-flash building (Transcript at 28) Petitioner climbed up a stairway 35-40 feet above ground to a platform (Transcript at 27, 32) Group Exhibit 3A,B,C,D and E depict the area Petitioner was working. (Transcript at 29-36) Petitioner then had to climb another 10 feet up a metal framed ladder alongside a vessel atop the platform. (Transcript at 31-33) Petitioner climbed another 3-4 feet to a second platform atop the ladder to reach the windsock. (Transcript at 34)

Petitioner was about 50 feet up in the air when he detached the pole and windsock from the railing and lowered it to Paul Carenen. (Transcript at 37) To change out the old windsock, Petitioner used a crescent wrench and wire pliers to detach the pole with the old windsock from

the ladder. (Transcript at 38-39). According to Petitioner, the pole weighed 10 to 15 pounds. (Transcript at 40). Petitioner became nauseous atop of the platform and climbed down the ladder. (Transcript at 90) Petitioner testified that he smelled fumes while changing the windsock. (Transcript at 104)

On re-direct examination, Petitioner testified that he could see the fumes coming from the vessel of the 4150 day tank. (Transcript at 122; RX 3A). Petitioner claimed he was exposed to Phthalic Anhydride fumes because the day tank processed that chemical. (Transcript at 123; RX 3A). On re-cross examination, Petitioner confirmed that the fumes came from a vessel near where Petitioner changed the windsock. (Transcript at 124; RX 3A). Paul Carenen testified that from where he was on the lower platform of the tower, he could not smell any phthalic anhydride or see any phthalic anhydride vapors. (Transcript at 132). Mr. Carenen testified that he had no reason to believe that there was any leakage from any of the piping of flanges (Transcript at 133).

Paul Carenen noticed the disfigurement on Petitioner's face and problems with his speech. (Transcript at 40) Mr. Carenen told Petitioner that something was wrong with his speech and noticed that one side of his face was drooping so he called Greg Bambule, the safety director, to the platform. (Transcript at 41, 143-44) Petitioner was nauseous, had dry mouth, and his speech was slurred but he was not dizzy. (Transcript at 44) When Mr. Bambule and Mr. Bokowy, a supervisor, arrived, Petitioner was still unable to put words together and still had a facial disturbance. (Transcript at 145-146) An ambulance was dispatched to the scene. (Transcript at 45) Paramedics arrived and climbed up to the platform. (Transcript at 45) First, the paramedics tried to strap Petitioner to a chair which Petitioner thought was too wobbly and then with a person in front and behind, Petitioner climbed down the stairs. (Transcript at 45) Petitioner was then transported by ambulance to MacNeal Hospital. (Transcript at 45; Px1).

The initial history recorded at MacNeal Hospital states "60 Y/O M smoker was @ work fixing a wind turbine 40 ft in the air & states he started getting "nauseous". He climbed down lower had trouble "finding words". Co-worker noticed L facial droop & called 911". Petitioner underwent a CT scan of the head without contrast which did not show any abnormality. However, there was no evidence of any intracranial bleed. Petitioner also underwent a portable chest x-ray which did not reveal any acute findings. After these diagnostic tests and physical examination, Petitioner was diagnosed with a transient ischemic attack (TIA). Petitioner also had elevated blood pressure, although there was no prior history of hypertension documented. A consultation with neurology was recommended, along with an echocardiogram with bubble study to rule out PFO/ASV. Petitioner was also counseled to quit smoking. Ultimately, Petitioner was admitted to the neurology-telemetry floor for a full admission. (Px.2)

A neurological consultation was performed by Dr. Wojcik who initially diagnosed Petitioner with a transient ischemic attach and admitted Petitioner for observation. The history recorded by Dr. Wojcik states "he was working trying to replace a weather device on the top of a tower. When he came down, there were some fumes, which made him, he thought, nauseated." Dr. Wojcik also noted in his neurological consultation that "he (Petitioner) was performing activities that might have increased right sided pressures." A CT study, EKG, doppler and echocardiogram were ordered. Petitioner was prescribed aspirin. (Px.2)

The diagnostic studies were unremarkable and Petitioner's condition continued to improve. (PX.2) Petitioner was discharged the following afternoon.

Petitioner followed up with his primary care physician, Dr. Norman James, on June 12, 2017 who diagnosed petitioner with a cerebral vascular accident (CVA), dysarthria, and weakness in the left arm. Petitioner was referred to Dr. Jeffrey Kramer for neurological consultation. (PX.3) Petitioner was restricted from all work activity. (PX.5)

Dr. Kramer's initial consultation was performed on June 21, 2017 at Mercy Hospital, who noted that Petitioner presented with some left facial weakness, slurred speech, and residual left-sided weakness. Petitioner was diagnosed with a lacunar infarct and prescribed a course of speech and physical therapy. Petitioner was also prescribed Atorvastatin. (PX.3)

On July 10, 2017, Petitioner followed up with Dr. James. At that time, Petitioner continued to have some left-sided deficits. Dr. James recommended speech therapy and physical therapy. Later that day, Petitioner had an initial speech therapy evaluation at Mercy Hospital and Medical Center. (PX 3).

Petitioner completed the speech and physical therapy treatment at Mercy Hospital (PX.5)

On July 13, Dr. Kramer recommended occupational therapy for Petitioner's left arm weakness. Dr. Kramer recommended a sleep study which was completed at Mercy Hospital on August 11, 2017. The study revealed mild to moderate obstructive sleep apnea. (PX.3) Petitioner continued to follow up with Dr. James who restricted his work activity. (PX.5)

On August 28, 2017, Petitioner followed up with Dr. James. He reported that he was attending physical therapy, speech therapy, and occupational therapy. He followed up again with Dr. James on September 18, 2017. Petitioner was still participating in occupational therapy for his mild left hemiparesis. Petitioner was released to return to work by Dr. Kramer at that time. (PX.3)

On August 31, 2017, Petitioner underwent an initial occupational therapy evaluation. He was referred to occupational therapy for coordination deficits and decreased endurance. The OT diagnosis was a right CVA on June 8, 2017. Petitioner stated that when his left arm was tired, it felt lazy and heavy. He stated that he "really wanted to return to work next month." He stated he was employed as a chemical maintenance staff member for a chemical company. He stated his job duties included checking pumps, repairing pipe leaks, operating high lifts and forklifts. However, he stated he was off duty on disability at that time. He presented with left upper extremity decreased strength and fine motor coordination, with limited left sided range of motion, secondary to a right CVA in June 2017. (PX 3).

At Respondent's request, Petitioner was required to undergo a physical capability evaluation. Petitioner completed the testing on October 4, 2017. Petitioner demonstrated a medium-heavy capability but Respondent failed to allow Petitioner to return to work. (Transcript at 63)

Dr. James prepared a disability certificate, dated October 9, 2017, which certified that Petitioner was under his professional care and was totally incapacitated from June 9, 2017 to October 9, 2017. Dr. James wrote an amended note on October 9, 2017, releasing Petitioner to return to his regular job duties without any restrictions. (Px.5)

At Respondent's request Petitioner completed three physical capability assessment tests (IPCS testing) with the company physician, Dr. McGraw. (Transcript at 63-65) The test relied on a machine to measure the strength of Petitioner's arms and legs as he pulled up and down. The test was half an hour. (Transcript at 65) Petitioner needed to lift 50 pounds in order to return back to work (Transcript at 67-68) According to Petitioner, the results of his first test, which he took on October 4, 2017, revealed some weakness, so he had to repeat the test. (Transcript at 66, 106). The IPCS test of October 4, 2017 revealed that Petitioner scored a 1.43 placing him at medium-heavy duty level and indicated that the goal was a 1.56 or higher (heavy duty). (Px.5) The summary section of the report indicates "Mr. Stitts' rating is below the Heavy strength rating that is recommended for the Maintenance Mechanic position, he is not recommended to return to work as a Maintenance Mechanic." (Px.5) Respondent wouldn't take Petitioner back to work based upon the results of the company testing (Transcript at 67-68) The last test was completed in January 2018. (Transcript at 66-67) Petitioner tested at the medium-heavy duty level on Janurary 11, 2018. (Transcript at 108)

Regarding IPCS testing, Petitioner testified that this type of testing was not a company-wide standard. (Transcript at 105) IPCS tests are given by Respondent's physicians to employees who are deemed to have medical conditions that are not work-related. (Transcript at 105). Petitioner had to pass the IPCS test before Respondent would permit him to return to work. (Transcript at 105)

On January 15, 2018 Dr. Kramer examined Petitioner and again released him to return to work without restrictions. (PX.3) On February 15, 2018 Dr. James released Petitioner to return to work. (PX.5)

Respondent continued to refuse Petitioner's request to return to work.

On February 15, 2018, Respondent's Section 12 examiner, Dr. Neil Allen, testified via evidence deposition. Dr. Allen testified he is board-certified in neurology and internal medicine. He has been practicing medicine for over 40 years. (RX 6, p. 7). He has been teaching neurology at Roseland Franklin University since 1974. (RX 6, pp. 9-10). He has published journal articles in every decade since he has been in practice. (RX 6, p. 11).

Dr. Allen testified he treats about 3-4 stroke patients per week. (RX 6, p. 14). He also evaluates and treats patients with obstructive sleep apnea and cerebral vascular disease. (RX 6, pp. 17-18, 24).

Dr. Allen testified he spends about 5 percent of his time performing medical-legal work, which includes independent medical examinations and records. (RX 6, pp. 12-13). He testified he does about 50/50 for the employer/employee. (RX 6, p. 12).

Dr. Allen testified that a lacunar infarct is a blockage of an end blood vessel going to the brain by the process of hypertension, which causes a proliferation of cells in the margin of a blood vessel. (RX 6, p. 17). Dr. Allen explained that a lacunar infarct is a loss of blood flow that is permanent because of a buildup of abnormal material around an end blood vessel due to hypertension. (RX 6, p. 21).

Dr. Allen testified that there is a correlation between smoking and all types of stroke. (RX 6, p. 17). He also testified that obstructive sleep apnea increases the risk of stroke and hypertension, which thereby increases the risk of lacunar stroke. (RX 6, pp. 18-19). Additionally, he testified that cerebral vascular disease is commonly caused by age, male sex, hypertension, cigarette smoking, and obstructive sleep apnea. (RX 6, p. 24).

According to Dr. Allen, the combination of risk factors for a stroke can have a synergistic effect. (RX 6, pp. 24-25).

Dr. Allen testified he examined Petitioner on January 24, 2018. (RX 6, p. 27). In connection with his examination, Dr. Allen obtained a history from Petitioner. Dr. Allen testified, "I mean fundamentally he told me he was working. He had somebody else he was working with and he climbed up. What he did is he climbed up and there was a valve up there, and he said he didn't feel good and he came down. When he came down, he had symptoms, and those symptoms were neurological in nature." (RX 6, p. 30).

Dr. Allen testified that Petitioner had no prior history of heart disease, stroke, TIAs, vascular disease, lacunar infarct, dizzy spells, fainting, slurred speech, facial droop, or heart disorder. (RX 6, pp. 66-68).

Dr. Allen testified that Petitioner had no documented history of hypertension. (RX 6, p. 68). He testified it is possible for someone to have undiagnosed hypertension. (RX 6, pp. 101-102).

Dr. Allen performed a neurological examination, which was his usual and customary, comprehensive examination. (RX 6, pp. 33-34). Dr. Allen's neurological examination included mental status testing, motor testing, reflex testing, coordination testing, sensory function testing, and gait testing. (RX 6, pp. 34-35). Dr. Allen testified that Petitioner had no evidence of drift or weakness of the left side, no abnormality of coordination, and no abnormality of finger taps, thrust or rapid alternating movements. (RX 6, p. 36). Cranial nerve testing was normal. Reflex testing was symmetrical. (RX 6, p. 38). Coordination testing did not reveal and left-sided deficits. (RX 6, pp. 38-39). Lastly, sensory and gait examination were both normal. Dr. Allen concluded that Petitioner returned to his pre-existing state. (RX 6, p. 39). Dr. Allen believed that the absence of complaints from Petitioner was consistent with his examination findings. According to Dr. Allen, Petitioner stated he was not having any more symptoms and was able to do what he was doing before the incident. (RX 6, p. 40).

Dr. Allen offered detailed testimony regarding the medical records he reviewed in connection with his examination. Dr. Allen reviewed the GMSI Job Task Analysis, MacNeal

Hospital records, Dr. Kramer's June 2017 record, and therapy records from Mercy Hospital. (RX 6, pp.40-45). Dr. Allen rendered a number of opinions to a reasonable degree of medical and surgical certainty. (RX 6, p. 29).

Dr. Allen diagnosed Petitioner with a lacunar stroke to his brain, secondary to cigarette smoking, hypertension, male sex and possible hereditary factors. (RX 6, p. 46). Dr. Allen opined that Petitioner had not done anything on June 8, 2017 that caused, predisposed, or aggravated any medical or neurological condition that would have caused him to have a stroke. Dr. Allen explained his opinion was based on his 49 years of experience as a physician and neurologist, his review of the medical records, and review of the literature over the years on the causation of atherosclerotic disease, hypertension, obstructive sleep apnea and cigarette smoking as it relates to neurological conditions. (RX 6, p. 47).

Dr. Allen believed that Petitioner had number of personal risk factors that caused or contributed to his acute condition of ill-being, including: obstructive sleep apnea, cigarette smoking, mild hypertension, and male sex. (RX 6, pp. 47-48). Dr. Allen testified that Petitioner had predilection to cerebral vascular disease by age, sex, cigarette smoking, obstructive sleep apnea, and perhaps hereditary family factors were the most likely contributory factors to his condition of ill being. (RX 6, p. 48).

On cross-examination, Dr. Allen testified that Petitioner felt dizzy because he was allegedly exposed to fumes coming out of a pipe. (RX 6, p. 89). Dr. Allen admitted that, by definition, there was a temporal relationship between the onset of Petitioner's symptoms and the work activities that he was doing on top of the ladder. (RX 6, p. 94). Dr. Allen testified that Petitioner suffered a stroke while on the ladder at work. (RX 6, p. 95) Dr. Allen testified that he agreed with treating neurologist Dr. Wojcik's note that Petitioner may have been performing activities that would increase the right-sided pressures. (RX 6, pp. 95-96)

Dr. Allen testified that he did not ask Petitioner questions about the level of physical exertion it took to climb the ladder and change the windsock because, Dr. Allen opined, the exertion required by Petitioner while he was working on the ladder would not have made a difference in his opinion on causation. (RX 6, p. 98).

Dr. Allen opined that Petitioner's current condition had resolved from his initial condition of ill-being. (RX 6, p. 48).

Dr. Allen opined that all of Petitioner's medical treatment since June 8, 2017 was reasonable and necessary, but not causally related to any work-related accident. Dr. Allen explained the treatment was causally related Petitioner's lacunar stroke with a subsequent neurological condition. (RX6 at 48). Dr. Allen opined that Petitioner does not require any future medical treatment or testing as a result of this condition. (RX 6, p. 49).

Dr. Allen opined that Petitioner had reached maximum medical improvement (MMI) as a result of his episode on June 8, 2017. Dr. Allen's opinion was based on petitioner's neurological examination, records review, and petitioner's statement of well-being. (RX 6, pp. 49-50).

Dr. Allen believed Petitioner was able to return to work, but not specifically as a mechanic. Dr. Allen testified that he did not believe Petitioner had been tested to determine if he was capable of lifting 50 pounds with assistance. (RX 6, p. 50). Dr. Allen testified he did not believe any of Petitioner's work limitations were causally related to the alleged work accident. Dr. Allen explained that Petitioner's underlying condition of ill being that occurred at the time of his stroke was due to his underlying medical conditions. (RX 6, p. 51).

Dr. Allen testified he further reviewed additional medical records that were not previously available at the time of his examination and he supplemented his opinions. (RX 6, pp. 52-53). Dr. Allen reviewed additional medical records form Dr. Kramer and Dr. James through January 2018. (RX 6, pp. 55-56). Dr. Allen also reviewed a Pub Chem Biotech Search on phthalic anhydride. (RX 6, p. 55). Dr. Allen testified that Dr. Kramer's records also reflected his opinion that Petitioner likely had a lacunar infarct. (RX 6, p. 56).

Dr. Allen testified regarding his review of the literature pertaining to Phthalic Anhydride. Dr. Allen explained that Phthalic Anhydride, as it relates to human exposure and animal exposure, can produce irritation of the skin, eyes, and lungs. According to Dr. Allen, there is no evidence it can produce any acute change in blood vessels. (RX 6, p. 57). Dr. Allen opined that he found no evidence that phthalic anhydride produces any vascular change or alteration of blood flow that would be causally related to having a stroke. (RX 6, p. 58).

Respondent continued to refuse Petitioner's requests to return to work.

Dr. James ordered a Functional Capacity Evaluation which Petitioner completed at ATI Physical Therapy on March 16, 2018. (PX.7) The FCE demonstrated Petitioner's ability to work at a medium to heavy physical demand level which exceeds the physical requirements of a maintenance mechanic. (PX.7) Petitioner was capable of lifting 62 pounds occasionally above the shoulder, 82 pounds occasionally desk to chair, 87 pounds occasionally chair to floor, and carry 79 pounds occasionally. (PX.7)

After completing the FCE, Petitioner contacted his superintendent, Mike Bokowy, and Supervisor, Ralph Soto, regarding his return to work. (Transcript at 71) They advised Petitioner there was a problem with him returning to work. (Transcript at 71) On March 23, 2018, Dr. James reviewed the FCE results and released Petitioner to return back to work without any restrictions. Petitioner continued to request a return to work in April and May 2018 but Respondent failed to allow Petitioner back to work. (Transcript at 72)

CONCLUSIONS OF LAW

The Arbitrator adopts and incorporates the above Findings of Fact in support of the foregoing Conclusion of Law.

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS

305/1(b)3(d). 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)

The Arbitrator finds that the testimony of the Petitioner was credible because Petitioner's responses to questions showed candor and were consistent with the documentary evidence.

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

An employee's injury is compensable under the Act only if it arises out of and in the course of his employment. 820 ILCS 305/2. "In the course of" employment refers to the time, place and circumstances under which the accident occurred. *Lee v. Industrial Comm'n,* 167 Ill.2d 77, 81 (1995). For an injury to 'arise out of' the employment its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Caterpillar Tractor Co. v. Industrial Comm'n,* 129 Ill.2d 52, 58 (1989). If an employee is exposed to a risk common to the regular public to a greater degree than other persons, the accident is also said to arise out of his(her) employment. *Id.* at 58-59. Further, an injury arises out of an employment related risk when the claimant is engaged in an activity that she might reasonably be expected to perform incident to her duties. *Accolade v. Illinois Worker Compensation Com'n*, 371 Ill. Dec. 713 (App.Ct. 3d Dist. 2013), *Young v. Illinois Workers Compensation Comm'n*, 383 Ill.Dec. 131. (App. Ct. 4d Dist. 2014).

"A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be *sufficient circumstantial evidence* to prove a causal nexus between the accident and the employee's injury." *International Harvester v. Industrial Comm'n*, 93 Ill.2d 59, 63-64 (1982) (emphasis added). The Appellate Court has noted that *International Harvester* does not stand for the proposition that a claimant's testimony alone can establish a causal connection. See *Sorenson v. Industrial Comm'n*, 281 Ill.App.3d 373, 382 (1st Dis. 1996). The *Sorenson* Court distinguished *International Harvester,* which found a causal connection based on the combination of the claimant's testimony and the medical evidence; it did not solely rely on Petitioner's testimony to support a finding of causal connection. *Id.* Indeed, 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*, 276 Ill.App.3d 446, 449 (1st Dist. 1995).

Petitioner testified he became nauseous and his speech slurred while removing a windsock atop a vessel on the pre-flash building. When Petitioner came down the ladder alongside the vessel his co-worker noticed a left facial droop and speech difficulty. An

ambulance was dispatched to the scene and Petitioner was taken to MacNeal Hospital for immediate medical treatment.

The history contained in the MacNeal records reflect:

> "60 Y/O smoker was @ work fixing a wind turbine 40 ft in the air & states he started getting "nauseous". He climbed down lower had trouble "finding words". Co-worker noticed L facial droop & called 911". (PX.2.)

The same history is contained in the neurological consultations performed by Dr. Wojcik and Dr. Kramer.

Petitioner was changing out the windsock atop a vessel on the pre-flash building at Respondent's chemical plant at the time of his injury at work. "In the course of" refers to the time, place, and circumstances under which the accident occurred. *Caterpillar Tractor Co. v, Industrial Commission,* 129 Ill.2d 52 (1989). The Arbitrator notes that the Petitioner's injury occurred during his work shift outside the pre-flash building completing a work order to remove the windsock for Respondent. Therefore, the Arbitrator finds that Petitioner sustained an accident on June 8, 2017 in the course of Petitioner's employment with Respondent.

Petitioner's injury must also arise out of his employment. The Arbitrator finds that it does.

Among the elements that the Petitioner must establish is that his condition of ill-being is causally connected to his employment. *Elgin Bd. of Education U-46 v. Workers' Compensation Comm'n,* 409 Ill. App. 3d 943, 948 (2011). 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. Indus. Comm'n*, 128 N.E.2d 718, 720 (Ill. 1955). The workplace injury need not be the sole factor, or even the primary factor of an injury, as long as it is a causative factor. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 205 (2003). Thus, if a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Id.*

"A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in a disability may be sufficient circumstantial evidence to prove a causal connection between the accident and the employee's injury." *Int'l Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63-64 (1982). If a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. *Schroeder v. Ill. Workers' Comp. Comm'n*, 79 N.E.3d 833, 839 (Ill. App. 4th 2017).

In *Sisbro*, the Illinois Supreme Court rejected the argument that the "normal daily activity" exception bars recovery when the claimant's physical condition has so deteriorated that the condition of ill-being could have been produced by normal daily activity, despite a causal connection between the work and the condition. *Twice Over Clean v. industrial Comm'n,* 214 Ill.

2d 403, 412 (2005) *citing Sisbro*, 207 Ill.2d at 208-09. Instead, the Court held "whether `any normal daily activity is an overexertion' or whether `the activity engaged in presented risks no greater than those to which the general public is exposed' are matters to be considered when deciding whether a sufficient causal connection between the injury and the employment has been established in the first instance." *Twice Over Clean v. industrial Comm'n,* 214 Ill. 2d 403, 413 (2005) *citing Sisbro*, 207 Ill.2d at 211-12. The Court has never initially found a causal connection to exist between work and injury and then, as a further analytical step, denied recovery based on a "`normal daily activity exception.'" *Twice Over Clean v. industrial Comm'n,* 214 Ill. 2d 403, 413 (2005) *citing Sisbro*, 207 Ill.2d at 212.

> "When an employee with a preexisting condition is injured in the course of his employment, serious questions are raised about the genesis of the injury and the resulting disability. The Commission must decide whether there was an accidental injury which arose out of the employment, whether the accidental injury aggravated or accelerated the preexisting condition or whether the preexisting condition alone was the cause of the injury. * * * However, the Commission's decision must be supported by the record and not based on mere speculation or conjecture. If there is an adequate basis for finding that an occupational activity aggravated or accelerated a preexisting condition, and, thereby, caused the disability, the Commission's award of compensation must be confirmed." *Sisbro*, 207 Ill.2d at 215, 278 Ill. Dec. 70, 797 N.E.2d 665.

Petitioner testified without contradiction that he became nauseous while removing a windsock over 50 feet in the air from a vessel atop the raised platform of the pre-flash building. Paul Carenen testified that Petitioner's speech became slurred and he had a left facial droop. (Transcript at 143-144) Petitioner had none of these symptoms before climbing up the ladder. (Transcript at 136.) Petitioner testified he could see "fumes" coming from the tank depicted in Group 3A (Transcript at 122) The tank contains phthalic anhydride. (Transcript at 33) Greg Bambule was dispatched to the accident site and called the guard house to request an ambulance. (Transcript at 165) Mr. Bambule did not climb up the ladder outside the vessel to determine where the winds were blowing. (Transcript at 179-180)

Petitioner was diagnosed with a lacunar infarct which affected his left side. The Arbitrator notes Petitioner had no prior history of stroke, heart disease, cerebrovascular disease, nausea, dizziness, speech problems, seizures, diabetes, chronic high blood pressure, hypertension or sleep apnea. (Transcript at 46-49)

Pursuant to Section 12 of the Act Petitioner was examined by Dr. Neil Allen, a neurologist, on January 24, 2018. It is Dr. Allen's opinion that Petitioner has a number of personal risk factors that caused or contributed to this stroke, including: obstructive sleep apnea, cigarette smoking, mild hypertension, and male sex. (RX.6 p.47-48) Dr. Allen testified that the Petitioner suffered a lacunar stroke to his brain secondary to cigarette smoking, hypertension, male sex, and possible hereditary factors. (RX.6 p.46) Furthermore, Dr. Allen testified that he "found no evidence that phthalic anhydride produces any vascular change, alternation of blood pressure that would be causally related to having a stroke." (RX.6 p.58)

Dr. Allen acknowledged the temporal relationship between the onset of Petitioner's symptoms and the work activities he was doing on top the ladder that day. (RX.6 p.94) Dr. Wojcik noted in his neurological consultation that "he (Petitioner) was performing activities that might have increased right sided pressures." (PX.2) Dr. Allen agreed when asked at his deposition that Petitioner was performing activities that would increase the right-sided pressures. (RX6 at 96) Dr. Allen also testified that in forming his opinion as to the cause of Petitioner's stroke, it did not matter to Dr. Allen what level of exertion Petitioner experienced when changing the windsock. (RX6 at 98). The Arbitrator finds the testimony of Dr. Allen to be mostly credible but believes that it is contradictory in a significant way on causation because Dr. Allen acknowledged that Petitioner's act of changing the windsock could increase right-sided pressures but then testified that Petitioner's level of physical exertion was not relevant to his opinion. Dr. Allen can credibly opine that Petitioner's stroke was caused primarily and even overwhelmingly by things other than his work activities on June 8, 2017, and be correct but all Petitioner has to do to prove his case is to show that his work activities were a cause of his injury.

Petitioner's own uncontroverted testimony is that he was in a condition of good health, exerted himself at work, and then suffered a stroke. First, the Arbitrator finds that Petitioner suffered a stroke while engaged in a work activity that was an activity, more strenuous than a normal daily activity, that a maintenance repairman in an industrial setting was called to perform by his employer. Moreover, the Arbitrator finds the opinions of Dr. Wojcik more credible that the testimony of Dr. Allen to the extent that Dr. Allen dismisses Petitioner's work activities as a complete non-factor in causing the stroke. Dr. Wojcik observed Petitioner the day of his stroke and wrote in contemporaneous medical records that Petitioner's work activities may have contributed to his stroke. Under *Sisbro* and *Twice Over* Clean, based on the medical records admitted into evidence along with Petitioner's and other witnesses credible testimony, the Arbitrator finds that Petitioner's stroke arose out of his employment.

The Arbitrator considered all the testimony regarding whether fumes were present when Petitioner suffered a stroke. The Arbitrator finds that whether or not fumes were present and inhaled by Petitioner does not change the finding that Petitioner's stroke arose out of his employment because Petitioner's activities could have increased his right-sided pressures.

Petitioner testified credibly throughout the trial and was the only person who was ever present on top of the tank when changing the windsock. It was on top of the tank that Petitioner testified he smelled fumes. The purpose of the windsock is so that if there is a chemical fume leak, the plant employees will know which way the wind is blowing so that appropriate actions can be taken. (Transcript at 88) Even though it does not change the finding that Petitioner's stroke arose out his employment, the Arbitrator finds that Petitioner inhaled fumes while on top of the tower changing the windsock.

WITH RESPECT TO ISSUE (E) WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO RESPONDENT? THE ARBITRATOR FINDS AS FOLLOWS:

Respondent disputes notice even though its own employees witnessed Petitioner's decline in medical condition, assisted him, called an ambulance, and then two of Respondent's employees testified at trial regarding the same.

Petitioner's co-worker, Paul Carenen, called the plant and safety supervisor, Greg Bambule, over to the pre-flash building after observing Petitioner's condition. Greg Bambule, Petitioner's supervisor, Ralph Soto, superintendent, Mike Bokowy, and plant manager, Jason Bach, all came out to the platform after the accident. (Transcript at 41-42, 79-80). Jason Bach visited Petitioner in the emergency room later that day where they discussed the stroke Petitioner experienced at work earlier that morning. (Transcript at 81)

Petitioner testified he went to the Administrator that day he got out of the hospital to complain about his benefits and was told it was not established whether it was workman comp and was instructed to fill out an application for short-term disability benefits. (Transcript at 117-118). A week later Petitioner again reported the accident to his supervisor and questioned him regarding his benefits.

Based upon the Petitioner's credible testimony along with the evidence presented at hearing the Arbitrator finds that timely notice of the accident was given to Respondent.

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

Petitioner's testimony regarding the accident at work is consistent with the history contained in the emergency room records at MacNeal Hospital which states:

> "60 Y/I M smoker was @ work fixing a wind turbine 40 ft in the air & states he started getting "nauseous". He climbed down lower and had trouble "finding words". Co-worker noticed L facial droop & called 911. (PX.2)

The medical records indicate that Petitioner suffered a stroke.

Petitioner testified without contradiction that he suffered a stroke while removing a windsock over 50 feet in the air. Petitioner had no prior history of stroke, hypertension, or sleep apnea. Petitioner was working fulltime/full duty performing a physically demanding job as a maintenance mechanic for Respondent prior to his June 8, 2017 injury at work. The Arbitrator finds the testimony of the Petitioner to be credible and accurate.

Petitioner worked for Respondent almost 39 years without experiencing a stroke at work. Petitioner smoked the last 25 years he worked for Respondent. It was not until Petitioner became nauseated atop the platform that he suffered a stroke.

Dr. Wojcik noted in his neurological consultation that "he (Petitioner) was performing activities that might have increased right sided pressures." (PX.2) As stated above in (C), the Arbitrator finds the opinions of Dr. Wojcik more credible that the testimony of Dr. Allen on the critical issue of whether Petitioner's work activities were a cause of his injury and current condition. Therefore, based upon the medical records admitted into evidence along with

Petitioner's credible testimony, the Arbitrator finds that Petitioner's stroke is causally related to the June 8, 2017 accident at work.

WITH RESPECT TO ISSUE (G) WHAT WERE PETITIONER'S EARNINGS? THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner testified he worked the third shift from 7:00 a.m. to 3:00 p.m. (Transcript at 13) Petitioner testified that he worked overtime and that overtime work was mandatory. (Transcript at 13) The overtime work depended on the task Petitioner was performing that day. (Transcript at 13-14) Petitioner did not have the option of refusing overtime. (Transcript at 84) The wage records admitted into evidence reflect Petitioner worked overtime 86% of the time during the year prior to the injury at work. (PX.6)

Section 10 of the Illinois Worker's Compensation Act provides as follows:

> The compensation shall be computed on the basis of the "Average weekly wage" which shall mean the actual earnings of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the last day of the employee's last full pay period immediately proceeding the date of injury, illness or disablement excluding overtime, and bonus divided by 52; but, if the injured employee lost 5 or more calendar days during such period, whether or not in the same week, then the earning for the remainder of the 52 weeks shall be divided by the number of weeks and parts thereof remaining after the time so lost has been deducted... 820 ILCS 305/10.

Petitioner testified he missed 5 or more days from work in the year prior to the injury at work. (TR.24) Pursuant to *Sylvester v. Industrial Commission*, 197 Ill.2d 225, 756 N.E.2d 822, 258 Ill.Dec. 584 (2001) the second method for calculating Petitioner's earnings applies. Petitioner worked 34 full weeks and 13.4 partial weeks for a total of 47.4 weeks in the year prior to the injury at work. (PX.6) Petitioner's combined earnings including overtime are $71,526.44. Therefore, pursuant to Section 10 of the Act Petitioner's average weekly wage is $1,509.00 ($71,526.44 ÷ 47.4 weeks = $1,509.00)

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

The Arbitrator has determined that Petitioner suffered a stroke at work removing a windsock atop a vessel on the pre-flash building. The Arbitrator finds the medical treatment Petitioner received for the stroke was reasonable and necessary medical treatment. Respondent denied the claim and Petitioner submitted the medical expenses to his group health insurance carrier. (Transcript at 73) Therefore, the Arbitrator finds that Respondent shall pay to Petitioner the reasonable and necessary medical expenses, pursuant to the Illinois Medical fee schedule and

Section 8.2 of the Act as identified in (PX.1,2,3,5 and 7). Furthermore, Respondent is entitled to a credit pursuant to Section 8 (j) of the Act for any and all payments made.

WITH RESPECT TO ISSUE (L) WHAT TEMPORARY BENEFITS ARE IN DISPUTE? MAINTENANCE AND TTD. THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner was restricted from all work activity following his June 8, 2017 injury at work. (Transcript at 53) On September 19, 2107 Dr. Kramer released Petitioner back to work without restrictions. (PX.3.) However, Respondent would not allow Petitioner back to work without performing a company physical capability evaluation. (Transcript at 63) Petitioner underwent IPCS testing 3 times between October and January 2018. (Transcript at 64-67). Respondent did not take Petitioner back to work since he didn't meet the 50 pound lifting requirement on the left arm. (Transcript at 67-68).

According to Petitioner, the results of his first test, which he took on October 4, 2017, revealed some weakness, so he had to repeat the test. (Transcript at 66, 106). The IPCS test of October 4, 2017 revealed that Petitioner scored a 1.43 placing him at medium-heavy duty level and indicated that the goal was a 1.56 or higher (heavy duty). (Px.5) The summary section of the report indicates "Mr. Stitts' rating is below the Heavy strength rating that is recommended for the Maintenance Mechanic position, he is not recommended to return to work as a Maintenance Mechanic." (Px.5) Respondent wouldn't take Petitioner back to work based upon the results of the company testing (Transcript at 67-68) The last test was completed in January 2018. (Transcript at 66-67) The results of Respondent's mandated IPCS testing indicated that Petitioner tested at the medium-heavy duty level on Janurary 11, 2018. (Transcript at 108)

Regarding IPCS testing, Petitioner testified that this type of testing was not a company-wide standard. (Transcript at 105) IPCS tests are given by Respondent's physicians to employees who are deemed to have medical conditions that are not work-related. (Transcript at 105). Petitioner had to pass the IPCS test before Respondent would permit him to return to work. (Transcript at 105)

Dr. James released Petitioner back to work without restrictions on February 15, 2018. However, Respondent failed to allow Petitioner back to work. (TR.69) Petitioner continued to contact his supervisor, Ralph Soto, and Superintendent, Mike Bokowy, about his return to work without any success. (Transcript at 71-72).

Consequently, Dr. James ordered a Functional Capacity Evaluation which Petitioner completed on March 16, 2018. (PX.7) This was a 4-hour test which measured Petitioner's physical demand level. The FCE results demonstrated Petitioner's ability to work at a medium to heavy demand level which Petitioner contends meets or exceeds the physical requirements of a maintenance mechanic. (PX.7) Petitioner testified the maximum over the shoulder lift is 40-50 pounds. (TR.24) Greg Bambule agreed with Petitioner's testimony regarding his job description. (TR.159) The FCE results of occasionally lifting 62 pounds above shoulder, 82 pounds occasionally desk to chair, 87 pounds occasionally chair to floor and carry 79 pounds all meet or exceed the physical demands of Petitioner's work as a maintenance mechanic for

Respondent. On March 22, 2018, Dr. James released Petitioner to perform medium-heavy work with no restrictions. (PX.5)

In short, Petitioner believes himself capable of returning to work and desires to do so but Respondent disagrees, and through its own testing regimen, denied Petitioner's requests to come back to work.

Therefore, the Arbitrator finds Petitioner is entitled to Temporary Total Disability benefits of $1,006/week for 41 weeks commencing on June 9, 2017 through March 22, 2018. Furthermore, the Arbitrator finds Petitioner is entitled to maintenance benefits of $1,006/week for 7 and 6/7 weeks commencing March 23, 2018 through the date of the 19(b) hearing.

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

Petitioner's treating neurologist, Dr. Kramer, released Petitioner back to work without restrictions on September 19, 2107.

The IPCS test of October 4, 2017 revealed that Petitioner scored a 1.43 placing him at medium-heavy duty level and indicated that the goal was a 1.56 or higher (heavy duty). (Px.5) The summary section of the report indicates "Mr. Stitts' rating is below the Heavy strength rating that is recommended for the Maintenance Mechanic position, he is not recommended to return to work as a Maintenance Mechanic." (Px.5) Respondent would not take Petitioner back to work based upon the results of the company testing (Transcript at 67-68) The last test was completed in January 2018. (Transcript at 66-67) The results of Respondent's mandated IPCS testing indicated that Petitioner tested at the medium-heavy duty level on Janurary 11, 2018. (Transcript at 108)

On March 16, 2018, Petitioner completed a valid Functional Capacity Evaluation. (PX.7) The results demonstrate Petitioner's ability to lift 50 pounds over the shoulder. (PX.7) On March 21, 2018 a copy of the Functional Capacity Evaluation was presented to Respondent along with a request to allow Petitioner to return to full duty employment. (PX.9) On March 22, 2108 a copy of Dr. James' disability certificate releasing Petitioner to perform medium-heavy work activities with no restrictions was sent to Respondent along with a request to allow Petitioner back to work. (PX.10)

However, Respondent took the position that this FCE result was insufficient to allow Petitioner to return to work. (PX.11)

In an effort to resolve the dispute and return back to work a copy of the Union job description was provided to the physical therapist at ATI who performed the Functional Capacity Evaluation. After reviewing the document, the physical therapist stated "Petitioner meets the individual lifting requirements stated in the Union job description and may return to work within the stated guidelines of the FCE". (PX.7)

Thereafter, on April 10, 2018 a copy of the addendum to the FCE was presented to Respondent along with Petitioner's request to return back to work. (PX.14) A follow up request was sent on April 12, 2018. (PX.15) Respondent refused to allow Petitioner to return to work. (TR.72).

It is worth noting that the discrepancy between what Petitioner's treating physicians and own FCE find and Respondent's ICPS testing results is fairly small. The Arbitrator also finds it commendable that Petitioner has made numerous attempts to return to work. However, the Arbitrator finds that Respondent and Petitioner have an honest disagreement as to whether Petitioner is ready to return to work, and therefore denies Petitioner's request that penalties be imposed.

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

Respondent denied Petitioner's claim for workers' compensation benefits (Transcript at 73) Petitioner received 6 months of short-term disability benefits through Aetna. (Transcript at 82). Respondent paid the premium on the disability insurance and is entitled to a credit pursuant to Section 8(j) of the Act. Petitioner received short-term disability benefits in the amount of $14,040.18 (gross) (RX.2.)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tyler Jones,

Petitioner,

vs. No. 18 WC 14632

State of Illinois/Menard Correctional Center,

Respondent.

19IWCC0521

DECISION AND OPINION ON REVIEW

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

The Commission agrees with the Arbitrator's assessment to afford greater weight to the opinions of Dr. Sudekum over those of Dr. Paletta. Dr. Sudekum possessed a better understanding of the manner and method in which Petitioner performed his job. Certainly, there is no legal requirement that Petitioner present evidence as to the percentages of a day a certain task is preformed, or the force required. *Edward Hines Precision Components v. Industrial Commission*, 356 Ill. App. 3d 186, 194 (2005). The Commission, though, must consider the evidence, or lack thereof, as to whether Petitioner's job duties are sufficiently repetitive to support a finding of accident. See *Williams v. Industrial Commission*, 244 Ill. App. 3d 204, 614 N.E.2d 177 (1993). Petitioner failed to present sufficient evidence to support a finding of a compensable accident based upon a repetitive trauma theory of recovery as it relates to Petitioner's diagnosis of bilateral cubital tunnel syndrome.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 22, 2019, is hereby affirmed with changes.

19IWCC0521

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.

Pursuant to §19(f)(1) of the Act, there shall be no right of appeal as the State of Illinois is Respondent in this matter.

DATED: SEP 2 0 2019
o-08/20/2019
SM/sk
44

Stephen Mathis

Douglas McCarthy

L. Elizabeth Coppoletti

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

JONES, TYLER Case# **18WC014632**
Employee/Petitioner

19IWCC0521

MENARD CORRECTIONAL CENTER
Employer/Respondent

On 1/22/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.46% 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:

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

0558 ASSISTANT ATTORNEY GENERAL
KENTON J OWENS
601 S UNIVERSITY AVE SUITE 10
CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
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1350 CENTRAL MANAGEMENT SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

JAN 22 2019

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

19IWCC0521

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

TYLER JONES
Employee Petitioner

Case # 18 WC 14632

v.

Consolidated cases: _____

MENARD CORRECTIONAL CENTER
Employer Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Herrin**, on **11/15/18.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **5/2/18**, 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 $**57,083.64**; the average weekly wage was $**1,097.76**.

On the date of accident, Petitioner was **25** years of age, *single* with **0** dependent children.

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

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

Respondent is entitled to a credit of $ **any benefits paid through group** under Section 8(j) of the Act.

ORDER

Benefits are denied. Petitioner alleged injuries to his hands and wrists and Dr. Paletta and Dr. Sudekum agree that Petitioner does not have carpal tunnel syndrome. Benefits are denied as to Petitioner's elbows as no injury was alleged in the Application for Adjustment of Claim to the elbows and if there was an injury alleged to the elbows, Petitioner has failed to prove an accident arising out of his employment to the elbows.

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

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

1/19/19
Date

JAN 22 2019

The Arbitrator makes the following findings of fact:

This is a decision on a repetitive trauma claim. The issues in dispute are accident, causation and prospective medical care.

The petitioner, a 25-year-old Correctional Officer for Respondent who worked at Menard Correctional Center, alleges accidental injuries to his bilateral hands and wrist due to repetitive work activities with an effective date of loss of May 2, 2018. (Arb. Ex. 2) The Petitioner began working for Respondent in September 2013 as a Correctional Officer at Menard Correctional Center. (T-31) In August 2016, Petitioner began working as a Correctional Sergeant. (T-20)

On May 15, 2018, Petitioner filed his Application for Adjustment of Claim in this matter. (Arb. Ex. 2)

On May 2, 2018, Petitioner was examined by Dr. George Paletta with complaints of numbness and tingling in his bilateral hands and elbows. (Px. 3) Petitioner was referred to Dr. Paletta by his attorney, Thomas C. Rich. (T-25) Dr. Paletta ordered nerve conduction studies along with an EMG of the upper extremities. (Px. 3)

The studies were done by Dr. Daniel Phillips on May 2, 2018 and showed mild-moderate ulnar neuropathies across the cubital tunnels. (Px. 4) Dr. Phillips' exam noted the Petitioner was muscular and had a body builder's physique, but denied weight lifting. (Id.)

Dr. Paletta's review of the studies showed bilateral cubital tunnel syndrome and no significant carpal tunnel syndrome. (Px. 3)

Respondent had Petitioner examined by Dr. Anthony Sudekum pursuant to Section 12. (Rx. 5) Dr. Sudekum examined Petitioner on July 5, 2018. (Id.) Dr. Sudekum opined that Petitioner has bilateral cubital tunnel syndrome which was not caused or aggravated by his work activities. (Id.) Dr. Sudekum has a certificate of added qualification for hand surgery. (Rx. 6, pg. 81) Dr. Sudekum has toured Menard Correctional Center. (Id. at 10)

Dr. Sudekum performed a physical exam on Petitioner; performed a nerve conduction study and reviewed medical records. (Id. at 20, 21, 22)

Dr. Sudekum opined that Petitioner had co-morbid facts that could lead to the development of cubital tunnel syndrome. (Id. at 26) Petitioner is moderately obese, with a BMI of 33.1. (Id. at 21) Petitioner had a rapid weight gain from 170 pounds to 211 pounds in a few years. (Id. at 23) Dr. Sudekum noted that Petitioner was muscular and had a body builder physique but denied weight lifting. (Id. at 26)

Dr. Sudekum testified that Petitioner was not suffering from carpal tunnel syndrome. (Id. at 35)

Petitioner's Staff Assignment history was admitted into evidence. (Rx. 3) Petitioner has held a variety of jobs at the facility including many that do not involve bar rapping or keying doors such as writ officer and tower assignments.

Petitioner filed his application for adjustment of claim alleging injury to his bilateral hand and wrists. Both Dr. Paletta and Dr. Sudekum agree that Petitioner does not have carpal tunnel syndrome. (Px. 7, pg. 11; Rx. 7, pg. 35)

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent with regards to the right hand?

A claimant must prove by the preponderance of credible evidence all elements of the claim in order to receive compensation under the Act. Orisini v. Industrial Commission, 117 Ill. 2d 38, 44-45, 509 N.E.2d 1005, 109 Ill. Dec. 166 (1987). In cases involving the repetitive trauma concept, the petitioner must show the injury arose out of and in the course of his employment and was not the result of a normal degenerative aging process. Peoria County Bellwood Nursing Home v. Industrial Commission, 115 Ill. 2d 524, 505 N.E.2d 1026, 106 Ill. Dec.235 (1987).

Simply performing work over a period of years is not legally sufficient to prove that work is repetitive enough to cause an increased to the petitioner. Id.

The Arbitrator also notes a claimant fails to prove a causal relationship through repetitive trauma where the medical opinion upon which they have relied is based upon incorrect or incomplete information about the claimant's job duties. See, e.g., Lon Dale Beasley v. Decatur Public School #61, 03 IIC 301; Jerry Wiser v. American Steel Foundries. 02 HC 310; Vicki Staley v. BroMenn Lind Medical Hills Internists, 99 IIC 539.

The Commission has determined a claimant fails to prove causation from repetitive trauma when the treating physician testified repetitive motions caused the injuries but failed to detail what repetitive motions the petitioner engaged in and the frequency of the motions. Gambrel v. Mulay Plastics, 97 IIC 238.

Additionally, in cases involving a repetitive trauma theory, the claimant generally relies on medical testimony to establish a causal connection between the claimant's work and the claimed disability. See, e.g., *Peoria County Bellwood*, 115 Ill.2d 524 (1987); *Quaker Oats Co.* v. *Industrial Commission*, 414 Ill.2d 326 (1953). When the question is one specifically within the purview of experts, expert medical testimony is mandatory to show claimant's work activities caused the condition of which the employee complains. See, e.g., *Nunn v. Industrial Commission*, 157 Ill. App. 3d 470, 478 (4th Dist. 1987). The causation of compression neuropathy via repetitive has been

deemed to fall in the area requiring such expert testimony. *Johnson v. Industrial Commission*, 89 Ill. 2d 438 (1982).

The right to recover benefits cannot rest upon speculation or conjecture. *County of Cook v. Industrial Commission*, 68 Ill. 2d 24 (1977).

The Commission decision Clay v. Hill Correctional Center, 12 I.W.C.C. 0152, is instructive to this case. In Clay, the Commission noted that testimony of locking and unlocking hundreds of doors was unpersuasive testimony to show that those job duties aggravate carpal tunnel syndrome when there is no mention of the force required to do these activities. (Id.) Likewise, in this case there is no testimony about the force to perform any of the activities listed by Petitioner.

The Arbitrator also notes that finds the testimony of Dr. Sudekum more credible than that of Dr. Paletta. Dr. Sudekum is board certified and has the added qualification for hand surgery. (Rx. 6, Ex. 1)

Dr. Sudekum has toured the Menard Correctional Center and observed a correctional officers perform their job duties.

Petitioner's job duties at Menard have varied over the years. At the time of the alleged accident, Petitioner had worked for Menard for less than 5 years. His assignment history shows jobs that did not involve bar rapping or keying inmates, such as tower, catwalk, escort officer and Sergeant duties. (Rx. 3)

Beginning August 2016, Petitioner was assigned a Correctional Sergeant. As a Sergeant, Petitioner does not have to bar rap the individual cell doors.

At trial, Petitioner is a well-developed muscled individual. Petitioner has a BMI that placing him in moderately obese category which could lead to development of cubital tunnel syndrome. Petitioner had a 40 pound weight gain since 2011 which could lead to the development of cubital tunnel syndrome.

The evidence shows that Petitioner has bilateral cubital tunnel syndrome. The doctors disagree as to the cause of the condition. Petitioner's application for adjustment of claim does not allege any injury to the elbows.

Petitioner has alleged injuries to the writs and hands. All the physicians agree that Petitioner does not have carpal tunnel syndrome.

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

Based upon paragraph D, paragraph F is moot.

19IWCC0521

K. Is Petitioner entitled to any prospective medical car?

Based upon paragraph D, paragraph K is moot.

Therefore, the Arbitrator concludes that:

1. Petitioner failed to prove an accident that arose out of his employment that is related to his work duties as to Petitioner's elbows.
2. Petitioner failed to prove an accident that arose out of his employment that is related to his work duties as to Petitioner's hands and wrists as Petitioner does not have carpal tunnel syndrome.
3. Benefits are denied.

STATE OF ILLINOIS	)		
	) SS.		
COUNTY OF SANGAMON	)		

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DARA HALLIBURTON,

Petitioner,

vs.

NO: 17 WC 31060

19IWCC0522

STATE OF ILLINOIS, ILLINOIS DEPARTMENT OF TRANSPORTATION,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Arbitrator's award of prospective temporary total disability benefits is hereby stricken. Section 19(b) of the Act provides that payment of temporary total disability may be awarded up to the date of the hearing only and shall be reviewable and enforceable in the same manner as other awards and in no instance a bar to a future hearing and determination of a further award of temporary total disability.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 25, 2019 is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay temporary total disability benefits of $790.67 per week for 64 3/7 weeks, for a total of $50,941.74 for the period of September 26, 2017 through December 21, 2018, as provided in Section 8(b) of the Act. Respondent shall receive a credit for benefits previously paid in the amount of $40,463.88 and shall pay the remaining amount of $10,477.86.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for all prospective medical care pertaining to Petitioner's right knee and low back, including the knee surgery recommended by Dr. Kefalas. Respondent shall authorize and pay for epidural transforaminal injections by a pain management specialist as recommended by Dr. Rahman.

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.

19IWCC0522

Pursuant to Section 19(f)(1) of the Act, there shall be no right of appeal as the State of Illinois is Respondent in this matter.

DATED: SEP 2 0 2019
o-08-20-19
SM/msb
44

Stephen Mathis

Douglas McCarthy

SPECIAL CONCURRENCE/DISSENT

I concur with the majority in all aspects of its decision other than its order to compel Respondent to authorize medical treatment. This issue was previously addressed by the Court in *Hollywood Casino-Aurora, Inc. v. Illinois Workers' Compensation Commission*, 2012 IL App (2d) 110426WC, which is dispositive. The Court noted "Assuming for the sake of analysis that this provision of the Act [Section 8(a)] is sufficiently broad so as to include a requirement that an employer authorize medical treatment for an injured employee in advance of the services being rendered, the fact still remains that there is no provision in the Act authorizing the Commission to assess penalties against an employer that delays in giving such authorization." *Id.* at ¶ 19. Ordering Respondent to authorize medical treatment is meaningless where no enforcement mechanism exists under the Act. In accordance with Section 8(a) of the Act and the Court's holding in *Hollywood Casino*, I would order Respondent to provide and pay for the awarded medical expenses and/or treatment.

L. Elizabeth Coppoletti

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

HALLIBURTON, DARA
Employee/Petitioner

Case# **17WC031060**

SOI-IL DEPT OF TRANSPORTATION
Employer/Respondent

19IWCC0522

On 2/25/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.45% 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:

0333 SHAY AND ASSOCIATES LAW FIRM
TIMOTHY M SHAY
260 E WOOD ST
DECATUR, IL 62523

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

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

1430 CMS BUREAU OF RISK MANAGEMENT
WORKERS' COMPENSATION MANGER
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

FEB 25 2019

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

19IWCC0522

STATE OF ILLINOIS)

)SS.

COUNTY OF **SANGAMON**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

DARA HALLIBURTON
Employee/Petitioner

Case # **17** WC **31060**

v.

Consolidated cases: ____

STATE OF ILLINOIS/IL DEPARTMENT OF TRANSPORTATION
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christina Hemenway**, Arbitrator of the Commission, in the city of **Springfield**, on **December 21, 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. [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, **September 25, 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 $**1,186.00**; the average weekly wage was $**1,186.00**.

On the date of accident, Petitioner was **38** years of age, ***married*** with **5** dependent children.

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

Respondent shall be given a credit of $**40,463.88** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**40,463.88**.

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

ORDER

As explained in the Arbitration Decision, Petitioner's current condition of ill-being with regard to her right knee and low back is causally related to the accident of September 25, 2017. Petitioner has not reached maximum medical improvement and Respondent shall pay for ongoing medical care.

Respondent has previously paid all medical bills contained within Petitioner's Exhibit 7, which indicate a zero balance to each provider. Respondent is not liable for additional amounts.

Respondent shall pay temporary total disability benefits of **$790.67** per week for **64 3/7 weeks**, for a total of **$50,941.74**, for the period of **September 26, 2017, through December 21, 2018**, as provided in Section 8(b) of the Act. Respondent shall continue to pay benefits until such time as Petitioner is released to full duty or Respondent provides her with light duty work within her restrictions or she reaches maximum medical improvement. Respondent shall receive credit for benefits previously paid in the amount of **$40,463.88**, and shall pay the remaining amount of **$10,477.86**.

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

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

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

Signature of Arbitrator

February 21, 2019
Date

ICArbDec19(b)

FEB 25 2019

19IWCC0522

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

DARA HALLIBURTON
Employee/Petitioner

v. Case #: **17 WC 31060**

STATE OF ILLINOIS/IL DEPARTMENT OF TRANSPORTATION
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

This cause came before the Arbitrator on Petitioner's Section 19(b) Petition. The parties placed into dispute the issues of causal connection, past medical treatment, prospective medical treatment, and temporary total disability. The parties stipulated that Petitioner sustained an accident that arose out of and in the course of her employment. The parties further stipulated that at the time of the accident Petitioner was 38 years old, married, had five dependent children, and had an average weekly wage of $1,186.00. The nature and extent of Petitioner's injuries is not currently at issue.

Petitioner's Testimony

Petitioner testified that on September 25, 2017, she was employed as a flagger for Respondent and had been so employed for about a week or two. She had been hired out of the union hall for the specific project of putting in a drainage pipe on the side of a two-lane country road near Shelbyville, Illinois. She testified that not long after she started work that day, around 7:34 a.m., she was standing by the side of the road with a sign directing traffic to stop. A car began to drive down the hill toward her but was not slowing to stop. She testified that she waived the sign in an attempt to get the car to stop, but as it continued to approach, she ran for cover to avoid being struck. The car only stopped after it hit the cooler that was right in front of her. She testified that she had been holding the sign in her right hand and, when she ran to take cover, she turned quickly to the left to run down into the ditch. Immediately following the incident, she was shaking and frightened and crying. She did not initially notice that she had been injured, and attempted to continue working, but shortly thereafter she noticed pain in her right leg and hip.

Petitioner testified that following the accident she made a statement to Dwayne Carr, who completed an accident/incident report. The Supervisor's Report stated that Petitioner was flagging when a van driven by Tammy Wearle failed to stop, and that she moved out of the way and was not hit, but her lunch bucket was. RX1. Petitioner testified that this portion of the Supervisor's Report was accurate, though she clarified that the lunch bucket was the cooler she had referred to, which was a large cooler holding all the drinks. The Supervisor's Report further stated "[a]t first she said she was not hurt, but now her leg hurts." RX1. Petitioner disagreed that she made that statement to Mr. Carr. She testified that she was crying and after Mr. Carr spoke with the driver he came back to her, and she said she needed to get herself together and call her mom. She testified that she walked to her car and sat for a while before coming back to work. As she was walking between the left and right side of the road to let cars go, her right leg started hurting and she was limping. She called for another employee, Mike, who she spoke to before going back to her car. The supervisor, Mr. Carr, was then called. Petitioner provided her statement to Mr. Carr on his return to the site.

In addition to the Supervisor's Report, Petitioner completed a Workers' Compensation Employee's Notice of Injury that day. In that report, she documented that her leg hurt at the hip and that her knee was swollen. RX1.

Petitioner testified that following the accident she was unable to drive, and she called her mom to pick her up. Her mom then drove her to St. Mary's Hospital Emergency Room, where she underwent several diagnostic studies and was prescribed hydrocodone. She testified that she was instructed by St. Mary's to follow up with the workers' compensation doctor for the State of Illinois, but when she called she was told they could not see her unless they received something from the workers' compensation carrier. When she called "worker's comp", she was told to find her own physician, which is what she did.

Petitioner testified that she began treating with Dr. John Kefalas, an orthopedic surgeon in Decatur, on September 29, 2017. He ordered an MRI of her right knee and an MRI of her lumbar spine and kept her off work. She returned to Dr. Kefalas after the MRI's and, based on the findings, she was referred for a whole-body scan to potentially rule out cancer. She followed up with Dr. Kefalas' office after the scan and was evaluated by a Physician's Assistant. At that time, she continued to have muscle spasms in her back and issues with her knee catching. She testified that she was on crutches for her knee, which seemed to be causing worse pain in her lower back. She underwent physical therapy from October 17 through November 16, 2017, which did not provide relief. She returned to Dr. Kefalas on November 17, and underwent an injection into her right knee, which did not provide relief. She returned on December 20, at which time Dr. Kefalas recommended surgery to the right knee. She testified that her most recent visit with Dr. Kefalas was June 25, 2018, at which time he continued to recommend right knee surgery.

Petitioner testified that at some point she stopped using the crutches and began wearing a knee brace because the crutches were bothering her back more. Dr. Kefalas did not prescribe the brace, but she informed him in June that she was wearing it and explained why. She testified that he indicated she could continue the knee brace if it worked for her. It was noted on the record that Petitioner was wearing the brace at the time of trial. She testified that she does not wear it every day, but does "wear it a lot", and that it provides relief.

Petitioner testified that she had also seen Dr. Rahman, a neurosurgeon in Decatur, on December 12, 2017. He recommended lumbar pain management injections, which have not been approved by Respondent.

Petitioner testified that she continues to have pain in her lower back, which comes and goes and is located just above the belt line. She testified that approximately once a week the pain travels down to her knee and on some days it goes down to her foot, causing it to tingle.

Petitioner testified that her right knee continues to catch and pop and some days it swells, which interferes with her activities for the day. She testified that she has more bad days than good with regard to her knee, that when it pops out of place the pain is indescribable, and that it is terrible when the weather changes. She does not drive because she is afraid her knee will catch and that she will not be able to get her leg right.

Petitioner testified that she had received temporary total disability benefits for a period of time, that the payments had been irregular, and that they were initially paid at a lower rate than what was stipulated to at the time of trial. She testified that at no time has Respondent provided work within restrictions suggested by the IME physician, Dr. Williams, which were no climbing of stairs or ladders and no prolonged sitting. She testified that if such work had been made available within those restrictions, she would have done her best to attempt to perform that work, even though her treating physician, Dr. Kefalas, has kept her off.

On cross-examination, Petitioner acknowledged that she was not currently a State of Illinois employee, nor was she ever a permanent State employee. Rather, she was hired out of the union hall on a temporary basis. She testified she has been a flagger out of the union hall since 2008. The work usually starts around March and ends late November or early December, and is sometimes hit and miss. She is called out to work by the union hall when work is available. She confirmed that she has not recently received a call from the union for a job because they have her off work slip, and she has been placed on the "out of work list". She testified that, when working out of the union hall, if you have any restrictions they will not call you out to work. She confirmed that prior to her work injury, the union hall was her primary income source and she has not applied for any other type of employment.

Petitioner testified that some days are better than others as far as her knee pain, and that when the weather changes "it's terrible". She testified that her right knee had caught a couple times on the day of trial, and that some days she can walk fine, and on others she walks with a limp due to pain. She testified that some days she can stand for prolonged periods of time, and some days she cannot. During physical therapy she walked on a treadmill, but only a little, as that is what was recommended. She denied any self-limiting in that regard. She is not currently on any pain medication. She testified that her pain is not getting better but not getting worse, except on days when the knee swells. She acknowledged that she is able to carry groceries.

Medical Records

Respondent's Exhibit 1 contains several accident reports completed on the day of the accident, September 25, 2017. (1) Petitioner completed the Employee's Notice of Injury and stated a lady was driving fast into the work zone, she waved her sign, the lady kept coming, she ran and was scared, and the lady hit her cooler. She reported that her leg hurt at the hip and her knee was swollen. (2) Dwayne Carr completed the Supervisor's Report of Injury and stated Petitioner was flagging, an SUV failed to stop, she jumped out of the way to keep from being hit, and she injured her right leg and hip. (3) Dwayne Carr also completed and signed an IDOT Employee Accident/Incident Report. The history of accident was consistent. Mr. Carr indicated that Petitioner was not hit but her lunch bucket was, and that at first she said she was not hurt but now her leg hurt. The report was also signed by Petitioner. (4) an Employer's First Report of Injury was completed by TriStar and mirrored the information in the other reports. RX1.

Following the accident, Petitioner presented to St. Mary's Hospital on September 25, 2017, complaining of right hip and thigh pain. She was examined by Dr. Hamid Sagha, who noted tenderness along the lateral aspect of her right femur and thigh. X-rays were completed of her right femur, right knee, right ankle, right leg, and right foot. The studies where reviewed by radiologist Dr. Daniel Roubein, who noted no acute fractures. Dr. Sagha diagnosed lower extremity musculoskeletal pain and prescribed Hydrocodone for pain. Petitioner was discharged home with instructions to follow up with a primary care physician in three days, although it was noted that she did not have a primary care physician. PX1.

On September 29, 2017, Petitioner presented to orthopedic surgeon Dr. John Kefalas of the Central Illinois Bone & Joint Center. She reported she was working on a construction site stopping cars when a car ran her off the road. She suddenly moved and felt pain in her right leg, lower back, and knee. She complained of pain in her right lower leg, which radiated from her lower back. She denied any prior back or right leg pain. On examination, Dr. Kefalas noted that she was having a difficult time ambulating, and that she was very tender over the right sacroiliac joint and lower buttock area. He noted this reproduced right leg symptoms. He also noted some pain with internal and external rotation of the hip. Assessment was back pain and right leg pain. Dr. Kefalas opined she may have a lumbar disc herniation or sacral injury and may have a right knee meniscal tear. He ordered MRIs of the lumbar spine and right knee. He instructed Petitioner to remain off work and to return to the clinic after the MRIs were completed. PX2.

On October 10, 2017, Petitioner presented to Decatur Open MRI for an MRI of her lumbar spine. The MRI was reviewed by radiologist Dr. Philip McDonald, who noted disc bulges at L4-5 and L5-S1 with neuroforaminal narrowing. PX3. On October 11, Petitioner returned for an MRI of her right knee. Dr. McDonald noted: (1) a radial tear of the anterior horn of the medial meniscus and undersurface fraying/tearing of the posterior horn of the medial meniscus; (2) undersurface and superior articular surface fraying of the anterior horn of the lateral meniscus and superior articular surface fraying of the posterior horn of the lateral meniscus; and (3) ovoid abnormal hypointense bone marrow signal of the distal femur and proximal tibia, nonspecific. PX4.

On October 13, 2017, Petitioner returned to Dr. Kefalas, who reviewed the MRIs and recommended a whole-body bone scan to rule out activity in the lesions of the distal femur and proximal tibia. Petitioner was referred to physical therapy for her right hip and right knee. She was instructed to remain off work. PX2.

Petitioner presented to St. Mary's Hospital on November 1, 2017, for the bone scan, which was reviewed by radiologist Dr. Anton Johnson. Dr. Johnson noted foci of mildly increased tracer accumulation in a pattern consistent with degenerative disease. PX5.

On October 17, 2017, Petitioner presented to Athletico Physical Therapy for an initial evaluation by therapist Lynn Hanson. She reported a consistent history of the accident, that afterward she sat down for a few minutes, and when she got out of the car she noted stiffness. She complained of tingling in her right foot that started in the glut area and went down her right leg, spasms in the low back, back pain that increased with walking, and right knee pain that was sharp and diffuse in the knee and quad. PT Hanson noted that testing was limited due to pain. Assessment was symptoms consistent with diagnosis, decreased function secondary to right knee/lower extremity/back pain, weakness, decreased range of motion, stiffness, weightbearing and postural deficits, and difficulty walking. Therapy was recommended for two times a week for nine weeks. Petitioner attended therapy on October 20, 24, 26, 31, and November 2. Throughout treatment, her complaints were consistent, with some days better or worse. PX6.

On November 3, 2017, Petitioner returned to the Central Illinois Bone & Joint Center and was evaluated by Physician's Assistant Cami Kistenfeger. She reported some improvement in her low back over the past week of therapy, though she continued to have muscle spasms down her leg. She stated her back was the most symptomatic. The Arbitrator notes that Petitioner testified she was using crutches at this time, and that they were making her lumbar pain worse. PA Kistenfeger's assessment was low back strain and right knee meniscal tear. She prescribed Flexeril for the muscle spasms, which she noted were limiting Petitioner in physical therapy. She instructed Petitioner to remain off work and to return in two weeks. She noted that if her knee became more symptomatic, an arthroscopy would be considered to address the meniscal tears. PX2.

Petitioner underwent therapy on November 7, 9, 14, and 16. Throughout treatment, her complaints were consistent, with some days better or worse. On November 7 it was noted there was an increase in symptoms with right knee "flexion OP" and that Petitioner reported "popping on TM with pawing". On November 16, 2017, PT Boone provided a Progress Note to Dr. Kefalas and reported that Petitioner continued to experience pain in the right knee rated at 7/10 and pain in the low back rated at 5-6/10 after taking a muscle relaxer. She was able to bend her knee more since beginning therapy, but reported that the knee felt "mushy" and swollen. Petitioner reported that she has to stand for 8 to 14 hours a day at work and must be able to intermittently walk for at least 5 hours. PT Boone noted in the assessment section that Petitioner continued to have deficits that would prevent her from returning to work and that she would benefit from continued physical therapy. PX6.

On November 17, 2017, Petitioner was again evaluated by PA Kistenfeger. She continued to report spasms in her lower back and pain down the side of her right leg. She noted that the Flexeril had helped. She reported an episode at therapy two weeks prior, where she was attempting a leg press when she developed pain and swelling behind her patella and pain down her leg. She stated that the swelling had not gone down, and she rated her pain at 8/10. Examination showed tenderness over the lumbar spine, minimal pain over the right lateral hip, excellent straight leg raise, and tenderness across the front of her knee. Impression was right

knee synovitis with meniscal tear, and low back strain with early degenerative changes. Petitioner underwent an injection into the right knee, administered by Dr. Kefalas. She was also referred for a spine consultation, in lieu of therapy and medications, due to her ongoing back issues. She was instructed to remain off work and to follow up in one month. PX2.

On December 12, 2017, Petitioner presented to Dr. Mohammed Rahman of Neuroscience Center Decatur regarding her radiating low back pain. She gave a consistent history of the work accident and reported that her pain began at that time. She denied any prior back issues. She reported that she had completed physical therapy for her back and knee, which provided no relief. Dr. Rahman conducted an examination and reviewed the lumbar MRI, which he noted did not reveal any acute surgical findings. Assessment was low back pain and radiculopathy. He recommended a referral to pain management for epidural transforaminal injections. PX9.

The records from Dr. Rahman indicated that on December 26 his office called "Jason" requesting approval for the referral for the injections. On January 2, 2018, a note was entered by Olivia Howe following a conversation with "Carolyn", case manager with TriStar, who advised that the injections were not approved and that the only approved body parts were the right hip, leg, and knee. She further noted that an IME was scheduled for January 22. On January 5, 2018, Ms. Howe noted that Petitioner called and advised she had received a letter stating she was approved for the injections. Ms. Howe relayed the information received from Carolyn about the denial, and further noted that she left a voicemail for the adjuster Jason regarding approval of the injections. PX9. The Arbitrator notes that Petitioner testified that the recommended injections were never approved and that she had not received them as of the date of hearing.

On December 20, 2017, Petitioner returned to Dr. Kefalas. She reported that the knee injection had not helped, that the knee was still quite painful, and that she was having a difficult time bending it. Dr. Kefalas noted that she was still using crutches. He noted the failed conservative treatment of physical therapy and injection. He recommended an examination under anesthesia as well as a right knee arthroscopy to inspect the chondral surfaces and meniscal structures of the right knee. Dr. Kefalas noted the procedure would be scheduled once it was authorized. He continued to keep Petitioner off work. PX2.

The next treatment record is June 25, 2018, when Petitioner returned to Dr. Kefalas. She continued to complain of pain over the medial aspect of the right knee and reported that she was not working. It was noted that she was wearing a brace. Dr. Kefalas advised that he was still trying to obtain authorization for the right knee arthroscopy. On examination, there was minimal pain with right hip motion, tenderness over the medial joint line and medial patellofemoral region, and equivocal meniscal signs. Dr. Kefalas again recommended the arthroscopy to evaluate the chondral surfaces and the menisci, and noted that he had made multiple attempts to get authorization for the surgery. Petitioner was instructed to continue Tylenol and use of the brace. PX2. Dr. Kefalas further instructed Petitioner to remain off work. PX13. The Arbitrator notes that the off work slip, though dated June 25, 2018, was not provided to Respondent until the day of the hearing.

On May 4, 2018, Dr. Kefalas testified by way of deposition. He is a Board Certified Orthopedic Surgeon with a subspecialty certificate in orthopedic sports medicine. He testified

that he provides medical and surgical treatment for knee injuries as part of his practice. He testified consistent with his treating records. PX13.

Dr. Kefalas testified that he first saw Petitioner on September 29, 2017, at which time she was complaining of right leg and back pain and denied a prior history of same. He testified that when he subsequently saw her on November 17, 2017, her right knee was clearly more symptomatic following an incident which had occurred two weeks prior in physical therapy. He testified that on December 20, 2017, he was concerned about her decreasing knee motion, and so recommended a diagnostic right knee arthroscopy. PX13.

Dr. Kefalas testified that, based on the MRI of the right knee and his examination, it was difficult to determine whether the findings were the result of an acute injury or a degenerative process. However, he noted that Petitioner clearly sustained an accident at work, that she potentially twisted her knee and strained her lumbar spine while trying to avoid the car, and that this resulted in her symptoms. Further, she clearly had a right knee event during physical therapy. Dr. Kefalas testified that his recommendation for an arthroscopy was causally related to her workplace injury, that the procedure would be both diagnostic and therapeutic, and that he thought he would find an articular cartilage injury under her kneecap. PX13.

Dr. Kefalas testified that he kept Petitioner off work when he saw her on December 20, 2017, and that he had not placed an expiration date on that restriction. He noted that the restriction was mainly for her knee. PX13.

On cross-examination, Dr. Kefalas testified that Petitioner was 5 foot 4 inches tall and weighed 190 pounds, which might contribute to some risk factor for developing degenerative changes in the knee, but that he had not come across any other risk factors. He opined that she was quite young, and that he was not aware of a history of arthritis. He testified that the arthroscopy he recommended would be both diagnostic and therapeutic, and that he believed he would find articular cartilage injury underneath her kneecap. As to work status, he testified that when he last examined Petitioner it was difficult for her to walk, which would not allow her to work. When asked about light duty, he testified that Petitioner could perform light duty clerical work if available, but that she could not drive at that point. PX13.

On January 22, 2018, Petitioner was evaluated by Dr. Joseph Williams of the Orthopedic Center of Illinois, Respondent's Section 12 examiner. She reported a consistent history of the accident and her treatment to date. She complained of pain in her low back that radiated down her right leg and intermittent numbness and tingling. She also complained of significant pain in the right knee with difficulty ambulating. On examination, there was tenderness to palpation of the joint line medially and laterally of the right knee, no effusion or erythema, and no instability. It was noted that her gait was antalgic and that she was walking with a crutch. She expressed pain with any manipulation or palpation of the knee. Dr. Williams noted, "The pain and the grimacing appears to be out of proportion to what one would expect, given the force of the palpation." After obtaining a history, performing an examination, and reviewing the right knee and lumbar MRIs, Dr. Williams' assessment was (1) chronic lumbar degenerative disc disease; (2) low back pain; (3) lumbar strain; (4) right knee strain; and (5) chronic right knee meniscal degenerative tears. The Arbitrator notes that it is not clear from Dr. Williams' report whether he conducted an examination of Petitioner's lumbar area. RX5.

Dr. Williams opined that the MRI findings of both the knee and lumbar spine were degenerative in nature and preexisted Petitioner's work accident. He believed that the medical treatment to date had been reasonable and necessary, and that Petitioner was in need of additional treatment. Specifically, he opined that she would benefit from physical therapy and nonsteroidal anti-inflammatory medications. In addition, he opined that she may benefit from a knee arthroscopy and partial meniscectomy to better control her symptoms if she failed to see significant improvement with time, activity modifications, physical therapy, and injections. However, he expressed concern about Petitioner's long-term prognosis with any surgery, as he believed her responses to some of the physical exam manipulations appeared to be out of proportion to what would be expected. Dr. Williams opined that Petitioner should be working with restrictions of no climbing stairs or ladders and no prolonged standing. He did not believe there would be any permanent long-term restrictions. Finally, Dr. Williams opined that Petitioner had not reached maximum medical improvement because of the need for additional treatment, including the possibility of an arthroscopy with meniscectomy. RX5.

On September 6, 2018, Dr. Williams authored an addendum report in response to a request for his opinion as to right knee surgery. He opined that Petitioner had degenerative tears of the right knee, that the tears were related to her age and obesity, and that they were not related to her work accident. He stated, "The mechanism of her injury is not consistent with these degenerative tears." He opined that Petitioner had reached maximum medical improvement but would benefit from weight reduction, nonsteroidal anti-inflammatory medications, and the avoidance of any narcotic pain medication. RX5.

Dr. Williams testified by way of deposition on October 16, 2018. He is a Board Certified Orthopedic Surgeon with a specialty fellowship in spine surgery. He testified consistent with his reports. He opined that Petitioner's right knee condition was degenerative and related more to her obesity and age than to the work accident. He reiterated that at the time he examined Petitioner, she required restrictions of no climbing stairs or ladders and no prolonged standing. He noted, however, that the climbing restriction was the main restriction, with the standing restriction "the weakest of the two". The restrictions were based on both Petitioner's subjective complaints and natural history of the knee and lumbar spine problems. He reiterated his guarded prognosis for Petitioner, noting the degenerative nature of her conditions and the fact that her complaints upon examination did not appear realistic. With regard to Petitioner's lumbar pain, Dr. Williams testified that it was related to the degenerative changes seen in obese individuals and was not acute. He opined that a restriction of no prolonged standing would be appropriate. He testified that, separating the conditions of the knee and low back, Petitioner had reached maximum medical improvement as to the lumbar spine. RX6.

On cross-examination, Dr. Williams acknowledged that he had not reviewed any medical records which demonstrated that Petitioner had prior treatment to either her right knee or her lumbar spine, nor did she state that she had had any prior treatment. He agreed that a person could have degenerative findings, such as those on Petitioner's MRIs, and not have any symptoms. He conceded there was a temporal relationship between the onset of Petitioner's symptoms and the incident at work of her getting out of the way of the car, and conceded it was possible that the incident aggravated a preexisting degenerative condition which rendered her symptomatic. He testified, however, that Petitioner's description of the severity of her symptoms

did not go along with the degenerative changes visualized on the MRIs, which led him to conclude that there was magnification. RX6.

With regard to Petitioner's right knee, Dr. Williams agreed that the MRI has some limitations, with respect to diagnosis, and that the diagnostic arthroscopic procedure recommended by Dr. Kefalas would be reasonable. He testified that Petitioner was not at maximum medical improvement at the time of his exam, and that nonsteroidal anti-inflammatory medications, physical therapy, and potentially the knee arthroscopy would be appropriate. He testified that his opinion in his January 22, 2018 Addendum, that Petitioner had reached maximum medical improvement, was not based on a review of any additional medical records or examination, but rather on his anticipation of the natural course of her injury. He testified it remained his opinion that she may need a knee arthroscopy with meniscectomy. RX6.

With regard to Petitioner's lumbar pain, Dr. Williams testified that some degree of her back pain would be consistent with a sprain/strain from the accident, superimposed on her degenerative condition. RX6.

CONCLUSIONS OF LAW

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

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

A claimant has the burden of proving by a preponderance of the credible evidence all elements of the claim, including that any alleged state of ill-being was caused by a workplace accident. *Parro v. Industrial Comm'n*, 260 Ill.App.3d 551, 553 (1st Dist. 1994).

The Arbitrator finds that Petitioner's current condition of ill-being, with respect to both her right knee and her lumbar spine, is causally related to her work accident of September 25, 2017. In so concluding, the Arbitrator finds significant that the medical records are consistent throughout with regard to Petitioner's complaints and objective findings, which started immediately after the accident. The Arbitrator relies upon the medical records, as well as the testimony of Petitioner and Dr. Kefalas.

With respect to Petitioner's right knee, Dr. Kefalas testified that it was difficult to determine whether the MRI findings were the result of an acute injury or a degenerative process, but that Petitioner clearly sustained an accident at work, potentially twisting her knee while trying to avoid the car, and opined that this was the cause of her continuing symptoms. He also opined that she clearly had a right knee event during physical therapy, and the Arbitrator notes that an incident was referenced in the therapy record of November 7, 2017. Dr. Kefalas testified that his recommendation for an arthroscopy was causally related to her workplace injury.

Dr. Williams, on the other hand, testified that Petitioner's right knee condition was degenerative and related to her obesity and age. On cross-examination, however, he agreed that Petitioner's accident could have aggravated her degenerative condition, that there was a temporal relationship between the accident and the onset of her symptoms, and that she could have strained or sprained the knee and exacerbated her preexisting degeneration at that time.

Both medical opinions submitted into evidence, therefore, support a finding that Petitioner sustained an aggravation of her underlying knee pathology during her work accident of September 25, 2017, and that her current condition of ill-being is causally related to that aggravation. The Arbitrator therefore finds no genuine dispute between the causal connection opinions of Dr. Kefalas and Dr. Williams with respect to Petitioner's right knee.

To the extent that there is a dispute, the Arbitrator gives more weight to the opinions of Dr. Kefalas, for several reasons. First, as Petitioner's treating physician, Dr. Kefalas had significantly more time to examine, evaluate and treat Petitioner.

Second, Dr. Kefalas demonstrates a greater understanding of the mechanism of Petitioner's injury. In addition to the work accident, Dr. Kefalas testified that Petitioner's right knee clearly became more symptomatic following an incident which occurred during physical therapy. Dr. Williams, however, fails to mention this event in either his report of January 22, 2018, or his Addendum of September 6, 2018. It is therefore unclear whether he considered this event in formulating his opinions regarding the cause of Petitioner's condition of ill-being.

Third, Dr. Kefalas's opinions are more consistent with the medical evidence as a whole. While Dr. Williams opined that there was some symptom magnification, as Petitioner's complaints did not go along with the changes seen on the MRI, he also acknowledged that there had been diagnostic limitations with the MRI. He therefore agreed that the arthroscopy recommended by Dr. Kefalas would be reasonable. Dr. Kefalas opined that his recommendation for an arthroscopy was causally related to Petitioner's work injury, that it would be diagnostic as well as therapeutic, and that he expected he would find a cartilage injury under her kneecap. The Arbitrator finds Dr. Williams's opinion with respect to symptom magnification to be inconsistent with his acknowledgment of the need for further diagnostic evaluation.

With respect to Petitioner's back injury, Dr. Williams testified that Petitioner's lumbar pain was related to the degenerative changes seen on the MRI. He acknowledged, however, that Petitioner did not report any prior lumbar issues, that he did not review any records pertaining to prior lumbar treatment, and that a patient can have Petitioner's lumbar MRI findings without symptoms. He agreed that there was a temporal relationship between the work accident and the onset of Petitioner's symptoms, and that her lumbar pain was consistent with a sprain/strain from the accident, superimposed on her degenerative condition. Dr. Williams's testimony, therefore, supports a finding that Petitioner sustained an aggravation of her underlying lumbar pathology during the September 25, 2017 accident, and that her current condition of ill-being is causally related to that aggravation.

Based upon the foregoing and the record in its entirety, the Arbitrator finds that Petitioner met her burden of proof on the issue of causation with regard to both her right knee and her lumbar spine, and further finds that she has not reached maximum medical improvement.

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

Under Section 8(a) of the Act, a claimant is entitled to recover reasonable medical expenses, the incurrence of which are causally related to an accident arising out of and in the scope of employment and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury. *Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Comm'n*, 409 Ill.App.3d 463, 470 (4th Dist. 2011).

In light of the Arbitrator's findings with respect to issue (F), the Arbitrator finds that medical services rendered to date were reasonable and necessary in Petitioner's care and treatment relative to her accident of September 25, 2017. The parties stipulated and the Arbitrator finds that Respondent is entitled to a credit for all payments previously made to providers, including those made pursuant to Section 8(j), for which a credit is allowed. The Arbitrator finds that Respondent is liable for the medical bills set forth in Petitioner's Exhibit 7, subject to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act, and subject to prior payments. All of the medical bills in Petitioner's Exhibit 7 indicate that payments have previously been made by Respondent and that there is a zero balance as to each provider. As such, no additional payments are warranted or ordered.

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

Upon establishing causal connection and the reasonableness and necessity of recommended medical treatment, employers are responsible for necessary medical care required by their employees. Specific medical procedures or treatment that have been prescribed by a medical service provider have been "incurred" within the meaning of the statute, even if they have not yet been paid for. *Plantation Mfg. Co. v. Industrial Comm'n*, 294 Ill.App.3d 705, 710 (2nd Dist. 1997).

In light of the Arbitrator's findings with respect to issue (F), the Arbitrator finds that Petitioner is not currently at maximum medical improvement and is in need of further care. The Arbitrator finds that Respondent is liable for prospective medical care for Petitioner's right knee and her low back, including the knee surgery recommended by Dr. Kefalas. With respect to her low back, Petitioner was evaluated only one time by Dr. Rahman, on December 12, 2017, at which time he recommended referral to a pain management specialist for epidural transforaminal injections, which has not yet occurred. The Arbitrator is mindful that this recommendation was made more than one year prior to the date of hearing. To the extent that Dr. Rahman continues to recommend the injections, Respondent is liable for same.

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 order to be eligible for temporary total disability benefits, a claimant must prove not only that he did not work, but also that he was unable to work. *City of Granite City v. Industrial Comm'n*, 279 Ill.App.3d 1087, 1090 (5th Dist. 1996). 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, 887 (2nd Dist. 1990). The ability to do light or restricted work does not preclude a finding of temporary total disability. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill.2d 107 (1990), citing *Ford Motor Co. v. Industrial Comm'n*, 126 Ill.App.3d 739 (1984).

The record establishes that, as a result of her injuries, Petitioner has missed work from September 26, 2017, through December 21, 2018, the date of the hearing, for a period of 64 3/7 weeks. Respondent agrees that Petitioner has missed work for this period of time, but denies liability for same.

Petitioner was taken off work by St. Mary's Hospital Emergency Department on the date of accident, September 25, 2017. Dr. Kefalas continued her off work status when he began treating her on September 29, 2017. He testified that the off work status remained in place when he saw her on December 20, 2017, and that he had not placed an expiration date on that restriction. He saw Petitioner again after his deposition, on June 25, 2018, and his records reflect that he continued to have her off work at that time. The Arbitrator is mindful that Dr. Kefalas testified, on cross-examination, that Petitioner would have been able to perform sedentary clerical-type work. In addition, Dr. Williams testified that Petitioner could work with restrictions of no climbing stairs or ladders and no prolonged standing. However, Petitioner testified that Respondent had never offered her work within any of these restrictions, and her testimony was unrebutted by Respondent.

In light of the Arbitrator's findings with respect to issues (F) and (K), the Arbitrator finds that Petitioner was temporarily and totally disabled from September 26, 2017, through the date of hearing, December 21, 2018. Further, Petitioner is entitled to continued temporary total disability benefits until such time as she is released to full duty or Respondent provides her with light duty work within her restrictions or she reaches maximum medical improvement.

The parties stipulated that Petitioner's average weekly wage was $1,186.00. The Arbitrator finds that her temporary total disability rate is $790.67. The Arbitrator finds that Respondent is liable for 64 3/7 weeks of temporary total disability benefits of $50,941.74. The parties stipulated that Respondent previously paid TTD benefits of $40,463.88 and is entitled to credit for same, leaving a balance of $10,477.86.

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 CHAMPAIGN	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Desiree M. Vaughan n/k/a Bell,

Petitioner,

vs. No. 14 WC 28148

Odle, Inc., **19IWCC0523**

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review under §19(b) having been filed by the parties herein and proper notice given, the Commission, after considering the issues of causal connection, medical expenses, prospective medical care and temporary disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation, medical benefits or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327 (1980).

The Commission finds that Petitioner has not reached maximum medical improvement from the neuropsychological injury she sustained as a result of the work accident. In so finding, the Commission relies on the continuity of Petitioner's neuropsychological complaints and aberrant behaviors, and the opinions of Dr. Hall. The Commission is not unmindful of Petitioner's preexisting anxiety and ADHD, and does not disagree with the Arbitrator's finding of opioid dependence. However, having carefully considered the record, the Commission finds the work accident caused a downward spiral in Petitioner's mental health, from which she has not recovered. The Commission highlights that on March 25, 2016, Petitioner underwent a repeat neuropsychological assessment by Dr. Hall. Dr. Hall found a significant decline in Petitioner's psychoemotional status and opined that it would be difficult for Petitioner to be

employed until she got her psychoemotional distress under control and learned compensation strategies for her strengths and weaknesses with regard to memory and attention. The Commission awards the treatment recommended by Dr. Hall and additional temporary total disability benefits from March 25, 2016 through the date of the arbitration hearing on November 19, 2018.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 27, 2018, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $452.00 per week for a period of 179 2/7 weeks, from July 19, 2014 through April 29, 2015, and from March 25, 2016 through November 19, 2018, those being the periods of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation, medical benefits or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay, pursuant to §§8(a) and 8.2 of the Act: the medical bills in evidence related to Petitioner's right knee injury through December 26, 2014; the medical bills in evidence related to Petitioner's other injuries through April 29, 2015; and all medical bills in evidence from Dr. Hall.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for further treatment recommended by Dr. Hall, pursuant to §§8(a) and 8.2 of the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent 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.

19IWCC0523

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: SEP 2 0 2019
o-08/20/2019
SM/sk
44

Stephen Mathis

Douglas McCarthy

L. Elizabeth Coppoletti

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

VAUGH, DESIREE M NKA BELL Case# **14WC028148**
Employee/Petitioner

ODLE INC 19IWCC0523
Employer/Respondent

On 12/27/2018, 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 2.48% 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:

0834 KANOSKI BRESNEY
CHARLES N EDMISTON
129 S CONGRESS
RUSHVILLE, IL 62681

0265 HEYL ROYSTER VOELKER & ALLEN
DANIEL R SIMMONS
3731 WABASH AVE
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)

DESIREE M. VAUGHN, nka BELL,
Employee/Petitioner

Case # **14** WC **28148**

v.

Consolidated cases: ______

ODLE, INC.,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Urbana**, on **11/19/18**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches 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, **7/18/14**, 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 as it relates to her accident on 7/18/14 (excluding her right knee) ***is*** causally related to the accident on 7/18/14 through 4/29/15.

Petitioner's current condition of ill-being as it relates to her right knee ***is*** causally related to the accident on 7/18/14 through 12/26/14.

In the year preceding the injury, Petitioner earned $**32,256.00**; the average weekly wage was $**678.00**.

On the date of accident, Petitioner was **28** years of age, ***single*** with **1** 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 $**00.00** for TTD, $**9,211.38** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**9,211.38**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

ORDER

Petitioner's claim for prospective medical expenses is denied based on the arbitrator's finding that petitioner's current condition of ill-being as it relates to the injury (excluding the right knee) on 7/18/14 is only causally related to the injury on 7/18/14 through 4/29/15, and petitioner's current condition of ill-being as it relates to her right knee is only causally related to the injury on 7/18/14 through 12/26/14.

Respondent shall pay Petitioner temporary total disability benefits of $452.00/week for 40-5/7 weeks, commencing 7/19/14 through 4/29/15, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services for petitioner's injury on 7/18/14 (excluding the right knee) through 4/29/15 pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay all reasonable and necessary medical services related to the petitioner's right knee through 12/26/14, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act.

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

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

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

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

Maureen H Pulia

Signature of Arbitrator

12/18/18
Date

ICArbDec19(b)

DEC 2 7 2018

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 28 year old Apprentice Industrial Painter, sustained an accidental injury that arose out of and in the course of her employment by respondent on 7/18/14. On this day petitioner was employed with respondent through the Painters union to remove plastic wrap from the steel beams inside the large tank at the Sanitation District for Decatur. Petitioner testified that while attempting to remove plastic wrap off the steel beams she slipped on some plastic wrap and fell about 15 feet to a concrete floor. Petitioner testified that while on the steel beams she was unable to find anywhere she could tie off. Petitioner testified that after falling she lost consciousness for a while. After screaming for help she army crawled to the ladder in the tank and used her upper body strength and knees to get up the ladder and out of the tank at the cutout.

Petitioner was taken by ambulance to the emergency room at Decatur Memorial Hospital. The ambulance report noted that petitioner fell in a sewer hole and was complaining of pain to her posterior head, left scapula, lower back and left forearm area. Petitioner gave a history of falling 8 feet and landing on her rear end and struck her head on sidewall. She had an approximate ½" laceration to the posterior head with bleeding controlled. Petitioner also had an abrasion to her left forearm. Coworkers said petitioner was unconscious for around 2 minutes and then climbed out of the drain on her own.

In the emergency room petitioner was sleepy, tired and nauseous. She said she did not remember climbing out of the drain. Her neuro exam was normal. Her Glasgow coma scale was 15. She was oriented to person, place and time. Her speech and memory were normal. Her cranial nerves were intact. She had no focal motor deficits or focal sensory deficits. Her 5 cm scalp laceration was closed with 4 staples.

She remained an inpatient until 7/24/14. While inpatient petitioner was evaluated and treated. A CT of the head revealed evidence of a subarachnoid hemorrhage on the right sylvian fissure and scalp hematoma in the left parietal region. A CT of the cervical spine revealed no traumatic process. Chest x-ray was negative. X-ray of the left elbow revealed some limitations in technique, but no acute fracture or dislocation. There was a subtle lucency, but no clearly identified fracture. X-rays of left forearm, left humerus, sacrum, coccyx, and pelvis were negative. X-rays of the lumbar spine were negative for traumatic process. X-rays of the shoulders revealed no fracture or dislocations.

Her course in the hospital began with an admission to the IMC for observation. Her clinical status stabilized. Petitioner had some issues with pain control and nausea, which were controlled medically and with intravenous hydration. On 7/21/14 she was transferred to the floor. She was on a parenteral

regimen to an oral regimen. Follow-up CT scans showed resolution of the subarachnoid hemorrhage. There was a questionable contusion in the region of the falx anteriorly. Petitioner was discharged on 7/24/14 in stable condition. She was discharged on a combination of Norco and Phenergan to control her residual symptoms. She was to do light activity as tolerated. She was told not to drive, and not drink alcohol.

Petitioner was seen by Dr. Oliver Dold, a neurosurgeon, while inpatient and in follow-up for removal of her staples and for further clinical assessment. Dr. Dold noted that following the incident petitioner was unconscious for a couple of minutes, but was then able to get up and get out of the hole. He noted that she had good recollection of the event itself. She complained of headaches, nausea, vomiting and pain in her head, her left shoulder, her back and her neck. He noted no neurological symptoms of numbness, paresthesias, or bowel or bladder dysfunction. He noted that on admission to the hospital petitioner was alert and oriented with a coma score of 15. She had a large left parietal occipital hematoma with repaired scalp laceration, and mild tenderness in the neck. Petitioner had mild tenderness in the chest and abdomen, and pain in shoulders, left elbow, back and sacral area.

On 8/11/14 petitioner followed-up with Dr. Dold. She complained of headaches and nausea, and right retro-orbital pain. She also reported that her teeth hurt. She stated that her headaches were bad and she was sensitive to light and wears sunglasses. She stated that bending forward can precipitate a headache. She had multiple joint pains, as well as some hand and wrist complaints. She also had right knee popping. Petitioner stating that she was taking quite a bit of pain medication and some Phenergan for her nausea. Petitioner underwent x-rays of the left hand, right hand, right wrist and left wrist. All were unremarkable or showed no acute findings. An x-ray of the right knee showed no fracture, but did show some effusion. Dr. Dold was of the opinion petitioner was making progress with respect to her head injury and cerebral contusion. She reported no significant symptoms. He restricted her driving and told her not to return to work at that time. He suspected that petitioner had some soft tissue complaints.

On 8/14/14 petitioner presented to Dr. Costerisan for followup of her head injury. Petitioner stated she was still having difficulties with headaches, and sensitivities to both light and loud noises. She reported discomfort in her low back, left wrist and knee. Petitioner stated that she was struggling emotionally and financially as a result of her fall and subsequent hospitalization. Petitioner's past medical history included a history of attention deficit hyperactivity disorder. Petitioner's current medications included Alprazolam, Buprenorphine, Nalonone HCI, Hydrocodone-Acetaminophen, Paroxetine HCI, Sulfamethoxazole, and Tramadol. All these medications were prescribed in 2013.

Petitioner was examined and assessed with lower back pain, a cerebral contusion and a laceration with loss of consciousness, head injury, headache, right knee pain, and wrist joint pain. Counseling was recommended. Dr. Costerisan took petitioner off work.

On 8/21/14 petitioner called Dr. Dold for a refill of hydrocodone and promethazine. He refilled them.

On 8/26/14 Joe Greiner, at Odle, drafted a note identifying the descriptions for light/restricted duty, as well as a description of her normal job.

Petitioner followed up with Dr. Dold on 8/27/14. Petitioner reported that overall she felt better but was very distressed. She reported nightmares about the injury. She reported difficulty with her memory, thinking, and concentration. He stated that she cries constantly with a very low threshold to trigger significant emotional responses. He noted that she was not wearing her sunglasses. She reported significant back pain. She stated that the discomfort in her extremities was starting to settle down. Following an examination Dr. Dold's impression was that petitioner had post traumatic problems with respect to her head injury. He recommended a psychological referral, and antidepressants prescribed by her primary doctor. He also recommended a formal therapy program. He continued petitioner off work and instructed her to follow up in two weeks.

8/27/14 Dr. Dold drafted a letter to Dr. Hall. He noted that petitioner had a significant post traumatic syndrome with respect to her memory, emotional status and so on, following an injury on 7/18/14. He requested an evaluation and management in this regard by Dr. Hall. He wanted to know if neuropsychological testing would be appropriate. On 8/29/14 Dr. Dold drafted another script for hydrocodone. On 9/4/14 Dr. Dold refused a call from petitioner for another refill of Hydrocodone. On 9/8/14 Dr. Dold drafted another refill script for hydrocodone for petitioner.

On 9/10/14 petitioner had an appointment to see Dr. Dold and did not show. He sent her a letter telling her that if she was feeling better then there may be no need to followup. However, if she was still having continued difficulties then she should call and schedule another appointment. He also noted that she needed to establish herself with referrals for psychology and physical therapy since she had not done so. Dr. Dold noted that he could not reach her at the number she provided.

On 9/18/14 petitioner underwent a physical therapy evaluation at DMH Corporate Health Therapy for her head and back pain, as well as pain in her right knee and weakness in her left shoulder. Petitioner

presented for treatment on 9/24/14, 9/25/14, 10/2/14, and 10/3/14. Petitioner did not show for appointments on 10/1/14, 10/8/14, 10/10/14, 10/15/14, and 10/20/14.

On 9/18/14 Dr. Dold refilled her hydrocodone and promethazine. On 9/26/14 petitioner called Dr. Dold's office and stated that she wanted an additional refill of her hydrocodone. When Nurse Bonds refused because she was not due for more until 9/29/14, petitioner became argumentative. Bonds told petitioner he would not argue with her and that if she was misusing her Norco then that is why she is out.

On 9/29/14 petitioner returned to Dr. Dold. She reported ongoing headaches and dizziness. She complained of constant pain in her back. She stated that she saw Dr. Hall and was participating with her therapy. She stated that she was struggling to keep her appointments. He noted various psychosocial stresses which were significant. Following an examination Dr. Dold assessed significant psychological effects of her head injury with possible post-traumatic stress and so on, which Dr. Hall was addressing. He was of the opinion that she needed an antidepressant, and needed to start tapering down off her medications. He ordered a CT of the head. Petitioner was instructed to return to office on 10/14/15.

On 10/1/14 Dr. Dold's office called in another script for petitioner's hydrocodone and promethazine. On 10/6/14 petitioner called back and said she needed a refill of hydrocodone and was going through withdrawal. A refill was prescribed.

On 10/10/14 petitioner underwent a CT of the head without contrast, after she failed to show on 10/3/14. The impression was a negative CT of the head. A CT of the facial bones showed extensive mucoperiosteal thickening of the right maxillary sinus suggestive of chronic sinusitis.

On 10/10/14 petitioner followed up with Dr. Costerisan. She stated that she was still not feeling well. She complained of headaches, dizzy spells, periods of nausea, facial pain and pressure with bloody nasal discharge, memory loss, and depression. She stated that she cries uncontrollably at times and is struggling with her lack of improvement. She reported that she was in physical therapy but still had neck and back pain. Dr. Costerisan assessed head injury, headaches, lower back pain and depression with anxiety. He stated he would followup with Dr. Hall regarding an antidepressant. He continued her off work.

On 10/13/14 petitioner's mother called Dr. Dold's office and stated that petitioner had been in the Macon County Jail and was told that Dr. Dold would not give petitioner any pain medication. She wanted a call back. Dr. Dold spoke with the jail doctor Dr. Braco. Dr. Dold said he had no ability to prescribe meds while petitioner was in jail. Dr. Braco prescribed Motrin. Petitioner was to be released

from jail on 10/20/14. Petitioner's mother did not say why petitioner was in jail. Petitioner's appointment for 10/15/14 was cancelled.

On 10/27/14 petitioner called Dr. Dold's office and wanted an appointment ASAP. She provided a new phone number that she got that day. Dr. Dold's office changed her number in the computer. She was given an appointment on 11/3/14.

On 10/27/14 petitioner presented to Dr. Costerisan for an initial evaluation of depression. She complained of a gradual onset of constant episodes of moderate depressed mood. She stated that the episodes started 5-6 weeks ago. Dr. Costerisan was of the opinion that her symptoms were probably caused by stress and disability, improved by psychotherapy and meditation, and made worse by emotional stress. He stated that her symptoms were worsening. She noted a family history of depression, fatigue, sense of failure, poor concentration, indecisiveness, weight gain, insomnia, headaches, irritability and anxiety. Dr. Costerisan noted that petitioner has been compliant, had good tolerance of treatment, and poor symptom control with respect to her current psychotherapy treatment. A physical examination noted that petitioner was anxious, depressed, despairing, cried excessively, and was fearful. He prescribed Duloxetine HCI, medication for depression. Petitioner stated that she wanted to wean off Vicodin. Dr. Costerisan instructed her to follow up in 2 weeks.

Despite seeing petitioner on 10/27/14, Dr. Costerisan drafted a letter to petitioner stating that they had made several attempts to reach her by telephone and were unable to reach her.

On 11/3/14 petitioner returned to Dr. Dold. She reported some sinus drainage and blood, significant dizziness when she bends forward, and poor memory. She reported that she reestablished treatment with Dr. Hall, but her therapy was interrupted due to a recent incarceration. She complained of back pain. Following an examination Dr. Dold was of the opinion that petitioner probably had a posttraumatic stress disorder. He noted that she was a professional painter drywall finisher which requires working at heights. He was of the opinion that the need for the antidepressants was related to the injury. He noted that she was off her high dose of narcotics. He refilled her antidepressant. He noted that petitioner got relief from dizziness with Promethazine. He gave her another script for therapy. He continued her off work and told her to return to the office on 12/4/14. Petitioner was given referral to an ENT doctor Dr. Ulis for 11/5/14 for dizziness and sinus drainage. Petitioner was also given a referral for physical therapy.

On 11/10/14 petitioner did not show for appointment with Dr. Costerisan.

On 11/12/14 petitioner underwent another physical therapy evaluation at DMH Corporate Health Therapy for the same problems she was evaluated for on 9/18/14. Petitioner had only one additional session on 11/25/14. On 11/25/14 she reported moderate right knee pain noting that it pops when she gets up and bends her knee. Petitioner missed her appointments on 11/14/14, 11/19/14, 11/20/14, 11/21/14, 11/28/14, and 12/3/14,

On 12/1/14 petitioner called Dr. Dold's office for another refill of her Tramadol and Promethazine. She was told that all medication refills must go through Dr. Costerisan's office.

On 12/4/14 petitioner followed-up with Dr. Dold. Following an examination, Dr. Dold was of the opinion that petitioner was post multiple trauma with respect to her head injury and musculoskeletal problems. He noted that he spoke with Stephanie McBee at Corporate Health to reinitiate her therapy. He told petitioner her compliance must be 100% so that they can come to a resolution with respect to her rehabilitation. He noted that a few weeks of physical therapy should be followed by work hardening. He instructed petitioner to follow up in a month. He continued petitioner off work until 1/12/15.

On 12/17/14 petitioner underwent a third physical therapy evaluation at DMH Corporate Health Therapy for the same problems she was evaluated for on 9/18/14 and 11/12/14. Petitioner had additional sessions on 12/18/14, 12/19/14, 12/22/14, 12/26/14, 12/29/14, and 12/30/14. Petitioner missed her appointment on 12/24/14. On 12/26/14 petitioner reported that she was feeling awesome, had been playing on the floor with her son and nephew a lot the past few days and had not had significant pain in her knee or back with these activities. On 12/30/14 the therapist noted that petitioner had improved neck and back range of motion, and her lower extremity strength was within normal limits bilaterally. It was noted that she had tolerated lifting well in therapy and was ready to transition to work conditioning.

On 12/18/14 petitioner presented to the emergency room at Decatur Memorial Hospital with a cough, pain in ears and sore throat. Petitioner denied dizziness. Her speech and memory were normal. She was diagnosed with acute bronchitis.

On 12/30/14 petitioner was instructed to progress to work conditioning by her therapist. Petitioner reported improved neck and back range of motion. Her lower extremity strength was within normal limits bilaterally. She tolerated lifting well and was found ready to transition to work hardening.

On 1/7/15 it was noted that petitioner had attended 2 of her 4 work conditioning appointments so far. Her attitude and effort had been good.

On 1/7/15 Dr. Hall drafted a letter to Dr. Dold informing him that he had performed a comprehensive neuropsychological assessment secondary to a reported head injury and traumatic brain injury for evaluation of her cognitive, memory, and mood functions, including her ability to return to work. These tests were performed on 10/28/14 and 12/31/14. He noted that petitioner's overall profile indicated significant cognitive and memory deficits resulting in a diagnosis of Major Neurocognitive Disorder. He reported that petitioner's results were difficult to evaluate because on one test of effort and motivation she scored in the borderline range and on another in the clinical range, indicating significant psychoemotional distress as a component of her symptoms. On two other tests of efforts and motivation, petitioner had perfect scores, indicating adequate effort and motivation. Dr. Hall indicated that his impression was that petitioner had suffered some declines in her cognitive and memory function relative to her premorbid levels, but that psychoemotional distress (provisional diagnosis – posttraumatic stress disorder) was playing a significant role in her difficulties. He was of the opinion that it was clear petitioner needed significant psychotherapy and cognitive retraining, which were part of his recommendations. Dr. Hall recommended a course of Cognitive Behavioral Therapy to address petitioner's psychoemotional distress and develop more effective ways of coping with the changes her injuries have caused in her life. He was also of the opinion that petitioner needed help in understanding how her psychoemotional distress likely exacerbates her cognitive and memory symptoms.

On 1/8/15 the therapist in work conditioning noted that she received a call from petitioner's insurer indicating they had not yet approved work conditioning. Work conditioning was placed on hold pending approval.

On 1/12/15 petitioner returned to Dr. Dold. He noted that overall petitioner was making progress. He noted that her work hardening was interrupted due to some bureaucratic confusion regarding her authorization, but was cleared up. He also noted that she had seen Dr. Hall for an initial assessment, and Dr. Hall was planning further interventions. He noted that petitioner takes Tramadol occasionally for her symptoms. She still reported dizziness. Dr. Dold reported that Dr. Hall noted some definite neurocognitive deficits in his testing as a result of her injury along with some psychoemotional distress component. Dr. Dold was of the opinion that petitioner was stable with respect to her head injury and her musculoskeletal problems. He instructed petitioner to continue her work hardening and seeing Dr. Hall for these issues. He instructed petitioner to return on 2/2/15. He was of the opinion that once she finished work conditioning she would be a candidate for a functional capacity evaluation. He continued

petitioner off work until these processes were complete, particularly with Dr. Hall. He was of the opinion that petitioner's complaints of some dizziness may be related to her head injury.

On 1/28/15 petitioner underwent another physical therapy evaluation. It was recommended she reinitiate work conditioning. Petitioner did not show for appointments she set for herself on 2/4/15 for 2/5/15 and 2/6/15. Following these no shows petitioner was discharged from work conditioning due to non-compliance.

On 1/29/15 petitioner returned to Dr. Costerisan. She stated she was on Cymbalta for 7 days but had to stop because she could not pay for it. Dr. Costerisan noted that it was recommended that petitioner be on Zoloft due to her anxiety and sleeping difficulty, which had worsened. He also noted recurrent episodes of depression, which she described as moderate in severity. Dr. Costerisan examined petitioner and assessed depression with anxiety. He prescribed Sertraline. Petitioner was instructed to follow-up in three weeks. Dr. Costerisan did not provide petitioner with any work status.

On 1/30/15 Dr. Dold noted that petitioner's work hardening was being held up because they were still waiting for work comp approval. The case manager, Nurse Davis, stated that she had not heard from petitioner in two weeks and was not aware of a lapse in approval. She said she would look into it.

On 2/16/15 Dr. Dold sent petitioner a letter informing her that she had an appointment on 2/12/15 and did not show. He told her that Nurse Davis, her case manager was there. He asked petitioner to call the office and reestablish her appointment. Davis told Dr. Dold that petitioner only went to one physical therapy appointment.

On 2/25/15 Dr. Dold drafted an off work authorization taking petitioner off work through 3/30/15, following a call from petitioner on 2/24/15 informing him that her job has a class with a part that is hands on that she was to go to. She stated that she needs a note stating that she cannot attend work or school. Dr. Dold's office followed-up with Dr. Hall's office who noted petitioner had finished testing and had a follow-up appointment on 3/3/15. His office also called petitioner's physical therapy and found out she was discharged from care following 4 no-show appointments. Dr. Dold's office called petitioner and told her that if she does not follow through with plan of care she will be released from care.

On 3/16/15 petitioner presented to the emergency room at Decatur Memorial Hospital with dental pain following dental extraction and 6 fillings. She reported migraines due to a head injury. She stated that she was taking Tramadol at home without relief. She was diagnosed with acute odontalgia. She was told to follow up with dentist. She was prescribed Tylenol with Codeine. Petitioner denied any dizziness,

focal weakness, headaches, paralysis, parethesias or sensory changes. Her neuro examination showed petitioner was oriented to person, place and time.

On 3/30/15 petitioner returned to Dr. Dold. Petitioner told Dr. Dold that her work hardening schedule conflicts with her school work at the union hall. She stated that she was still seeing Dr. Hall and he told her that her memory and depression were getting worse. She complained of ongoing pain in her back, tailbone and hips, left worse than right. She denied any radicular pain or paresthesias. She reported some dizziness when climbing ladders. She noted that she was scared about going back to full duties because at times she has to go up 100 to 200 feet on ladders and equipment. Dr. Dold's impression was that petitioner's course of treatment was now protracted and that for various reasons she had not completed her work hardening. He released petitioner to work on 3/31/15 with a max lifting of up to 20 pounds, and no use of ladders. He told her to follow-up in 4 weeks. He saw no worrisome features clinically that would demand any further investigation at this time. He was of the opinion that her prognosis was somewhat guarded as she was a very complicated management scenario with her brain injury, posttraumatic stress disorders, depression, and so on. Nonetheless, he reassured petitioner that he did not see anything worrisome that would preclude a graduated return to her duties. Alternatively, he was of the opinion that in the long run she may need to reconsider her career options.

On 4/14/15 petitioner called Dr. Dold for an off work slip from the date of injury to the present. She was told Dr. Dold released her to work at his last visit and no new work note would be created.

On 4/17/15 petitioner went by Dr. Dold's office to talk about her off work slip. Dr. Dold's nurse contacted Dr. Hall's office. She was told that petitioner rescheduled her 2/27/15 appointment and did not show for appointments on 3/3/15, 3/27/15, and 4/19/15, even after a reminder hours beforehand.

On 4/29/15 petitioner returned to Dr. Dold. She told him she was seeing Dr. Hall, even though Dr. Hall had told Dr. Dold she had not. Petitioner told Dr. Dold that her old boss was ready to take her back and she felt ready to return to her prior duties. She stated that she had been going up and down some short ladders and felt reasonably steady. Dr. Dold's impression was that petitioner was stable post trauma. He noted that per petitioner's request he gave her a return to work. He believed she should be fine, and to use precaution when going up and down ladders. She stated that she takes Meclizine in the morning and she felt her symptoms were under control. He told petitioner that there was no need for regular follow ups any longer. If new concerns arose he would be happy to reevaluate. Dr. Dold released petitioner from his care on an as needed basis and returned her to full duty work with no restrictions on 4/30/15.

On 6/1/15 petitioner returned to Dr. Costerisan with her mother and a friend concerning her ongoing symptoms and concerns related to her accident 10 months ago. Petitioner reported a lot of emotional mood swings, anxiety symptoms, and difficulty sleeping constantly. Petitioner noted that she had been released by Dr. Dold to return to work but had been unable to find a job with her former company. She reported that she had a lot of financial issues and was unable to pay her bills. She stated that she was on medication for depression and takes promethazine for dizziness. She also stated that she sees a psychologist. Following an examination Dr. Costerisan diagnosed insomnia. He noted that she was in no acute distress and her mood seemed normal. He noted no other neurological findings. He prescribed Trazodone. He instructed petitioner to follow up in 2 weeks. He did not restrict her work or take her off work.

On 6/2/15 petitioner did not show for her appointment with Dr. Hall.

On 6/8/15 petitioner presented to the emergency room at Decatur Memorial Hospital with complaints of right leg pain. She reported problems for her right leg and stated that she had been seeing Dr. Dold for it, and he found no problem. She reported her right leg was more swollen than usual. She stated that she works construction and her right leg was giving her problems at work. She gave a history of a fall 10 months prior. Petitioner denied confusion, dizziness, focal weakness, irritability, lethargy, or mental status changes. A neuro examination noted that petitioner was oriented to person, place and time. Her speech and memory were normal. Her cranial nerves were intact. She had no focal motor, focal sensory, or cerebellar deficits. Petitioner underwent an ultrasound of the right lower extremity veins that showed no deep venous thrombosis. Petitioner was diagnosed with edema of the right lower extremity and generalized pain. She was prescribed Norco.

After leaving the emergency room petitioner presented to Julie Auton, a nurse practitioner in Dr. Costerisan's office for right leg and knee pain that began after a work accident 10 months ago. Petitioner also gave a history of shopping on 6/7/15 and feeling a sudden popping sensation in her right leg followed by increased right leg pain and then swelling in the right knee and lower leg. Dr. Costerisan assessed right knee pain and right leg swelling. Petitioner was referred to an ortho for further evaluation.

On 7/2/15 petitioner presented to Dr. Sullivan at Decatur Orthopedic Center for her right knee. She reported an injury a year ago when she fell 20 feet at work. She reported that her pain was located mainly in the anterior knee, worse with weight bearing and activity. She noted that her knee clicks, pops, locks and gives way. She also complained of low back pain. She stated that she has had no treatment for her

right knee. Dr. Sullivan was of the opinion, based on history and exam, that petitioner may have a meniscal tear or some other internal derangement of the knee. He ordered an MRI of the right knee.

On 7/10/15 petitioner returned to Dr. Costerisan for follow up of her medications and her right knee pain. Petitioner denied any knee instability, limping or inability to bear weight. She claimed she had ongoing knee pain since the accident and was only now getting it worked up because so much time until now was focused on her back and brain injury. An examination revealed no bruising, swelling or erythema. Some mild popping and crepitus with extension and flexion near the patella was noted. Petitioner had pain on the anterolateral part of the knee, without any medial or collateral ligament pain. Range of motion had little limitation and was 130. Petitioner was assessed with dizziness, depression with anxiety, right knee pain, and lower back pain. She was of the opinion that they were related to her work injury. An MRI of the right knee was ordered.

On 7/16/15 petitioner underwent an MRI of the right leg due to her entire right leg swelling up two weeks ago. The impression was oblique undersurface tear of the body and posterior horn of the medial meniscus; focal partial-thickness chondromalacia involving the junction of the medial and odd patellar facets; a small Baker's cyst; and mild thickening of the superficial proximal medial collateral ligament which raised the possibility of an old healed sprain injury.

On 8/24/15 petitioner returned to Dr. Sullivan for her right knee. Petitioner did not go to the hospital where the MRI was ordered. When asked about this she said she was told that he did not accept worker's compensation or public aid, which he noted was not true, and if it was he would not have seen her in the first place. Petitioner eventually had an MRI ordered by her primary care physician, and it was done at a different hospital. Petitioner was a no show for two clinic appointments before this appointment. Dr. Sullivan noted that petitioner noted no change in her condition. He noted that she had undergone no conservative treatment. Dr. Sullivan reviewed the MRI and noted that it showed a posterior medial meniscus tear and some degenerative changes at the patellofemoral joint. Dr. Sullivan noted significant difficulty arranging petitioner's care. He noted that her knee injury may be related to her fall injury, but she would need to work this out with her doctor's and lawyers. He recommended an arthroscopic surgery. He stated that he was available to discuss this with worker's compensation, the case workers, her employer and her attorney.

On 9/3/15 petitioner returned to Dr. Costerisan for a urinary tract infection, and on 9/28/15 for her annual health maintenance and gynecology evaluation.

Petitioner returned to Dr. Costerisan on 2/8/16 for a medication check. She stated that she was slowly improving and was back to work in a month. She wanted meds to stop smoking and for birth control. She stated that she was trying to decrease her use of hydrocodone. She reported intermittent nausea and dizziness along with headaches. Following an examination her assessment was depression with anxiety, dizziness, headaches, chronic pain, cigarette smoker and encounter for preventive health examination. She was instructed to follow-up in three months. Dr. Costerisan prescribed Tri-Sprintec and Chantix. He was of the opinion she was improving, and would be back to work in a month. He believed that his diagnoses could possibly hinder her ability to work, but he could not give an opinion one way or another. He did not address her work status.

On 2/24/16 petitioner presented to Dr. Hall with continued issues of cognition and memory issues following her traumatic brain injury, with ongoing litigation surrounding her injury. She requested an updated neuropsychological examination to compare with her baseline.

On 3/25/16 petitioner underwent a repeat neurophysiological assessment with Dr. Hall. She stated that she was returning per the insurance companies request. She stated that she had continued trouble with her memory, remained afraid of heights, and had migraines and nightmares. She reported symptoms consistent with PTSD and reported ongoing knee problems. She also stated that she was now engaged and planning her wedding. Dr. Hall's diagnostic impression was that petitioner's overall cognitive and memory function remained deficient. He noted that her pattern was still inconsistent, but generally fit a profile consistent with a mild traumatic brain injury/concussion and extreme psychoemotional distress. He also noted evidence that petitioner's symptoms may be exacerbated by her psychoemotional distress, with or without conscious exaggeration of those symptoms. His Diagnosis was Major Neurocognitive Disorder due to Traumatic Brain Injury and PTSD. He recommended that petitioner needed to commit to his recommendations and follow through with her treatment plan if she was going to recover. Cognitive Behavioral Therapy was recommended. He noted that all this treatment had been recommended to petitioner before but she never followed through with it on a consistent basis.

On 4/5/16 petitioner returned to Dr. Costerisan for her right knee pain. She stated that she saw Dr. Sullivan once but did not return because there was a dispute as to whether the visit should be paid by workers' compensation or her insurance. Petitioner had pain with full extension of the right knee when he pressed along the medial meniscus. Petitioner was assessed with backache, chronic pain with respect to her headaches, and derangement of the right medial meniscus. Dr. Costerisan renewed petitioner's

Tramadol and stopped her hydrocodone. He was of the opinion petitioner's knee problem occurred at the time of her initial injury on 7/18/14.

On 8/15/16 petitioner returned to Dr. Hall. She was receptive and interactive. Dr. Hall reviewed his report and recommendations. Petitioner was emotional and distraught and adamantly insisted that she could not remember things, gets confused and disoriented, gets sad, gets depressed and anxious, and this causes conflict with her boyfriend who does not understand. She insisted she wanted to go to work. Petitioner was oriented to place, person and date, but Dr. Hall noted evident cognitive and memory deficits.

On 2/21/17 petitioner returned to Dr. Costerisan for her annual health maintenance and gynecological evaluation.

On 6/13/17 petitioner returned to Dr. Costerisan for her chronic pain in her right knee. She stated that she waiting for surgery, but had no job at that time. She stated that she still took Promethazine as needed for her dizziness and headaches. She also stated that she takes Tramadol 3 times a day. Petitioner reported that she had no significant interval events with respect to her headaches. She reported stable headaches, nausea and aura. She denied vomiting, photophobia, phonophobia, paresthesias, localized weakness and scotoma. She identified associated symptoms as vertigo and lightheadedness. She reported no significant interval events as it was related to her depression. Her active problems were identified as backache, chronic pain, headache, and right knee pain. He instructed petitioner to follow-up in three months.

On 11/20/17 the evidence deposition of Dr. Leroy Hall, a clinical psychologist, and clinical neuropsychologist was taken on behalf of petitioner. Dr. Hall testified that when he first saw petitioner he did not have access to any of her medical records regarding her work injury. Dr. Hall testified that during his first assessment of petitioner she was very pleasant, and engaged in a brief, polite, social conversation. He noted no obvious signs of disorganization, delusions or psychosis. He also noted that her though process was congruent with her mood and the examination. He noted that she made a good effort on the task presented, but on some of her tests there was some evidence that maybe she had variable attention focus and motivation. In other areas she showed very good concentration.

Dr. Hall's ultimate conclusion as far as petitioner's effort and motivation was that some of petitioner's tests were questionable, and other tests were spot on meaning that perhaps there was a variation in her psychoemotional and functional level and ability to maintain her focus over the course of

four hours of testing. With respect to orientation, his conclusion was that petitioner was fully oriented to person, place and circumstance. He noted that she was functioning at least at a functional level of being able to engage in simple interactions and provide her own personal history. Dr. Hall's conclusions as to attention were low average attention, which he believed was probably lower than her previous level of function given her education, background, and employment as a union apprentice. Based on this information he believed she should be in the average range. He was of the opinion that a deficit in attention can result from a brain injury. Dr. Hall's conclusion as to memory was that petitioner's overall immediate auditory memory was moderately deficient. Dr. Hall's conclusion as to language performance was in the mildly deficient range with significant variations and inconsistencies, which were typical of what he sees in post-concussive situations. Petitioner's visuospatial construction performance was average, her executive function performance was average, her performance under motor function was mildly deficient in her right hand and low average in her left hand. Petitioner was independent with all her ADL care. With respect to her mood, Dr. Hall noted very severe clinically significant depressive symptoms as well as anxiety symptoms. He noted that his conclusion as to memory in 2016 remained unchanged, and her language scores from 2014 to 2016 declined.

Dr. Hall opined that his initial assessment of petitioner in 2014 was that she was suffering from residual effects of some kind of brain injury, most likely a concussion with maybe some post-traumatic stress involvement or psychoemotional involvement at least that was engendered by the injury she incurred and the subsequent distress of not being able to return to her employment and pursue those goals that she had had, one of which was to become a journeyman painter and achieve that level under the union rules. He noted that petitioner in her mind believed this was taken away from her as a result of the injury leaving her questioning what she was going to do with her future. He found some residual injuries or symptoms as a result of the injury she incurred, some of which have affected her attention and memory as well as language function, other of which are her psychoemotional state and her ability to manage her emotions.

Dr. Hall opined that petitioner's impairment is related to a traumatic brain injury. He diagnosed petitioner with a major neurocognitive disorder due to another medical condition, traumatic brain injury, which was causally related to her work accident. In 2014 he also had a provisional diagnosis of post traumatic stress disorder which was causally related to her work injury.

Dr. Hall believed petitioner needed to engage in a course of cognitive behavior therapy to help her understand her psychoemotional distress and how it exacerbates her cognitive memory problems, helping

her resolve those and find other ways of coping. He was of the opinion that this should also include cognitive retraining to help her develop strategies to use her strength to compensate for her weaknesses.

Dr. Hall noted that petitioner only followed-up sporadically after her initial assessment. She did not engage in a consistent course of cognitive behavior therapy or cognitive retraining which was recommended at both testings. He testified that petitioner's reason for this was that she would forget appointments, show up late or miss them, and then just stopped coming. Dr. Hall was of the opinion that this behavior could be related to her psychological injuries as a result of her work injury.

With respect to the 2016 assessment Dr. Hall was of the opinion that petitioner's overall status stayed the same, with improvement in visuospatial abilities on the RBANS, and a decline in her overall language functions. He noted that her psychoemotional functions also declined. He noted that she became more depressed, more anxious, and had a severe increase in her psychoemotional distress over the course of time, which was not unusual. He opined that this increase was causally related to her work accident.

Dr. Hall opined that petitioner was not able to work in her regular duty job during the period of time he was seeing her. Dr. Hall noted that after his second assessment his recommendation were essentially the same and petitioner again did not follow through consistently. He was of the opinion that it would be difficult for her to be employed until she got her psychoemotional distress under control and learned compensation strategies for her strengths and weaknesses with regard to memory and attention. He was of the opinion that it would be helpful if someone like a nurse would bring her to her appointments.

On cross examination Dr. Hall testified that after both the first and second evaluation petitioner's clinical follow-up was sporadic to the point of just not coming at all. He testified that he has no way of knowing whether her reasons for not showing up were due to forgetting the appointment or whether she just decided not to attend the appointments. He testified that if she had followed-up regularly after the first assessment she would have been seen once a week for two months, and then less frequently depending on her progress. She most likely would have treated consistently for a year, 2-3 times a month, depending on her improvement. Dr. Hall stated that petitioner's attendance did not reflect this and was sporadic in that she would come for a couple sessions, then not show, then call back for an appointment and be apologetic, and then she would do the same thing again, and then not recontact his office for months.

On redirect examination, Dr. Hall said that when she appeared for an appointment she participated actively.

On 6/4/18 petitioner presented to Dr. Costerisan to establish care again. She reported a history of a fall at work with traumatic brain injury, and now chronic back pain. She noted that she had been placed on hydrocodone and then started abusing it. She started the Methadone program at Heritage and stated that she had been clean for about a year. She reported that her injury left her with a change in her personality and some cognitive loss. She stated that she seems to forget a lot of little things. She stated that she had gone back to work at the Decatur Foundry after almost 4 years. However, the job was quite physical with a lot of dust exposure. She stated that she needed a respirator mask. She stated that she had been on Tramadol and Gabapentin for some time but ran out 2-3 weeks ago. She reported that she gets quite dizzy at times and permethrin seems to help. She noted that she had been separated from her child by DCFS due to parental drug abuse, but now had unsupervised visitation rights and hoped to complete the process of getting him back in the next month. Dr. Costerisan noted some flight of thought on exam. He also noted pain to palpation in the lumbar and low thoracic area. All other parts of her exam were normal including neurological and psychiatric. He could not state with any medical certainty what the cause of her flight of though was.

On 7/12/18 petitioner followed up with Dr. Costerisan to discuss her memory problems. She stated that she continued to struggle with short term memory. She stated that she was fired from her most recent job after 2 months because she could not remember how to do the required processes. She stated that the same thing happened with her job before that one. Petitioner stated that she was still struggling with vertigo when she does not take her promethazine. She stated that her pain seemed to be well controlled on tramadol twice a day and gabapentin twice a day. Petitioner stated that she had some upcoming disability hearings. Petitioner reported dizziness and headaches. During her examination petitioner's symptoms seemed to focus on poor short term memory, but Dr. Costerisan noted that it was difficult to assess at that time. Petitioner's psychiatric exam was normal. Dr. Costerisan was of the opinion that petitioner did not have short term memory problems that had changed since her injury. He noted that it was difficult to determine if she would have improvement. He gave her nicotine patches for smoking cessation and diagnosed chronic pain syndrome well controlled off hydrocodone and on Tramadol. Dr. Costerisan could not state with any medical certainty what was the cause of petitioner's memory problems or memory complaints. He was of the opinion that it could be related to some degree to the

work injury. He believed her treatment for her dizziness and pain are causally related to the work injury. He instructed petitioner to return in two months.

On 8/3/18 the evidence deposition of Dr. Dennis Costerisan was taken on behalf of the petitioner. Dr. Costerisan is a family medicine doctor with no board certifications. Dr. Costerisan noted that he had treated petitioner since she was a child. Dr. Costerisan testified that he did not recall petitioner complaining of memory problems, or exhibit being anxious and tearful prior to 8/14/14. Dr. Costerisan opined that on 10/10/14 petitioner's current condition of ill-being was causally related to her work accident. He noted that the depression he diagnosed on 10/10/14 was a new finding. He opined that the insomnia he diagnosed on 6/1/15 was related to her anxiety and depression, but he could not tie it to her work accident. He opined that the depression was related to her accident. He opined that her ongoing depression and anxiety on or about 6/1/15 could possibly affect her ability to work. Dr. Costerisan opined that the right knee pain petitioner complained of on 6/8/15 was causally related, at least in part, to her work accident. He further opined that the findings on the right knee MRI were related to the work injury.

Dr. Costerisan was of the opinion that petitioner's opioid abuse took place from when he last saw her in 2017 and when he saw her 2018. He was of the opinion that the medical assisted treatment program for opioid abuse was related to the pain medication she was using for her work injury. Dr. Costerisan testified that petitioner was still under his care. He stated that petitioner told him her memory problems were what she attributed her difficulty working to since she could not stay on task. Dr. Costerisan noted a change in petitioner from how she was before the work accident. He noted that she was more anxious, emotional, and had difficulty focusing when he talked to her. He was of the opinion that physically petitioner could work, but mentally she has a hard time focusing and remembering things. He noted that she had been compliant her last couple of visits, but there was a time where he did not know what was going on with her.

On cross examination Dr. Costerisan testified that from August of 2014 until 6/8/15 he did not provide any actual treatment for petitioner's right knee. He stated that the reference to her right knee in his records during this period was simply part of her past medical history. Dr. Costerisan noted that when petitioner came in with right knee complaints on 6/8/15 she related that sudden onset of problems to when she out shopping on 6/7/15. Furthermore, he stated that when he saw her on 6/1/18 she did not have any complaints of right knee pain, and did not get any treatment for her right knee.

On redirect examination Dr. Costerisan testified that dizziness complaints had been persistent since the work accident, and he attributed it to her head injury. He was of the opinion that the dizziness would impact her ability to do her old job where she had to climb ladders. He stated that he would advise her to stay off ladders. Dr. Costerisan stated that on 6/8/15 that her right knee pain began at the time of her work accident and had been increasing in pain more recently.

Petitioner gave varying explanations through her testimony as to why she missed a lot of appointments. First, she stated that she did not know why she missed them. Then she stated that it was her difficulty with her memory that made her miss doctor appointments and court. Then she stated that she missed appointments because she had the flu. Petitioner also testified that she missed appointments because the insurance stopped paying for her treatment and no one else was paying for it until Medicaid paid for some treatment. Petitioner testified that currently her mom and boyfriend help her with her appointments. She also has an ipad where she puts her appointments and sets up reminders with SIRI.

Petitioner testified that she hardly had any headaches before the accident, but has had migraines after the accident. Her headaches post-accident have gone from 7-8 a week after the injury to maybe 10 a month currently. Petitioner testified that her knee pops all the time since the injury, but is currently not as severe as it was. She denied any right knee pain before the injury. Petitioner testified that she still wants to treat with Dr. Sullivan for her right knee.

Petitioner testified that when she was released by Dr. Dold with climbing restrictions she did not return to work for the Painter's union. She stated that she called respondent to see if she could get work on the ground. Since the accident petitioner has worked at a 22nd Street Tavern in Decatur selling cigarettes and alcohol out of a small window. She stated she was fired after a month because she could not remember where anything was or the customer's order. She testified that she also worked at Decatur Foundry. She stated that she had prior factory work. She testified that she worked in five different positions there but could not handle any of them and was let go after two months.

Petitioner testified that she has difficulty remembering things. She stated that she loses everything, including her money and phone. She stated that she cannot remember where she puts them. She stated that she argues with her spouse because she believes what she says is right and it is not. She also stated that she can't always verbalize what she is thinking. She denied any problems with her memory before the work accident. Petitioner also testified that she has difficulty with her emotions now.

Petitioner attended three years of college and had a B or C average. She stated that she was good at reading and math. She testified that she now has difficulty with math beyond adding and subtracting.

Petitioner was paid TTD through 1/12/15. Her TTD was stopped at that time because of missed appointments.

On 10/30/18 petitioner entered a guilty plea in Macon County for retail theft. This was a misdemeanor charge. Petitioner was also incarcerated in 2014. No reason for this incarceration was in the medical records or testified to at trial.

Julie Ann Bell, petitioner's mother, was called as a witness on behalf of petitioner. She testified that petitioner was vibrant and happy before the accident, and loved her job. She stated that she was proud to be a painter and loved going to work. She testified that petitioner had no memory issues before the injury. Julie testified that petitioner is depressed because she has no work. She stated that petitioner struggles with the meanings of words and remembering. She stated that petitioner is not articulate anymore. Julie testified that petitioner has difficulty completing sentences, and has difficulties with dates and appointments. Julie testified that she is pretty much retired because her husband is a fall risk. She stated that she can now take petitioner to appointments and treatment with Dr. Hall. Julie believes that petitioner is more depressed and frustrated now, as well as more emotional with mood swings.

Joshua Ledbetter, petitioner's fiancé was called as a witness on behalf of petitioner. He stated that he has known petitioner since she was 7, but that there was a 10 year period where they did not see each other. He testified that he was in a relationship with petitioner before and at the time of the accident. He testified that since the work injury petitioner has been forgetful and misplaces everything. He stated that she has trouble putting words into sentences. He noted that she is very depressed. He also noted that before the injury she was articulate, and now is not. He testified that she uses the wrong words. Ledbetter testified that petitioner is late to everything and loses things like her purse, phone and money. He stated she is also always misplacing things. He testified that she did not have these problems before the work injury.

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

Petitioner alleges that her current condition of ill-being as it relates to her right knee is causally connected to the injury she sustained on 7/18/14. Respondent claims petitioner's current condition of ill-being as it relates to petitioner's right knee is not causally related to the injury on 7/18/14.

Following the injury on 7/18/14 petitioner was taken to the emergency and remained inpatient for 6 days. Petitioner made no mention of any right knee problems. She further reported that the mechanism of injury was falling 8 feet and landing on her rear end and striking her head on the sidewall. Petitioner's first complaints of any right knee complaints was on 8/11/14 when she reported some right knee popping. An x-ray showed some effusion. A few days later petitioner reported some discomfort in her right knee. About a month later she mentioned in therapy on 9/18/14 that she had pain in her right knee. After this, on 11/12/14 petitioner reported moderate knee pain and popping when she would get up and bend her knee. Then a month later on 12/26/14 petitioner reported to therapy that she was feeling awesome, had been playing on the floor with her son and nephew a lot over the past few days, and had not had any significant pain in her right knee with these activities.

Petitioner made no further mention of any right knee complaints until 6 months later on 6/8/15 when she presented to the emergency room. She reported right leg pain and stated that her right leg was more swollen than usual. She was diagnosed with edema of the right lower extremity. After leaving the emergency room she presented to Dr. Costerisan and gave a history of shopping on 6/7/15 and feeling a sudden popping sensation in her right leg followed by increased right leg pain and then swelling in the right knee and lower leg. It was after this intervening incident that petitioner was referred to an ortho for further evaluation and underwent an MRI of the right knee that showed an oblique undersurface tear of the body and posterior horn of the medial meniscus; focal partial thickness chondromalacia involving the junction of the medial and odd patellar facets; a small Baker's cyst; and mild thickening of the superficial proximal medial collateral ligament which raised the possibility of an old healed sprain injury.

Based on the above, as well as the credible evidence the arbitrator finds the petitioner sustained a sprain injury of her right knee as a result of the injury on 7/18/14 that had resolved as of 12/26/14. The arbitrator further finds that petitioner's right knee/leg complaints 6 months later on 6/8/15 were a direct result of the intervening incident petitioner testified to sustaining on 6/7/15 when she was shopping and felt a sudden popping sensation in her right leg followed by increased right leg pain and swelling in the right knee and lower leg.

The arbitrator finds the petitioner's current condition of ill-being as it relates to her right knee is only causally related to the injury on 7/18/14 through 12/26/14. The arbitrator finds petitioner's current condition of ill-being as it relates to her right knee after 12/26/14 causally related to intervening accident she sustained while shopping on 6/7/15. The arbitrator finds it significant that despite significant treatment from 12/27/14 through 6/6/15 for unrelated problems petitioner made no complaints of any

right knee problems. It was not until she injured her right knee on 6/7/15 that her right knee condition required additional diagnostic testing and treatment.

Petitioner also claims her current condition of ill-being as it relates to her head injury is causally related to the injury she sustained on 7/18/14. These issues include cognitive and memory problems as well as problems with speech, depression and anxiety. Respondent claims petitioner's current condition of ill-being as it relates to her head injury on 7/18/14 is only causally related to the injury on 7/18/14 through 4/30/15.

The arbitrator finds it significant that despite Dr. Costerisan's opinion that petitioner had no psychoemotional or opiod dependence problems prior to the injury on 7/18/14, references in his own records would indicate otherwise. Prior to petitioner's injury on 7/18/14 she was treating with Dr. Costerisan and had a history of attention deficit hyperactivity disorder. It is also noted that in July of 2013 Dr. Costerisan prescribed Alprazolam for anxiety, Buprenorphine HCI-Naloxone HCI for opiod dependence, hydrocodone-Acetaminophen for a backache, Paroxetine for anxiety, and Tramadol for a backache. Based on these prescriptions the arbitrator finds that as recently as a year prior to the injury petitioner was dealing with an attention deficit hyperactivity disorder, anxiety, back pain, and opiod dependence.

Following the injury petitioner was diagnosed with a subarachnoid hemorrhage that had resolved prior to her being discharged from the hospital on 7/24/14. On 7/24/14 she was found capable of doing light activity as tolerated. Upon discharge petitioner continued to treat with Dr. Dold, a neurosurgeon. On 8/11/14 Dr. Dold was of the opinion petitioner was making progress with respect to her head injury and cerebral contusion and petitioner herself reported no significant symptoms.

A few weeks later on 8/27/14 petitioner reported that she felt better overall, but was very distressed. She reported difficulty with memory, thinking and concentration. Dr. Dold referred petitioner to Dr. Hall for a psychological referral. He thought she had significant post traumatic syndrome with respect to her memory, emotional status and so on, following the injury. He wanted to know if neuropsychological testing would be appropriate.

After this, petitioner began missing appointments with Dr. Dold, in therapy, and with Dr. Hall, after her testing was complete. Petitioner missed so many appointments therapy appointments between September and December of 2014 that she was discharged from therapy on three different occasions, after it had been reinstated each time. She also stopped following up with Dr. Dold, Dr. Costerisan, and Dr.

Hall. Petitioner testified that she simply forgot about these appointments because of her head injury. However, the arbitrator finds this claim less than persuasive given the fact that petitioner had no trouble remembering to contact Dr. Dold or Dr. Costerisan whenever she wanted a refill of her narcotics. She was also very argumentative with Dr. Dold's staff when she was told that Dr. Dold would not authorize any more refills unless she came in to see him. On those occasions petitioner made sure she made the appointments.

On 1/12/15 Dr. Dold was of the opinion that petitioner was stable with respect to her head injury and her musculoskeletal problems, and she should return on 2/12/15. Again, petitioner did not follow-up as instructed. Additionally, petitioner was discharged from work conditioning on 2/6/15 due to non-compliance. After this period of non-compliance Dr. Dold called petitioner and told her that if she did not follow through with the plan of care she would be released from care.

Despite petitioner's claims of having difficulty with her memory she reported to Dr. Dold on 3/30/15 that she was in school at the union hall and that was why she missed her work hardening appointments. However, petitioner never reported these conflicts to work hardening. She would just not show up. At this point, Dr. Dold noted that petitioner's treatment was being protracted because of her failure to attend therapy, work hardening or scheduled appointments with her providers and he released her to work on 3/31/15 with max lifting of up to 20 pounds and no use of ladders. Dr. Dold even noted that she would fail to appear even after she was reminded just hours before her appointment. Again, petitioner reached out to Dr. Dold on 4/14/15 only because she wanted to remain off work, which Dr. Dold would not authorize.

On 4/29/15 petitioner told Dr. Dold that her old boss was ready to take her back and she felt she was ready to return to her prior duties. She also reported that she had been going up and down some short ladders and felt reasonably steady. Dr. Dold was of the opinion that petitioner was stable post trauma, and released her to full duty work without restrictions on 4/30/15, and instructed her to be careful going up and down ladders. Dr. Dold discharged petitioner from his care on an as needed basis.

Petitioner had no further treatment until she presented to Dr. Costerisan on 6/1/15 and reported that she had emotional mood swings, anxiety, and difficulty sleeping, which are some of the same problems petitioner had prior to the injury on 7/18/14. She stated that she had been unable to find a job with her former company. She also reported a lot of financial issues and an inability to pay her bills. Dr. Costerisan noted that petitioner was in no acute distress and her mood seemed normal. He also noted no other neurological findings.

Following her assessment by Dr. Hall in 2014, petitioner showed up sporadically for a few appointments and then stopped going in March of 2015. After seeing Dr. Costerisan on 6/1/15 petitioner presented to no one for her alleged head injury problems until 2/8/16, 8 months later. On that day she reported to Dr. Costerisan that she was slowly improving and he was of the opinion that she would be back to work in a month. However, petitioner did not return to work and instead presented to Dr. Hall on 2/24/16 complaining of issues of cognition and memory with ongoing litigation surrounding her injury. She requested an updated neuropsychological examination by Dr. Hall to compare with her baseline. The arbitrator finds it significant that for over a year petitioner had made no complaints of any cognitive, memory or language issues to any healthcare provider, until she presented to Dr. Hall after she was unable to find any employment. The arbitrator also finds it significant that some of the issues petitioner reported to Dr. Hall, such as her anxiety and other problems, were problems she was treating for prior to the injury on 7/18/14. Petitioner did not report this to Dr. Hall and Dr. Hall did not review any of petitioner's medical records prior to 7/18/14. Based on this credible evidence the arbitrator finds Dr. Hall's opinions are not based on a thorough understanding of petitioner's medical history prior to 7/18/14.

Dr. Hall did reassess petitioner on 3/25/16. She told him she had continued trouble with her memory and remained afraid of heights. However, the arbitrator notes that after she was ready to return to her prior duties and Dr. Dold released her to full duty without restrictions, these issues seem to only conveniently arise in conjunction with her references to ongoing litigation with respect to this claim. Although Dr. Hall's impression was that petitioner's overall cognitive and memory function remained deficient, he noted that her pattern was still inconsistent, but did fit with a profile that was consistent with a mild traumatic brain injury/concussion and extreme psychoemotional distress, with or without conscious exaggeration of those symptoms. He again recommended cognitive behavioral therapy, but noted that he had recommended this to petitioner before but she never followed through with it on a consistent basis. Again, petitioner was not compliant with this recommendation, and did not return again to Dr. Hall until 8/15/16, 5 months later. Dr. Hall noted that she was receptive and interactive, but then noted that she was emotional and distraught and adamantly insisted that she could not remember things, got confused and disoriented, got sad, got depressed and anxious, and this caused conflict with her boyfriend. Dr. Hall noted evident cognitive and memory deficits, but as with all prior recommendations, petitioner never followed up again. The arbitrator again notes that these complaints petitioner continued to report are consistent with past complaints petitioner had and was treating for prior to the injury.

However, the arbitrator finds it significant that Dr. Hall did not have any knowledge of her psychoemotional problems prior to 7/18/14.

In his deposition on 11/20/17 Dr. Hall opined that petitioner's impairment was related to her traumatic brain injury and that she needed to engage in a course of cognitive behavior therapy. However, he admitted that she was not compliant with the courses of cognitive behavior therapy or cognitive retraining which were recommended in 2015, and again in 2016, and he had no way of knowing what the reasons for her non-compliance were. Additionally, the arbitrator finds it significant that Dr. Hall was unaware of petitioner's opiod dependence and issues with anxiety and attention deficit hyperactivity disorder prior to the injury on 7/18/14. The arbitrator also finds it significant that after petitioner was released from care by Dr. Dold to return to full duty work without restrictions on 4/30/15, there are only 3 documented visits to Dr. Hall on 2/24/16, 3/25/16 and 8/15/16, with no reference to any of these visits being related to the treatment Dr. Hall recommended. The arbitrator finds it significant that after 4/30/15, other than the 3 visits to Dr. Hall, petitioner only saw Dr. Costerisan one time for her psychoemotional problems on 6/1/15 until she reestablished care with him on 6/4/18, three years later. During this interval petitioner continued to treat with Dr. Costerian for her right knee and other unrelated conditions, but did not complain of any psychoemotional issues. Additionally, the arbitrator notes that in no credible medical records, other than those of Dr. Hall, is there ever any mention of the petitioner having any speech difficulties. In fact, when petitioner presented to the emergency room on 6/8/15 her speech was documented as being normal. For this reason, the arbitrator questions whether or not the petitioner's speech difficulties at trial, and testified to by her mother and fiancé were simply self-serving and for secondary gain. Although Dr. Hall causally relates petitioner's current psychoemotional condition and speech difficulties to her injury on 7/18/14 the arbitrator finds many of his assessments are not supported by any of the credible medical records after 4/29/15. For these reasons the arbitrator finds Dr. Hall's opinions less than persuasive.

On 6/4/18 petitioner reported to Dr. Costerisan that she seemed to forget a lot of little things, which she never made mention of in any prior records. Also, for the first time since the injury on 7/18/14 Dr. Costerisan noted some flight of thought, but could not opine what the cause of her flight of thought was. On 7/12/18 petitioner stated that she continued to struggle with short term memory issues, but Dr. Costerisan noted that it was difficult to assess. Dr. Costerisan could not opine what was the cause of petitioner's memory problems or complaints. He also opined that petitioner's depression and anxiety were related to her work incident, but failed to address what if any impact her taking medication for these

type of conditions before the injury had on this opinion. Dr. Costerisan was of the opinion that petitioner's opiod abuse took place from 2017 to 2018 and was related to the pain medication she was using for her work injury. However, he failed to address why petitioner was prescribed Buprenorphine HCI-Nalonone HCI for opiod dependence in July of 2013. Although Dr. Costerisan testified in his deposition that petitioner had difficulty focusing when he talked to her, he mentioned that this was not documented in his records until 4 years after the accident.

The arbitrator also questions the persuasiveness of petitioner's mother's testimony that prior to 7/18/14 she was vibrant and happy given the fact that as recently as July of 2013 petitioner was taking medications for anxiety and opiod dependence, and was diagnosed with attention deficit hyperactivity disorder.

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 her current condition of ill-being as it relates to her head injury is causally related to the injury she sustained on 7/18/14, after 4/29/15.

The arbitrator finds petitioner's current condition of ill-being (excluding the right knee) as it relates to the injury on 7/18/14 causally related to the injury through 4/29/15, and the petitioner's current condition of ill-being as it relates to her right knee injury causally related to the injury on 7/18/14 only through 12/26/14.

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

Having found the petitioner's current condition of ill-being (excluding the right knee) as it relates to the injury on 7/18/14, causally related through 4/29/15, the arbitrator finds the respondent shall pay all reasonable and necessary medical expenses related to petitioner's injury on 7/18/14 through 4/29/15, other than for her right knee, pursuant to Section 8(a) and Section 8.2 of the Act.

Having found the petitioner's current condition of ill-being as it relates to her right knee casually related to the injury on 7/18/14 only through 12/26/14, the arbitrator finds the respondent shall pay all reasonable and necessary medical expenses for petitioner's right knee through 12/26/14, pursuant to Section 8(a) and Section 8.2 of the Act.

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

K. IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE?

Having found the petitioner's current condition of ill-being (excluding the right knee) as it relates to the injury on 7/18/14 casually related to the injury through 4/29/15, and petitioner's current condition of ill-being as it relates to her right knee casually related to the injury through 12/26/14, the arbitrator finds the petitioner is not entitled to any prospective medical care.

L. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

The petitioner claims she was temporarily totally disabled from 7/19/14 through 11/19/18. Respondent claims petitioner was temporarily totally disabled from 7/19/14 through 10/10/14, and 10/24/14 through 1/12/15.

Following the injury petitioner was authorized off work and not released to work until 3/30/15 when Dr. Dold released her to light duty work on 3/31/15 with a max lifting of up to 20 pounds, and no use of ladders. There is no evidence that respondent offered petitioner any work within her restrictions. On 4/29/15 Dr. Dold released petitioner to full duty work without restrictions effective 4/30/15.

The arbitrator finds the petitioner was temporarily totally disabled from 7/19/14 through 4/29/15, a period of 40-5/7 weeks. Respondent shall receive credit for the $9,211.38 it has already paid in temporary total disability benefits.

STATE OF ILLINOIS	)		
	) SS.		
COUNTY OF COOK	)		

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROMAN FLORES,

Petitioner,

vs.

NO. 14WC 034424

19IWCC0524

TOP VALUE AUTO REPAIR AND THE ILLINIOS STATE TREASURER AS EX-OFFICIO CUSTODIAN OF THE ILLINOIS INJURED WORKERS BENEFIT FUND,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission finds that the Arbitrator erred in awarding temporary total benefits commencing September 11, 2014 through March 1, 2016. Petitioner testified that he continued to work for Respondent until September 17, 2014. Temporary total disability benefits therefore should properly commence on September 18, 2014.

The Arbitrator awarded total temporary disability benefits to continue through March 1, 2016. Petitioner last saw Dr. Sean Salehi on December 15, 2015. At that time Dr. Salehi released Petitioner from treatment instructing him to return as needed. Dr. Salehi did not document any recommendations for work restrictions. Petitioner sought no medical treatment after December 15, 2015 and for that reason there is no medical documentation concerning ongoing work restrictions after that date. The Commission finds therefore that temporary total disability

benefits should be awarded through December 15, 2015, instead of through March 1, 2016. Although Petitioner did not return to employment until March 2016 it was not due to any current medical restriction.

The evidence shows that Petitioner has returned to work and that his current position involves easier and lighter work than the position he held prior to the accident. Petitioner has not required any additional medical treatment in over three years and continues to work as an auto mechanic. The work accident has not had a detrimental effect on Petitioner's earning capacity. Petitioner's average weekly wage is presently higher than prior to the accident. Petitioner has not required medical treatment since December 15, 2015.

The Commission finds based upon the foregoing and the evidence in totality that an adjustment in the award of permanent partial disability is warranted. The Commission finds that Petitioner sustained the loss of use of 7.5% of the person as a whole, and the loss of use of 12.5% of the use of his right leg and left leg and reduces the permanent partial disability award accordingly.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $266.67 per week for a period of 64 5/7 weeks, commencing September 18, 2014 through December 15, 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 $240.00 per week for a period of 37.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the loss of 7.5% of the person as a whole . Respondent shall pay to Petitioner the sum of $240.00 per week for 26.8 weeks for the loss of 12.5% of Petitioner's left leg. Respondent shall pay to Petitioner the sum of $240.00 per week for 26.8 weeks for the loss of 12.5% of Petitioner's right leg as provided in Section 8(e) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay directly to providers only outstanding medical bills, pursuant to the medical fee schedule, for care that was reasonably required to treat Petitioner's bilateral knee and back injuries caused by the September 19, 2014 accident as provided in Sections 8(a) and 8.2 of the Act.

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

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

19IWCC0524

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $36,000. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: SEP 2 0 2019
o-8-28-19
SM/msb
44

Stephen Mathis

Douglas McCarthy

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

FLORES, ROMAN
Employee/Petitioner

Case# **14WC034424**

19IWCC0524

TOP VALUE AUTO REPAIR AND THE ILLINOIS STATE TREASURER AS EX-OFFICIO CUSTODIAN OF THE ILLINOIS INJURED WORKERS' BENEFIT FUND
Employer/Respondent

On 7/17/2018, 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 2.14% 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.

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STATE OF ILLINOIS)
)SS.
COUNTY OF **COOK**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED
ARBITRATION DECISION

ROMAN FLORES
Employee/Petitioner

Case # **14** WC **34424**

v.

Consolidated cases: **n/a**

TOP VALUE AUTO REPAIR, and THE ILLINOIS STATE TREASURER AS EX-OFFICIO CUSTODIAN OF THE ILLINOIS INJURED WORKERS' BENEFIT FUND
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **DOUGLAS S. STEFFENSON**, Arbitrator of the Commission, in the city of **CHICAGO**, on **MAY 2, 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 **INSURANCE COVERAGE**

FINDINGS

On **SEPTEMBER 10, 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 $**20,800.00**; the average weekly wage was $**400.00**.

On the date of accident, Petitioner was **41** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**0.00** 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 Respondent shall pay the Petitioner the sum of **$266.67 per week** for a period of **76.86 weeks** for the period from **September 11, 2014, through March 1, 2016 ($20,496.26)**.;

2) The Arbitrator finds the Respondent shall pay only outstanding medical bills for medical care that reasonably were required to treat the Petitioner's bilateral knee and back injuries caused by the accident on September 10, 2014. Respondent shall pay said bills directly to the providers and pursuant to the fee schedule.;

3) The Arbitrator finds the Respondent shall pay the Petitioner:

- a **17.5%** loss of use of the **left leg** pursuant to Section 8.1b and Section 8(e)12 of the Act, or **37.63 weeks** of benefits **($9,031.20)**;
- a **17.5%** loss of use of the **right leg** pursuant to Section 8.1b and Section 8(e)12 of the Act, or **37.63 weeks** of benefits **($9,031.20)**; and
- a **12.5%** loss of use of the **person-as-a-whole** pursuant to Section 8.1b and Section 8(d)2 of the Act, or **62.50 weeks** of benefits **($15,000.00)**.

Injured Workers' Benefit Fund
The Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund, was named as a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award hereby is entered against the Fund to the extent permitted and allowed under §4(d) of the Act. In the event of the failure of Respondent-Employer to pay the benefits due and owing the Petitioner, Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the Injury Workers' Benefit Fund.

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

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

Signature of Arbitrator

JULY 17, 2018
Date

JUL 1 7 2018

ROMAN FLORES v. TOP VALUE AUTO REPAIR, and THE ILLINOIS STATE TREASURER AS EX-OFFICIO CUSTODIAN OF THE ILLINOIS INJURED WORKERS' BENEFIT FUND

14 WC 34424

CORRECTED

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter was tried before Arbitrator Steffenson on May 2, 2018. All issues were placed in dispute by the parties present at the hearing. (*Arbitrator's Exhibit* 1). The parties also requested a written decision, including findings of fact and conclusions of law, pursuant to Section 19(b) of the Act. (*Arbitrator's Exhibit* (hereinafter, *AX*) 1). They also agreed to receipt of this Arbitration Decision via e-mail. (*AX* 1).

FINDINGS OF FACT

The Petitioner testified his birthdate is June 25, 1973, and he was married at the time of his alleged accident. (Transcript at 14, 47).

The Petitioner stated on September 10, 2014, he worked at Top Value, a mechanical garage located at 5748 West Division. (Transcript (hereinafter, T.) at 15). When recalled as a witness by Respondent, Petitioner again identified Top Value's address as 5748 West Division. (T. at 56). However, when further questioned by his counsel, Petitioner testified he could be mistaken as to the address and 4857 West Division also sounded correct. (T. at 56-57). When again asked to clarify whether Top Value's address was 4857 or 5748 West Division, Petitioner explained that he only knows it to be at the intersection of Division and Lemon. (T. at 56-57).

Petitioner identified his supervisor at Top Value as George Ghanayem. (T. at 15). His job duties included mechanical and electrical work, such as suspensions, brakes and transmissions. (T. at 15). The tools required for these tasks included impact pistols, pliers and lugs extracting equipment. (T. at 46). Petitioner used his own tools and these tools were not electrical. (T. at 46).

Petitioner testified he earned $400.00 per week as an auto mechanic for Top Value in 2013 and at the time of his accident. (T. at 16). He worked a set weekly schedule that was determined by Mr. Ghanayem. (T. at 45-46). Petitioner further explained that he followed Mr. Ghanayem's instructions daily as Mr. Ghanayem told him what vehicles to work on and when. (T. at 48-49). He stated that Mr. Ghanayem had the right to fire him. (T. at 49).

Petitioner testified that on September 10, 2014, he was working on a customer's truck in the third entranceway of Top Value's property as depicted in *Petitioner's Exhibit* 13. (T. at 16; 18). As Petitioner was standing at the back of the customer's truck getting a tool, another Top Value mechanic named Charlie Ramos drove a U-Haul into the entranceway, hitting Petitioner and trapping him between the two vehicles. (T. at 18-19). The front of the U-Haul struck his knees and smashed his back against the customer's truck. (T. at 20). Mr. Ramos then reversed the U-Haul, causing Petitioner to fall to the floor. (T. at 20). Mr. Ghanayem was present and witnessed the accident. (T. at 42-43).

Petitioner testified that he was immediately transported by ambulance to West Suburban Hospital. (T. at 20-22). The Chicago Fire Department report explains that Petitioner was behind a vehicle at the auto mechanic shop when another slow-moving vehicle with bad breaks pinned him. (*Petitioner's Exhibit* 2). The EMS workers reported bilateral knee swelling. *Id.*

Upon arrival to West Suburban Hospital, Petitioner complained of left knee and ankle pain. *Id.* X-rays of the left ankle, left knee and right femur revealed no evidence of fracture or abnormality. *Id.* Petitioner was diagnosed with a closed crush injury of the lower leg. *Id.* He was administered a morphine drip, prescribed pain medication and advised to follow up with his primary care doctor. *Id.*

On September 12, 2014, Petitioner presented to PCC Community Wellness Center, complaining of back pain, bilateral leg pain and left knee swelling. (*Petitioner's Exhibit* (hereinafter, *PX*) 3). The doctor noted that Petitioner also suffered from Diabetes. *Id.* X-rays of both femurs and the left ankle were negative for fracture, and an ultrasound of the bilateral lower extremities demonstrated no evidence of significant stenosis or occlusions. *Id.* The doctor diagnosed Petitioner with a crushing injury to the legs and ordered a MRI to rule out ligament injuries. *Id.* Petitioner was further prescribed opiate medication and instructed to take as little as possible. *Id.*

Petitioner testified that after this doctor's visit, he attempted to return to work at Top Value. (T. at 26). However, he testified that he only worked a week due to back and knee pain, inflammation and swelling. (T. at 26).

On October 14, 2014, Petitioner returned to PCC Community Wellness Center. (*PX* 3). The doctor identified knee pain as Petitioner's main issue, but added peripheral neuropathy to his diagnoses. *Id.* Petitioner was prescribed medication and advised to follow up as needed. *Id.*

Petitioner testified that PCC Community Wellness Center was unable to provide any further treatment other than pain medication; and therefore, he sought a second opinion from a knee specialist. (T. at 26-27).

Petitioner presented to Dr. Ronald Silver on October 31, 2014. (*PX* 4). Repeat X-rays of both knees were obtained and within normal limits. *Id.* Dr. Silver prescribed pain medication and a topical anti-inflammatory, ordered MRIs of both knees and recommended physical therapy. *Id.* Dr. Silver further recommended referral to a spine specialist and provided Petitioner with the restrictions of no climbing or ladders, no crawling, no kneeling, no squatting, no prolonged standing and half-day work only. (*PX* 4).

At arbitration, Petitioner testified that he was unable to undergo the recommended MRIs because he has metal pieces in his face. (T. at 27-28). He testified that CT scans were performed instead. (T. at 28).

On November 3, 2014, Petitioner presented to spine specialist Dr. Intesar Hussain. (*PX* 5 & 6). Dr. Hussain diagnoses included thoracic or lumbosacral neuritis or radiculitis, lower leg joint pain, low back pain with bilateral leg pain likely secondary to disc disease and facet joint involvement, and bilateral knee pain. *Id.* Dr. Hussain recommended physical therapy and kept Petitioner off work. *Id.* He also ordered a lumbar spine MRI, but Petitioner was unable to undergo the MRI due to metal pieces in his face. (*Id.* and T. at 29).

On November 5, 2014, a lumbar spine CT revealed no acute abnormality, but spondylosis at L4-L5 with disc narrowing and mild disc bulging as well as a moderate disc bulge at L5-S1 and mild central stenosis at both levels. (*PX* 7). A CT of the bilateral knees further revealed no acute or significant abnormality. *Id.*

Petitioner began physical therapy on November 6, 2014 and participated in approximately twenty-seven sessions until January 9, 2015. (*PX* 9).

After starting physical therapy, Petitioner returned to Dr. Hussain on November 10, 2014 with continued complaints of low back pain radiating to the bilateral legs. (*PX* 5-6). Displacement of lumbar intervertebral disc without myelopathy was added to Petitioner's diagnoses. *Id.* Dr. Hussain recommended further physical therapy and advised Petitioner to return in two weeks. *Id.*

On November 17, 2014, Petitioner followed up with Dr. Hussain and reported worsening low back pain. *Id.* Dr. Hussain noted that CTs of the lumbar spine demonstrated a moderate diffuse disc bulge at L5-S1 with mild central stenosis. *Id.* Dr. Hussain added a diagnosis of lumbar spinal stenosis and recommended an epidural steroid injection at L5-S1. *Id.*

On November 22, 2014, Petitioner underwent a lumbar epidural injection at L5-S1. *Id.* Petitioner's postoperative diagnosis was lower back pain with bilateral leg pain likely secondary to diffuse disc bulge at L5-S1 with mild central stenosis and facet joint involvement. *Id.*

On December 1, 2014, Petitioner reported 50% pain relief from the injection. (*PX* 5-6). Dr. Hussain recommended continued observation of Petitioner's progress. *Id.*

On December 2, 2014, Petitioner underwent a bilateral knee arthrogram. (*PX* 8). The postoperative diagnosis was intractable bilateral knee pain. *Id.*

CT scans were also obtained on December 2, 2014. (*PX* 11). The left knee CT showed a knee arthrography demonstrating: (1) evidence for chronic synovitis with a small suprapatellar plica; (2) an ACL that is slightly attenuated and irregular, probably with a partial-thickness tear; and (3) a medial meniscus demonstrating slight blunting of the apical free edge of the posterior horn, probably with a small tear, and an intact lateral meniscus. *Id.*

The right knee CT revealed: (1) evidence for chronic synovitis with synovial hypertrophy; (2) small suprapatellar plica; (3) an ACL that was intact overall but with a slight irregularity that is probably a partial thickness tear; (4) small loose body seen in the posterior popliteal fossa; and (5) a small peripheral tear of the mid-body of the lateral meniscus. *Id.*

On December 3, 2014, Dr. Silver reported that Petitioner's CT scans demonstrated tearing of the medical meniscus of the left knee and lateral meniscus of the right knee with loose bodies present. (*PX* 4). Dr. Silver recommended arthroscopic surgery to both knees and placed Petitioner off work. *Id.* Dr. Silver also continued Petitioner's pain medication and physical therapy. *Id.*

Petitioner returned to Dr. Hussain on December 8, 2014. (*PX* 5 & 6). At that time, he was two weeks post-injection and reported 70% pain relief. *Id.* However, due to continued pain complaints, Dr. Hussain recommended a repeat lumbar epidural injection. *Id.* On December 20, 2014, Petitioner underwent the second lumbar epidural injection at L5-S1. *Id.*

On January 12, 2015, Petitioner returned to Dr. Hussain. *Id.* He reported continued low back pain, but stated that the numbness and pain in his legs was gone. *Id.* Dr. Hussain also noted that the injections resulted in the significant resolution of Petitioner's radicular symptoms. *Id.* As Dr. Hussain believed Petitioner's low back pain could be related to his facet joints, he recommended a diagnostic lumbar medial branch nerve block. *Id.*

Petitioner next presented to Dr. Silver on January 14, 2015. (*PX* 4). Dr. Silver again recommended arthroscopic surgery to both knees, continued physical therapy and kept Petitioner off work. *Id.*

On January 17, 2015, Petitioner underwent the diagnostic lumbar medial branch nerve block at the left L3, L4 and L5 levels. (*PX* 5 & 6). The postoperative diagnosis noted left-sided lower back pain that is likely secondary to facet joint involvement. *Id.*

Petitioner returned to Dr. Hussain on January 19, 2015. *Id.* Petitioner's diagnosis was low back pain with bilateral leg pain secondary to diffuse disc bulge at L5-S1 with mild central stenosis that improved after two epidural steroid injections. *Id.* Due to Petitioner's persistent pain complaints, Dr. Hussain recommended a spinal consultation. *Id.* Dr. Hussain further reported that he offered Petitioner pain medication, but Petitioner refused. *Id.*

On March 11, 2015, Dr. Silver advised that Petitioner could proceed with arthroscopic surgery at his discretion. (*PX* 4). Dr. Silver continued Petitioner's prescription medication and opined that Petitioner remained temporarily disabled. *Id.*

On April 23, 2015, Petitioner presented to Dr. Sean Salehi at Neurological Surgery and Spine Surgery, S.C. (*PX* 10). Dr. Salehi diagnosed Petitioner with lumbar degenerative disc disease and recommended a MRI to evaluate for disc disease or neural compression. *Id.*

On May 18, 2015, a lumbar spine CT revealed: (1) A 4-5 mm broad-based posterior disk herniation at L5-S1 with mildly extruded nucleus pulposus indenting the thecal sac with mild bilateral neuroforaminal narrowing; and (2) A 3-4 mm posterior disk protrusion/herniation at L4-L5 also indenting the thecal sac with mild bilateral neuroforaminal narrowing. (*PX* 11).

On October 13, 2015, Petitioner returned to Dr. Salehi with the CT scan and reported that he was unable to obtain the recommended MRI due to metal in his body. (*PX* 10). Dr. Salehi reviewed the lumbar spine CT and observed an annular tear at L5-S1, small centrally herniated discs at L5-S1 and L4-L5, mild disc height loss at L4-L5 and mild to moderate bilateral lateral recess stenosis at L4-L5. *Id.* Dr. Salehi opined that Petitioner's back pain was secondary to the annular tear and disc disease at L5-S1 and to a lesser extent at L4-L5. *Id.* He recommended a six-week course of physical therapy focusing on the lumbar spine. *Id.*

Petitioner began physical therapy for her back on October 20, 2015 and attended approximately eighteen sessions until it was discontinued on December 3, 2015. (*PX* 12). At that time, Petitioner denied any radicular symptoms. *Id.*

On December 15, 2015, Petitioner returned to Dr. Salehi and reported a 50% improvement to his back with no more radiating leg pain. (*PX* 10). Due to Petitioner's improvement, Dr. Salehi advised that Petitioner no longer needed follow up appointments and could return as needed. *Id.*

Petitioner sought no further treatment for his alleged work injuries. (T. at 37). He testified that although he was not told to do so by a doctor, he returned to work as an auto mechanic for AB & S in March 2016, because he had expenses and a family. (T. at 37, 40).

Petitioner never asked to return to work for Top Value after his accident. (T. at 39-40). He testified that his employment had ended around September 17, 2014, because he was in pain and had swollen knees. (T. at 40). Petitioner further testified that he told Top Value he would not be returning to work there. (T. at 41).

At the time of arbitration, Petitioner was still working for AB & S. (T. at 37, 41). His job duties include working on suspensions, brakes and oil changes. (T. at 41). Petitioner testified his current position involves easier and lighter work than his prior Top Value position. (T. at 41-42). Petitioner stated he currently works thirty-five to thirty-six hours per week for AB & S at a rate of $13.00 per hour. (T. at 42). He testified that he experiences a lot of pain and tires while working. (T. at 48). He now wears knee braces and a back-support girdle, which he never wore before his accident. (T. at 48).

Petitioner testified that he suffered no other injuries to his knees or back prior to his accident. (T. at 37). Petitioner further testified that his knees and back continue to hurt today. (T. at 38). He explained that during his workday, he is not able to move around like before his

accident and requires regular breaks. (T. at 38). He further testified that he sometimes does not sleep well at night. (T. at 38). Petitioner takes aspirin or Tylenol for pain. (T. at 38).

Ronaldo Garcia testified that he worked for Top Value in September 2014 with Petitioner. (T. at 51). Mr. Garcia testified that on September 10, 2014, Petitioner became trapped between a U-Haul truck and another vehicle inside Top Value's garage. (T. at 52). Mr. Garcia testified that he heard the impact from the accident and saw Petitioner on the floor after the U-Haul reversed. (T. at 52). Mr. Garcia then saw Petitioner being taken away by ambulance. (T. at 52-53). Mr. Garcia testified that Petitioner was doing mechanical work at the time of the accident. (T. at 53). Mr. Garcia further testified the address of Top Value was 5748 West Division in Chicago. (T. at 53). He identified the cross streets as Division and Lemon. (T. at 54).

CONCLUSIONS OF LAW

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

Issue A: *Respondent operating under and subject to Act*

Petitioner testified that he was employed as an auto mechanic for Top Value on the date of his accident. (T. at 15). His job duties included both mechanical and electrical work. (T. at 15). The Arbitrator finds that such electrical work is sufficient to subject Respondent-Employer to the automatic coverage provision of Section 3 of the Illinois Workers' Compensation Act.

Issue B: *Employee-employer relationship*

The existence of an employment relationship is a prerequisite for any award of benefits under the Act. There is no specific litmus test for determining whether an employer-employee relationship exists. Instead, there are multiple factors to consider when assessing the nature of the relationship between the parties. *Ware v. Indus. Comm'n.*, 318 Ill. App. 3d 1117, 1122 (1st Dist. 2000). Among these are: (1) whether the employer may control the manner in which the person performs the work; (2) whether the employer dictates the person's schedule; (3) whether the employer pays the person hourly; (4) whether the employer withholds income and social security taxes from the person's compensation; (5) whether the employer may discharge the person at will; (6) whether the employer supplies the person with materials and equipment; and (7) whether the employer's general business encompasses the person's work. *See Robertson v. Indus. Comm'n.*, 866 NE.2d 191, 200 (Ill. 2007). Other relevant factors include the

label the parties place on their relationship, and whether the parties' relationship was "long, continuous, and exclusive." *Ware*, 318 Ill. App. at 1122, 1126. No single factor is determinative and such determination of the employer-employee relationship rests on the totality of the circumstances. *Roberson*, 866 NE.2d at 200.

In the present matter, Petitioner testified that Mr. Ghanayem, who he identified as his supervisor at Top Value, gave him daily instructions on what vehicles to work on and when. (T. at 48-49). Petitioner further testified that Mr. Ghanayem set his weekly work schedule and had the right to fire him. (T. at 45-46; 49). Additionally, Petitioner was paid the same weekly wage of $400 per week, regardless of his schedule. (T. at 16). Petitioner used his own tools to complete tasks. (T. at 46). However, Mr. Ghanayem had control over what tasks Petitioner was completing. (T. at 48-49).

After considering the totality of the circumstances, the Arbitrator finds that an employer-employee relationship did exist between Petitioner and Respondent-Employer.

<u>Issue C</u>: *Accident*

Petitioner testified that on September 10, 2014, he was working on a customer's truck when a U-Haul driven by another Top Value employee hit him and pinned him between the two vehicles. (T. at 16-19). Petitioner testified that the front of the U-Haul struck his knees and smashed his back against the customer's truck. (T. at 20). The U-Haul was promptly reversed, causing Petitioner to fall to the floor. (T. at 20). Petitioner was immediately transported by ambulance to West Suburban Hospital and diagnosed with a closed crush injury. (*PX* 2).

Petitioner's testimony was corroborated by Ronaldo Garcia's testimony. Mr. Garcia testified that he worked alongside Petitioner at Top Value in September 2014. (T. at 51). Mr. Garcia testified that on September 10, 2014, he heard the impact from Petitioner getting trapped between the two vehicles. (T. at 52). Mr. Garcia then witnessed Petitioner fall to the floor after the U-Haul was reversed. (T. at 52). Mr. Garcia stated that Petitioner was doing mechanical work at the time of the accident. (T. at 53).

Thus, the Arbitrator finds that Petitioner sustained an accident on September 10, 2014 that arose out of and the course of his employment with Respondent-Employer.

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Issue D: *Date of Accident*

Petitioner testified that the accident occurred on September 10, 2014. Petitioner's testimony is supported by the medical records as well as Mr. Garcia's testimony. Thus, the Arbitrator finds the accident occurred on September 10, 2014.

Issue E: *Notice*

Petitioner identified his supervisor at Top Value as George Ghanayem. (T. at 15). Petitioner testified that Mr. Ghanayem was present and witnessed his accident on September 10, 2014. (T. at 42-43). Therefore, the Arbitrator finds that Petitioner provided timely notice of the accident.

Issue F: *Causal connection*

Petitioner testified that during the accident, the front of the U-Haul struck his knees and smashed his back against the other truck. (T. at 20). He immediately was transported by ambulance to West Suburban Hospital with complaints of bilateral knee and left ankle pain. (*PX* 2). EMS workers observed bilateral knee swelling and Petitioner was diagnosed with a lower leg crush injury on the date of accident. *Id.*

Two days after the accident, Petitioner followed up with his primary care doctor, complaining of back pain, bilateral leg pain and left knee swelling. (*PX* 3). All subsequent treatment records focus on treatment for his bilateral knee injuries and back pain. Petitioner testified that he suffered no prior injuries to his knees or back. (T. at 37).

Thus, the Arbitrator finds that Petitioner's injuries are causally connected to his work accident.

Issue G: *Earnings*

Petitioner testified that he was paid $400.00 per week as an auto mechanic for Top Value in 2013 and at the time of his accident. (T. at 16). Thus, the Arbitrator finds Petitioner's average weekly wage to be $400.00.

Issue H: *Age*

At arbitration, Petitioner identified his birthdate as June 25, 1973. (T. at 14). Thus, the Arbitrator finds that Petitioner was 41 years old on the date of accident.

Issue I: *Marital status*

Petitioner testified that he was married on September 10, 2014. (T. at 47). Thus, the Arbitrator finds Petitioner was married on the date of accident.

Issue J: *Medical bills*

Petitioner immediately presented for treatment on the date of accident and informed treating doctors that he was crushed in between two vehicles, causing bilateral knee and back pain. (*PX* 2 and *PX* 3). All medical records produced by Petitioner concern recommended treatment for the bilateral knees and back. Additionally, aside from the second opinion that Petitioner independently sought with Dr. Silver, Petitioner was referred to all subsequent medical providers. Thus, the Arbitrator finds that the medical services provided to Petitioner were reasonable and necessary to treat Petitioner's injuries.

The Arbitrator finds Respondent will pay only outstanding bills for medical care that were reasonably required to treat Petitioner's bilateral knee and back injuries caused by the accident on September 10, 2014. Respondent will pay said bills directly to the providers and pursuant to the fee schedule.

Issue K: *TTD*

Petitioner testified he attempted to go back to work as a mechanic following the accident, but was unable to due to his pain symptoms. Dr. Silver subsequently put Petitioner on light duty on October 31, 2014. Petitioner testified that he provided all the work slips to the Respondent, but they were unable to accommodate him, nor did they offer to pay him TTD for his time off from work. Dr. Silver and Dr. Hussain held Petitioner off work indefinitely, starting on December 3, 2014. Due to Petitioner's dire financial needs, he returned to work at a less physically demanding job, starting on March 1, 2016.

The Arbitrator finds that Petitioner is entitled to temporary total disability benefits from September 11, 2014, through March 1, 2016. As such, Petitioner is entitled to TTD benefits from September 11, 2014, through March 1, 2016, for a total of 76.86 weeks ($20,496.26).

Issue L: *Nature and extent of injury*

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

(a) A physician licensed to practice medicine in all 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 from (a) above;
- (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.

(See 820 ILCS 305/8.1b)

With regards to factor (i) of Section 8.1b of the Act:

The Arbitrator notes that no party submitted a permanent partial disability impairment report into evidence. As such, the Arbitrator gives ***no weight*** to this factor.

With regards to factor (ii) of Section 8.1b of the Act:

The Arbitrator finds the Petitioner was employed by the Respondent as an auto mechanic on the date of his accident and continued to work as an auto mechanic for a different company, AB & S, at the time of arbitration. Petitioner testified that he told Respondent-Employer that he would not return to work, effectively ending his employment on September 17, 2014. (T. at 40). He never asked to return to work at Top Value after his accident. (T. at 39-40). Petitioner further testified that his current job duties at AB & S include working on suspensions, brakes and oil changes. (T. at 41). He testified that this current position involves easier and lighter work than his pre-accident position. (T. at 41-42). Because

this occupation can be physically stressful, the Arbitrator therefore gives ***moderate weight*** to this factor.

With regards to factor (iii) of Section 8.1b of the Act:

The Arbitrator notes that the Petitioner was 41 years old at the time of the accident and still is in the workforce. As such, the Arbitrator gives ***some weight*** to this factor.

With regards to factor (iv) of Section 8.1b of the Act:

The Arbitrator notes that the Petitioner has returned to work and currently works thirty-five to thirty-six hours per week for AB & S at a rate of $13.00 per hour. (T. at 42). This equates to an average weekly wage of $455.00 to $468.00. Therefore, Petitioner's current average weekly wage is higher than his average weekly wage of $400.00 at Top Value. As such, the Arbitrator gives ***some weight*** to this factor.

With regards to factor (v) of Section 8.1b of the Act:

Evidence of disability corroborated by the treating medical records finds that the Petitioner testified that he continues to experience pain in his knees and back. (T. at 38). He testified that during his workday, he is not able to move around like he did before his accident and requires regular breaks. (T. at 38). He also wears knee braces and a back-support girdle while working, which he never required before his accident. (T. at 48). Petitioner sometimes sleeps poorly at night and takes aspirin or Tylenol for pain.

Petitioner treated conservatively for his knee injuries with only physical therapy and pain medication. He also treated conservatively for his back injury with injections, physical therapy and pain medication. Petitioner sought no further treatment for his injuries after December 15, 2015. (*PX* 10). At that time, Dr. Salehi noted that Petitioner no longer experienced radiating leg pain and could return only as needed. *Id.*

Petitioner testified that he suffered no prior injuries to his knees or back. (T. at 37). However, Petitioner's medical records show evidence of pre-existing degenerative disc disease. Specifically, on November 3, 2014, Dr. Hussain diagnosed Petitioner with low back pain with bilateral leg pain that was likely secondary to disc disease and facet joint involvement. (*PX* 5 &6). Later, on

19IWCC0524

October 13, 2015, Dr. Salehi also opined that Petitioner's back pain was secondary to an annular tear and disc disease at L5-S1 and to a lesser extent at L4-L5. (*PX* 10). Although Petitioner's disc disease is not the sole cause of his current back pain, it is a factor. Due to the Petitioner's pain, other physical complaints, and medically documented injuries, the Arbitrator therefore gives ***significant weight*** to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds the Petitioner sustained permanent partial disability to the extent of:

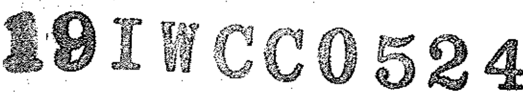
- a 17.5% loss of use of the left leg pursuant to Section 8.1b and Section 8(e)12 of the Act, or 37.63 weeks of benefits ($9,031.20);
- a 17.5% loss of use of the right leg pursuant to Section 8.1b and Section 8(e)12 of the Act, or 37.63 weeks of benefits ($9,031.20); and
- a 12.5% loss of use of the person-as-a-whole pursuant to Section 8.1b and Section 8(d)2 of the Act, or 62.50 weeks of benefits ($15,000.00).

__Issue O__: *Insurance coverage*

Petitioner provided certification from the National Council on Commission Insurance ("NCCI") showing "Top Value Auto Repair" did not have workers' compensation insurance on September 10, 2014. (*PX* 1). The NCCI certification is for "Top Value Auto Repair" at 4857 West Division Street, Chicago, Illinois. *Id.* NCCI must be provided with the correct business address to insure it identifies and locates information on the correct Respondent-Employer.

Ronaldo Garcia provided unrebutted testimony that Respondent-Employer had a different address, that being 5748 West Division. (T. at 53). Petitioner also testified on direct examination that Respondent-Employer's address was 5748 West Division. (T. at 15). When recalled as a witness by Respondent, Petitioner again identified the address as 5748 West Division. (T. at 56). When further questioned, Petitioner testified he could be mistaken as to the address, and 4857 West Division also sounded correct. (T. at 56-57). When again asked to clarify whether the address was 4857 or 5748 West Division, Petitioner explained that he only knows it based upon the cross streets. (T. at 56-57).

However, further analysis of the Petitioner's medical records from his September 10, 2014, date of accident reveals the first responders from the Chicago Fire Department were



dispatched to 4857 West Division Street in Chicago. (*PX* 2). This address matches that listed in the NCCI certification. (*PX* 1).

It must be remembered Petitioner bears the burden of proving all his case by a preponderance of the evidence. *Chicago Rotoprint v. Industrial Comm'n.*, 157 Ill.App.3d 996 (1987). Liability cannot rest upon imagination, speculation or conjecture. *Id.* To prove Petitioner is entitled to compensation from the Injured Workers' Benefit Fund, Petitioner must prove the Respondent-Employer lacked insurance on the date of accident.

The NCCI certification establishes Top Value Auto Repair at 4857 West Division Street in Chicago lacked "proof of workers' compensation insurance for Illinois on the date of 9/10/2014." (*PX* 1). Although the Petitioner and the witness, over three years later, could not specifically identify the Respondent's business address, the documentation prepared by the Chicago Fire Department at the time of the Petitioner's accident on September 10, 2014, clearly lists the accident address as 4857 West Division Street in Chicago, which matches the address provided to NCCI. (Compare *PX* 1 and *PX* 2).

Therefore, the Arbitrator finds the Petitioner did prove the Respondent-Employer Top Value Auto Repair, at 4857 West Division Street in Chicago lacked workers' compensation insurance on September 10, 2014, and the Petitioner is entitled to recover from the Injured Workers' Benefit Fund to the extent as provided by the Act. Specifically, the Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund, was named as a co-Respondent in this matter. (*AX* 1). The Treasurer was represented by the Illinois Attorney General. This award hereby is entered against the Fund to the extent permitted and allowed under §4(d) of the Act. In the event of the failure of Respondent-Employer to pay the benefits due and owing the Petitioner, Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the Injury Workers' Benefit Fund.

Signature of Arbitrator

JULY 17, 2018
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ILLINOIS WORKERS' COMPENSATION COMMISSION,
INSURANCE COMPLIANCE DEPARTMENT,

Petitioner,

19IWCC0525

vs. No: 14 INC 27
18 WC 27993

JAMES M. O'CONNELL,
INDIVIDUALLY & OWNER MANAGER OF
TRIPLE M & B, LLC,
A/K/A McBRODY'S RESTAURANT,

Respondents

DECISION AND OPINION ON PETITION FOR
FINES DUE TO INSURANCE NON-COMPLIANCE

Petitioner, the Illinois Workers' Compensation Commission, Insurance Compliance Department, brings this action, by and through the Office of the Illinois Attorney General, against the above captioned Respondents, alleging violation of Section 4(a) of the Illinois Workers' Compensation Act. Respondents received timely and proper notice. A hearing took place before Commissioner Charles DeVriendt in New Lenox on 12/3/2018 at 9 a.m. Respondents did not appear.

The Commission notes that on 12/3/2018 Respondents, after proper and timely notice, were found to be in default and found to have knowingly and willfully failed to insure their liability to pay compensation in accordance with Section 4(a) of the Act. An order of default was entered which continued the case to 4/17/2019 for hearing on the amount of civil penalties to be imposed upon Respondents.

Respondents were served with timely and proper notice of the hearing on 4/17/19 which included the signed order of default entered on 12/3/2018. On that date, Commissioner Maria Portela held a hearing on the amount of civil penalties to be imposed. Respondents did not appear.

The Workers' Compensation Commission Insurance Compliance Department Notice of Non-Compliance and Notice of Insurance Compliance Hearing states McBrody's Restaurant was not in compliance with the requirements of Section 4(a) of the act from 7/20/2005 through 2/07/2014. After considering the entire record, the Commission finds that Respondents knowingly and willfully violated Section 4(a) of the Act and Section 9100.100 of the Rules Governing Practice before the Illinois Workers' Compensation Commission, from 7/17/07 to 2/09/2015, a period of 2,764 days. The Commission assesses a civil penalty under Section 4 of the Act in the sum of $1,382,000.00 against Respondents for the reasons set forth below:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Triple M & B, LLC, a/k/a McBrody's is an employer under the Act:

    a. The corporation file detail report from the Office of the Secretary of State lists McBrody's as a Limited Liability Company. The Limited Liability Company was created on 7/17/2007. (Pet. Ex7).

    b. Investigator Shelton Wilson testified that the business was operating as a restaurant.

    c. The Automatic Coverage provision of the Act applies because McBrody's is a business serving food to the public for consumption on the premises where any employee is at risk of being scalded or burned by hot grease, hot water, hot foods, or other hot fluids, substances or objects.

2. Respondents had employees:

    a. The Department of Employment Security wage report showed wages for eight employees. (Pet. Ex8).

3. Respondents did not have workers' compensation insurance:

    a. The NCCI report stated that records do not show policy information filed showing proof of workers' compensation insurance from the period of 7/20/2005 to 2/09/2015. (Pet. Ex3).

    b. The Office of Self-Insurance records show no certificate of approval to self-insure was issued by the Illinois Workers' Compensation Commission. (Pet. Ex4).

    c. On 02/07/2014 notice of non-compliance was sent to Respondents. (Pet. Ex5).

    d. On 08/14/2014 Respondent entered into an insurance compliance settlement agreement with the State of Illinois. Respondent agreed to pay a $10,000 penalty, over 18 installments, in exchange for suspended enforcement actions for Workers' Compensation non-compliance. In the contract, Respondent admits to liability. The

Commission takes notice that no installment payments were made pursuant to the executed agreement. (Pet. Ex10).

e. On 12/22/2014 the Insurance Compliance Division sent Petitioner a notice of insurance compliance hearing for 02/25/2015. (Pet. Ex6).

f. Respondent received notice of hearing regarding non-compliance with the mandatory insurance coverage provisions in the Illinois Workers' Compensation Act during the time period of 7/20/2005 to 2/07/2014 and any other periods that the employer operated in violation of the Act through certified mail. (Pet. Ex6). A hearing was scheduled for 2/25/2015 in New Lenox, IL. Petitioner was notified that the Commission may asses a civil penalty of up to $500 a day pursuant to the Act. (Pet. Ex6).

g. On 10/20/2018 Respondent received notice of insurance compliance hearing for 12/03/2018. (Pet. Ex1).

h. On 12/03/2018 Commissioner Charles DeVriendt signed an Order of Default because Respondents failed to appear at the scheduled insurance compliance hearing. That order continued the case to 4/4/2019 for a hearing on the amount of civil penalties to be imposed for non-compliance. (Pet. Ex1).

i. Respondents received proper notice of the trial date on 4/4/2019. (Pet. Ex 1).

j. On 4/4/2019 Respondents failed to appear after receiving proper notice of a hearing on the amount of civil penalties to be imposed for non-compliance with the Act.

4. Therefore, the Commission finds Respondents in violation of the Illinois Workers' Compensation Act. Respondents are operating a business, with employees, and knowingly and willfully disregarding the requirement to possess Workers' Compensation Insurance, even after proper notice.

The Commission can, through this case, deter other businesses from disregarding the insurance laws of this State by exacting a severe penalty commensurate with the conduct of McBrody's Restaurant. For the forgoing reasons, and after considering the entire record, the Commission finds that Respondent was operating under and subject to the Illinois Workers' Compensation Act under Section 3 and was an employer during the periods of non-compliance. The Commission finds that Respondents have knowingly and willfully failed to comply with the requirements of Section 4(a) of the Act and shall be assessed penalties under Section 4(d) of the Act. The Commission finds Respondents knowingly and willfully were non-compliant with Section 4 of the Act from the date of incorporation on 7/17/07 to the date of the issuance of the NCCI certificate on 2/9/15 for a period of 2,764 days and shall pay a penalty of $1,382,000.00 under Section 4 of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's request for fines for non-compliance with the requirement of maintaining workers' compensation insurance is hereby granted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondents James M. O'Connell, Individually & Owner Manager, of Triple M & B, LLC, a/k/a McBrody's Restaurant, pay to the Illinois Workers' Compensation Commission the sum of $1,382,000.00 for knowingly and intentionally failing to maintain workers' compensation insurance for 2,764 days, pursuant to §4(d) of the Act.

Bond for the removal of this case 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: SEP 2 5 2019

Maria E. Portela

Thomas J. Tyrrell

Deborah L. Simpson

R: 4/17/19
49

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 WINNEBAGO)		Reverse		Second Injury Fund (§8(e)18)
				PTD/Fatal denied
	☒	Modify down	☒	None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DEB McKINNEY,

Petitioner,

19IWCC0526

vs.

NO: 09 WC 52101

DCFS,

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 date of accident, notice, causation, medical expenses, temporary total disability and permanent partial disability, and being advised of the facts and law, reverses and 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 reverses the Arbitrator as to causation for the right knee and vacates the award for temporary total disability benefits and the award of 40% man as a whole. The Commission affirms that proper notice was given and that Petitioner sustained an accident arising out of and in the course of employment on February 6, 2007. However, the Commission finds that Petitioner only proved causal connection as to the injury to her right foot. Petitioner is awarded the medical expenses for the treatment to her right foot, namely the visits to Physician's Immediate Care on February 7, 2007, and February 14, 2007, as well as an award for 2.5% loss of use of the right foot.

The Commission affirms the Arbitrator's decision regarding notice. Both parties agree that Petitioner presented on February 7, 2007 with paperwork regarding restrictions due to her injury on the prior day, and that a nurse from Physician's Immediate Care called Angela Harris on February 7, 2007. Respondent was given timely notice of the February 6, 2007 accident that

caused injury to Petitioner's right foot. It is not clear when Respondent was given notice of the injury to Petitioner's right knee, but it was likely when the Petitioner completed the Unusual Incident Report on February 5, 2010.

Petitioner met her burden that the injuries and treatment regarding her right foot were causally connected to the February 6, 2007, incident. However, Petitioner failed to prove causation as to her right knee injury. The testimony and records are consistent regarding the mechanism of injury, as well as the injury to the right foot. As to the right knee, Petitioner's testimony that the medical records are incorrect from multiple providers regarding no documentation or diagnostic testing regarding her right knee is simply not credible. Petitioner presented to Physician's Immediate Care on February 7, 2007 with complaints of injury to her right foot after a fall down 4-5 stairs at a client's home. (Px1) The Unusual Incident Report completed by Angela Harris also documents an incident and injury to Petitioner's right foot. (Rx3) Petitioner sought care on February 7, 2007 and a follow up on February 14, 2007, and was discharged from care with no restrictions. (Px1)

In neither the February 7, 2007 nor February 14, 2007, note is there any mention of injury to the right knee. Petitioner testified that she sought treatment from the physician at Physician's Immediate Care weekly for about a month in regard to her knee because it was painful and swollen, but they released her because there was nothing they could do since her knee wasn't broken. (T. 16-17) There are no records of the supposed weekly follow up visits. After that she sought treatment from her primary care physician and an MRI was performed on May 4, 2007.

The treating physician's records were not submitted into evidence and the MRI report was mostly illegible, but ultimately, it appeared as though the MRI from 2007 showed a sprain. Petitioner did not seek treatment again until January 2008 and worked full duty the entire time. It is unclear if the handwritten notes from the January 2008 visit with Dr. Strutzenberg reference the right knee as a prior issue or a current complaint, but there is no mention of the right knee in the transcribed office visit notes with the exception of listing a prior history of right knee arthroscopy. (Px2, 1/28/08 visit) The first real mention of right knee pain was when Petitioner presented to Dr. Strutzenberg on April 25, 2008, when she was there for a diabetic check up. She was sent for an MRI on May 3, 2008, and referred to orthopedic Dr. Nigam. The MRI at that time showed a medial meniscal tear that was not present on the May 4, 2007 MRI. (Px4) Dr. Strutzenberg makes no notation of mechanism and/or date of injury to the right knee. (Px2, 4/25/08 note) Dr. Nigam in his initial note references a history of a fall where she twisted her knee 3 weeks prior. (Px3, 5/13/08 note) The note does not reference a work injury.

There is no Unusual Incident Report for a fall other than the February 6, 2007, fall. Dr. Coe, Petitioner's retained expert, repeatedly testified as to a March 2008 work fall. Dr. Coe testified that Petitioner gave a history of two injuries – one on February 6, 2007, where she was at a client's home making an unannounced home visit and was walking down some stairs that were carpeted, and the toe of her right foot became caught in the carpeting causing her to jam her right foot on the stairs with immediate pain in the toes of her right foot. (Px6, p. 9) The second was on March 8, 2008, wherein Petitioner gave a history that she was again at a client's home and was going down some stairs and tripped and fell and twisted her right knee. (Px6, p. 11) When Petitioner presented to Dr. Nigam on May 13, 2008, she gave a history of a fall and

twisting her knee three weeks prior. (Px3) A similar history was conveyed to Dr. Nigam at the June 4, 2008 visit where she gave a history of falling and twisting her right knee about four weeks prior. (Px3) Petitioner's testimony did not reference a March, 2008 work fall, and there is no evidence in the record that a March 2008 work fall was reported to Respondent. It stands to reason that based on Petitioner's history to Dr. Coe as well as the history to Dr. Nigam, that Petitioner's right knee injury is not causally related to the February 6, 2007 work injury. Moreover, Dr. Coe opined Petitioner's condition of ill-being regarding her right knee was causally related to a work injury of March of 2008. (Px6, pp. 26-27)

Petitioner underwent an extensive course of medical treatment between 2008 and when she was discharged at MMI as to her right knee in December of 2009. Petitioner has failed to prove that her right knee injury and subsequent treatment was causally related to any work injury. Her testimony that the right knee injury and treatment relates back to the February 6, 2007, fall down the stairs simply is not credible. Although her primary care doctor's records were presumably destroyed when the practice closed, the fact that there were no complaints regarding the right knee at the time of injury to the treaters at Physician's Immediate Care on either February 7, 2007, or February 14, 2007, combined with Petitioner's questionable testimony that she continued to follow up there for a month and that diagnostic tests were performed to her knee, but the records are mistaken when they do not reflect that treatment, significantly calls Petitioner's credibility into question. The Unusual Incident Report completed by the supervisor on February 8, 2007, makes no reference to the knee. Although the MRI of May 4, 2007, seems to reference knee pain following the fall down the stairs in February, the lack of corroborating medical records and lack of timely follow up treatment fail to support Petitioner's contention that her condition of ill-being regarding her right knee is causally related to injuries sustained in the February 6, 2007 work accident. Additionally, Dr. Coe's extensive testimony regarding a second fall down stairs at a client's home in March of 2008, combined with Dr. Nigam's testimony referencing a 2008 fall, would indicate that Petitioner's knee injury was not causally related to the February 6, 2007, fall.

As Petitioner did not miss work as a result of her right foot injury, and her right knee injury was not causally connected to the February 6, 2007, incident, temporary total disability benefits are denied, and the Arbitrator's award of total temporary disability benefits is vacated.

Additionally, Petitioner did not prove that any treatment beyond the February 7, 2007, and February 14, 2007, visits to Physician's Immediate Care were causally connected to the February 6, 2007, incident. Therefore, the award for additional medical expenses is vacated.

As Petitioner failed to prove her current condition of ill-being regarding the right knee was causally related to the February 6, 2007, work accident, the Arbitrator's award of 40% loss of use of the right leg is vacated. Petitioner did, however, prove accident and causal connection regarding her right foot, and is awarded 2.5% loss of use of the right foot pursuant to §8(e)(11).

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $582.16 per week for a period of 4.175 weeks, that being the period of temporary total incapacity for work under §8(e) of the Act, for the reason that the injuries sustained caused the 2.5% loss of the right foot.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $536.00 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 the Arbitrator's Award of 40% loss of use of the right leg is vacated.

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

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

The party commencing 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: SEP 25 2019

Maria E. Portela

Thomas J. Tyrrell

Deborah L. Simpson

MEP/dmm
O: 082719
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

McKINNEY, DEB
Employee/Petitioner

Case# **09WC052101**

09WC052102
10WC010389

DCFS
Employer/Respondent

19IWCC0526

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:

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

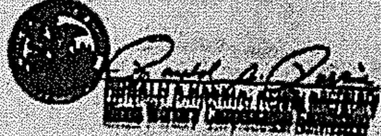
5946 ASSISTANT ATTORNEY GENERAL
HELEN LOZANO
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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

JUL 12 2017



STATE OF ILLINOIS)
)SS.
COUNTY OF **Winnebago**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Deb McKinney
Employee/Petitioner
v.
DCFS
Employer/Respondent

Case # **09 WC 52101**

Consolidated cases: **09 WC 52102**
10 WC 10389

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **Rockford, Illinois**, on **May 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other

FINDINGS

On the date of accident, **February 6, 2007**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner's average weekly wage was $970.27.

On the date of accident, Petitioner was **57** years of age, *single* with **0** dependent child.

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

ORDER

- The Respondent shall pay Petitioner temporary total disability benefits of $ **646.84** /week for **28-4/7** weeks, from **June 3, 2008 through July 29, 2008 and from July 23, 2009 through December 14, 2009**, as provided in Section 8(b) of the Act.
- The Respondent shall pay $ **1,590.48** for necessary medical services, as provided in Section 8(a) and 8.2 of the Act and consistent with the medical fee schedule.
- The Respondent shall pay the Petitioner the sum of **$582.16** / week for a period of **86** weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused **40% loss of use of the right leg.**
- Case number 10 WC 10389 is hereby dismissed.

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

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

Signature of Arbitrator

7/11/17
Date

ICArbDec

JUL 1 2 2017

STATEMENT OF FACTS

Prior to proceeding to hearing, Petitioner proffered an oral motion to consolidate Petitioner's three pending claims: 09 WC 52101 with February 6, 2007 as the date of accident; 09 WC 52102 with January 18, 2009 as the date of accident; and 10 WC 10389 with March 3, 2008 as the date of accident. Petitioner then made an oral motion to voluntarily dismiss case 10 WC 10389. Respondent did not object to either motion and both were granted by the undersigned Arbitrator.

Petitioner testified that she first became employed by the State of Illinois approximately in 2000 as a full-time investigator for the Department of Children and Family Services ("DCFS"). In this position, she was responsible for investigating reports of alleged child abuse. Her duties included travelling to homes, schools, hospitals, and jails to investigate her assigned cases and typing reports related to her investigations.

On February 6, 2007 Petitioner was at a family home to interview some children. Initially, she spoke with the children's parents in the living room. After a short period of time, Petitioner was informed that there were 2 additional children in the basement. Petitioner then proceeded to the home's basement to interview the two additional children. Petitioner stated that as she followed one of the parents down the stairs, she had paperwork in one hand and was holding the hand of a child in the other hand. Petitioner stated she was asked to remove her shoes prior to descending the stairs. As she was descending the stairs, about five to six steps from the bottom of the stairs, her right toe got caught on the carpeted stairs, she fell with a knee bent underneath her. Petitioner explained that the child she was holding was not injured. She stated that no steps were missing from the stairwell, and that other than being narrow, nothing was wrong with the stairs.

Petitioner stated that after the fall, she did not feel well but completed her interview. Petitioner testified she experienced immediate pain in her right ankle and her right knee and had difficulties walking. Once she left the home, she called her supervisor, Angela Harris, and left a message regarding her accident and injury. Petitioner did not seek medical treatment immediately; rather, she went home for the day and iced her injury.

Petitioner testified that the next morning she experienced swelling and was unable to put weight on her right lower extremity. As a result, she presented to Physicians Immediate Care for treatment. Records submitted show she reported a chief complaint of left foot pain. The record states that Petitioner reported she had fallen the day before at a client's house. The history noted that as she was going down the carpeted stairs, her left foot seemed to slip and her right foot jammed into the stairs. She complained of right foot swelling, bruising, and pain. X-rays of the right foot obtained revealed a normal right foot with no apparent fractures or avulsions, free-floating bodies, tumors, bone cysts or improper alignment. She was diagnosed with a right foot contusion, placed on desk work for the next three to four days, prescribed an ortho-shoe, and to follow up in one week. (PX 1) Petitioner testified that an x-ray of her right knee was also taken, and further stated that her medical records were incorrect if they did not reflect this diagnostic test.

Petitioner testified that she took paperwork from Physician's Immediate Care to her employer noting that she needed to perform desk work for a few days. She followed up at Physicians Immediate Care on February 14, 2007 and reported slight pain of right foot. She stopped using the prescribed ortho-shoe and denied use of Ibuprofen. Petitioner also reported occasional swelling after working all day. An examination of her right lower extremity to palpation, range of motion, stability and muscle strength were all normal. An examination of the right foot revealed no swelling, good range of motion and decreased ecchymosis remaining beneath the 4th toe. She was diagnosed with a resolved right foot contusion and discharged from care. (PX 1)

Petitioner testified she continued to experience pain, swelling, and an uncomfortable right knee. She then sought treatment with her primary care physician, Dr. Lori Richardson, who prescribed a MRI. The MRI was completed on May 4, 2007. The history noted at the time of the MRI noted Petitioner had medial right knee pain after falling down stairs in February. Also noted was she had pain after sitting. The MRI revealed 1.) prominent instrasubstance degeneration and free edge fibrillation at the body and posterior horn of the medial meniscus with no definite meniscal tear; 2.) edema superficial to the fibers of the medial collateral ligament complex, suggesting a Grade I sprain; 3.) mild nonspecific subcutaneous edema at the anteromedial aspect of the knee; and 4.) small-to-moderate joint effusion. (PX 8) Petitioner testified that subsequent to the MRI, Dr. Richardson recommended a referral for corrective surgery. Petitioner provided that when she attempted to follow up with Dr. Richardson regarding the referral, she learned that Dr. Richardson was closing her clinic. The medical records for this provider were not presented at hearing.

Petitioner testified that she continued to work full-duty, with pain and "on and off" swelling in her knee. On January 28, 2008, Petitioner presented to Dr. Jon Strutzenberg. Records on this date indicate Petitioner was a new patient upon referral of Dr. Richardson. Hand written notes show amongst other complaints, Petitioner reported a painful right knee. Also noted was a reported history of a right knee arthroscopy. (PX 2) Petitioner testified that the history of a prior right knee arthroscopy was incorrect.

Petitioner returned to Dr. Strutzenberg on April 25, 2008 for a routine three-month diabetic checkup. On this date, she reported complaints of a bad right knee pain for less than one year and the inability to fully extend the leg. The records also show she wanted to discuss surgery. An examination revealed positive tenderness in the medial and lateral joint lines as well as a mildly positive varus and valgus stress test. Dr. Strutzenberg assessed right knee pain and ordered a MRI. (PX 2) The MRI when completed on May 3, 2008 demonstrated 1.) medical meniscal tear; 2.) posterior bowing of the intact ACL, possibly due to sequela of partial injury; 3.) possible remote injury at deep component lateral collateral ligament; and 4.) probable remote injury at deep compartment lateral collateral ligament. (PX 2, PX 4) On May 9, 2008, Dr. Strutzenberg referred Petitioner to Dr. Tara Nigam at Orthopedic Sports and Rehabilitation. (PX 2)

Records submitted show Petitioner presented to Dr. Nigam on May 13, 2008 with a history of falling and twisting her right knee three weeks ago. After reviewing the May 2008 MRI and performing an examination, Dr. Nigam recommended she undergo arthroscopic surgery. (PX 3) Petitioner denied providing the history of falling three weeks previous. Instead, Petitioner testified to reporting to Dr. Nigam that her right knee felt unstable and was afraid of falling.

On June 4, 2008, Dr. Nigam performed right knee arthroscopy, synovectomy in three compartments, chondroplasty in two compartments, possible medial meniscectomy posterior area and lateral release. The postoperative diagnosis was 1.) torn meniscus; 2.) chondromalacia in two compartments; ad 3.) synovitis in three compartments, subluxating laterally in the knee cap. Medical records submitted show the procedure took place at Rockford Memorial Hospital. Said records from that date note that Petitioner reported she fell four weeks ago, and twisted her right knee. (PX 4) Petitioner denied this at hearing explaining that her medical records are incorrect.

Petitioner continued to treat with Dr. Nigam and Dr. Strutzenberg post-operative and underwent a course of physical therapy. On July 29, 2008, it was noted that Petitioner was slowly improving. She still lacked 15 degrees of extension and had slight restriction of flexion. Petitioner was released to return to work effective July 30, 2008. She was also instructed to continue in therapy twice a week. By August 19, 2008, it was reported that her knee was much better. Although she was limited with extension, she had fairly good range of motion. Dr. Nigam released Petitioner from her care with instructions of continual exercise. (PX 3)

Petitioner testified that she returned to her regular duty work and continued to experience difficulties with her right knee. On November 24, 2008, Petitioner saw Dr. Strutzenberg for a diabetic check-up. At that visit, Petitioner also reported continued knee pain along with decreased range of motion since the surgery. She was referred to physical therapy. (PX 2)

Petitioner began physical therapy at Ogle County PT on December 2, 2008. At the initial visit, the therapist noted Petitioner provided a history that she had fallen while descending stairs at a client's house in February of 2007. The history noted that she had slid down the stairs on her right knee for approximately 5 steps. (PX 2) By April 3, 2009, the therapist documented that Petitioner had been seen 22 times for her right knee and that Petitioner reported a lot of relief in the knee compared to before therapy. Petitioner continued to complain of discomfort with prolonged standing. (PX 2)

Petitioner testified that due to continual complaints, she sought a second opinion with Dr. Russell Bodner at Midwest Orthopedic. Petitioner stated she was recommended to Dr. Bodner by a family member. The doctor's records show Petitioner presented on July 16, 2009 with a two-year history of right knee contracture. Dr. Bodner recorded that she initially hurt her knee when she was at work holding a child's hand and fell down stairs. The doctor noted that her knee was bent and she had significant pain. Also noted was that her knee never really straightened after her arthroscopy and two courses of physical therapy. Dr. Bodner diagnosed right knee flexion contracture, significant and chronic. A MRI was recommended which when performed on July 21, 2009 showed postoperative change consistent with prior partial arthroscopic medial meniscectomy without evidence of recurrent tear. Also noted was moderate chondromalacia medial femorotibial compartment. (PX 5)

Petitioner followed-up with Dr. Bodner on July 23, 2009. Dr. Bodner noted the MRI demonstrated that she had almost no cartilage on the medial compartment of the knee. The doctor also provided that she had a postsurgical change in the meniscus which was totally abnormal. Dr. Bodner's impression was that she had a degenerative medial compartment with possible continued meniscal damage that had gone on to a 15-20 degrees flexion contracture of two years' duration. Dr. Bodner provided surgical options of a second arthroscopy with a high likelihood of failure; a partial knee replacement which would not guarantee a relief of the contracture; or a full knee replacement which would allow access to the posterior compartment for contracture release. Petitioner chose to undergo a full knee replacement. (PX 5)

On August 25, 2009, Dr. Bodner performed surgery consisting of cemented right total knee replacement with flexion contracture release. The post-operative diagnosis was right knee medial compartment arthritis with a 25 degree contracture. (PX 5)

Post-operatively, Petitioner underwent another round of physical therapy from September 2, 2009 through December 8, 2009. During that period, she continued to present with range of motion limitations and underwent a closed manipulation of her right knee on November 5, 2009. On December 11, 2009, Dr. Bodner noted Petitioner was doing quite well. She had up to 113 degrees of flexion and her pain was controlled. The doctor returned her to full duty work effective December 14, 2009 and noted she should return for a one year checkup with x-rays. Petitioner attended a follow up visit with Dr. Bodner on August 25, 2010. At that time, Petitioner reported occasional discomfort noting that her pain had essentially gone. On examination, the doctor noted that her range of motion had really improved. She was at near full extension to well over 100 degrees. X-rays taken revealed that the total knee replacement was in good alignment with no loosening. Dr. Bodner recommended continue with activities as desired. (PX 5) Petitioner testified that she has not treated for her knee thereafter.

Respondent submitted documents which are titled Unusual Incident Reporting Form. The reports dated February 5, 2010 and February 8, 2007 were marked and submitted as Respondent's Exhibits 2 and 3 respectively. The report dated February 5, 2010 contains a narrative completed by Petitioner wherein she

indicated that during the fall on February 6, 2007, her right leg/knee had turned under her body and that she had fallen, riding on her right knee, down the stairs. (RX 2) The Supervisor's report of the injury, completed by Angela Harris on 2/8/07, noted that she had received a phone call from Physician's Immediate Care on February 7, 2007, stating that Petitioner was being seen for a foot contusion. The report also notes that Petitioner came into the office on February 7, 2007 and informed Ms. Harris that she had fallen down the stairs with her leg underneath her. (RX 3)

Ms. Angela Harris was called to testify in her capacity as a supervisor at DCFS. More specifically, Ms. Harris was Petitioner's supervisor during her alleged accident of February 6, 2007. She testified regarding the procedures of DCFS when an employee suffers an injury while on the job. Ms. Harris testified that she did not receive a phone call or a message from Petitioner regarding an injury. She indicated that on February 7, 2007, Petitioner reported that she sustained an injury on February 6, 2007. At that time, Petitioner provided documentation from Physicians Immediate Care seeking time off on February 7, 2007. Ms. Harris indicated that Petitioner described injuring only her foot, and not her knee. Ms. Harris also testified that she received a phone call from a nurse at Physicians Immediate Care advising her that Petitioner was seeking treatment for an on the job injury. Based on this information, Ms. Harris filled out an Unusual Incident Report on February 8, 2007 which documents the phone call received from Physicians Immediate Care received on February 7, 2007.

At the request of her attorney, Petitioner underwent a Section 12 examination with Dr. Jeffrey Coe on March 30, 2010. Dr. Coe testified via deposition in this matter. The doctor testified that Petitioner reported that she sustained an injury on February 6, 2007 when she was walking down some stairs, a toe of her right foot got caught on the carpeting and injured her right foot. The doctor noted that Petitioner was treatment at Physicians Immediate Care for what was diagnosed as contusion and bruising of the right foot. According to Dr. Coe, Petitioner reported that her right foot got better following her follow-up visits at Physicians Immediate Care and that ultimately her right foot and toe symptoms had resolved. (PX 6, pp.9-10, 20)

Dr. Coe also testified that Petitioner reported a second accident in March 2008 wherein she fell down some stairs, twisted her right knee, and experienced an onset of right knee pain. Subsequent to this injury Petitioner complained of right knee pain and received treatment for her right knee. (PX 6, pp. 11-13) Dr. Coe stated that after obtaining a history, performing an examination and reviewing Petitioner's medical records, he opined Petitioner was status post right total knee arthroplasty, right knee replacement, and later manipulation of the right knee. He opined that there was a causal relationship between Petitioner's work injury of around March 8, 2008 and her condition of ill-being of her right knee. PX 6, pp. 24-26, 48)

Petitioner testified to some improvement following the knee replacement and manipulation procedures. She returned to work until resigning in March of 2010 due to issues with her knee and right arm (See 09 WC 52102). Petitioner testified that she attempted to work as a Veterinarian's assistant but could not perform the demands of the job. Petitioner provided that the job was too physically demanding on her knee and her right arm. She continued to experience tenderness inside the knee. She cannot squat or bend down on the knee. She has to be careful about getting on the floor due to difficulty getting back up. She no longer maintains a garden as she has difficulty getting down to the ground and back up. She provided that her home backs up to the river and she can no longer go up the hill she must traverse to get to the river. She testified that she generally has someone go with her to the grocery store now. Petitioner also stated that she has a three-level home. She no longer goes to the 3rd floor due to the difficulty traversing stairs.

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 adopts the statement of facts detailed above and finds that an accident did occur that arose out of and in the course of Petitioner's employment with Respondent on February 6, 2007.

Petitioner testified that she fell down the stairs at a client's home, while descending, holding a clipboard in one hand, and a small child's hand in her other. Petitioner testified that she had been asked to remove her shoes and that the stairs in which she fell were narrow. The frequency in which Petitioner would be required to traverse client stairs increased her risk of such an injury. As did the fact that she was required to remove her shoes before doing so. Further, Petitioner testified that the stairs were quite narrow. Finally, Petitioner testified that she was holding her clipboard in one hand and a child's hand in her other. With her hands full, Petitioner would not be able to hold on to a railing while descending the stairs. All these facts contribute to Petitioner's increased risk regarding the stairs that resulted in her injury.

In this case, Petitioner was descending stairs of a client's home in order to interview the two children that were in the basement. Her actions were reasonable and foreseeable. As such, the Arbitrator finds that Petitioner sustained an accident that arose out of and in the course of her employment by Respondent on February 6, 2007.

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

The Arbitrator finds that Petitioner provided timely notice of her accident to Respondent. Petitioner testified that she left a phone message with her supervisor, Angela Harris, reporting her injury on February 6, 2007. Ms. Harris testified that Petitioner provided paperwork from the doctor's office the day after the injury. While Ms. Harris testified that Petitioner initially reported only a foot injury, the Supervisor's Report of Injury Form notes that Petitioner had fallen down the stairs with her leg underneath her. Further, the Unusual Incident Reporting Form, filled out by Petitioner, stated that she had ridden her knee down the stairs and that she was to stay off her leg/knee for a couple of days. That form was prepared on February 5, 2010 and February 8, 2007.

Therefore, the Arbitrator finds that timely notice was given by Petitioner to Respondent.

With respect to (F.) Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner's right foot diagnosis and her current right knee condition of ill-being are causally related to her work injury of February 6, 2007. The Arbitrator relies upon the records of the treating physicians and the credible testimony of Petitioner regarding the continuation of her symptoms since her fall.

The Arbitrator relies upon the well-established rules set forth by the Illinois Supreme Court that "the fact that an employee may have suffered from a preexisting condition will not preclude an award if the condition was aggravated or accelerated by the employment. The employee need not prove employment was the sole causative factor or even that it was the principal causative factor, but only that it was a causative factor in the resulting injury." Williams v. Industrial Com., 85 Ill. 2d 117, 122 (1981). Thus, even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193 (2003).

Petitioner's records document the injury described by Petitioner as occurring on February 6, 2007. While the initial Physician's Immediate Care records focus on Petitioner's foot, the history notes that she had fallen down the stairs. While Dr. Richardson's records were not submitted as evidence, the Arbitrator infers Petitioner voiced right knee complaints to the doctor; otherwise, a MRI of the knee would not have

been ordered and carried out. Petitioner's MRI report from May 4, 2007 notes the history that Petitioner had knee pain after falling down stairs in February, consistent with the history of the injury given by Petitioner. The MRI also revealed swelling, effusion, and prominent degeneration of the meniscus at that time. Petitioner testified that she had not had any problems with her right knee prior to her fall in February of 2007, noting that she'd been an avid walker prior to her injury. No medical records were submitted that contradicted Petitioner's assertion that her knee was symptom free prior to February 6, 2007.

Petitioner testified that she continued to work full-duty, with pain and "on and off" swelling in her knee. On January 28, 2008, Petitioner presented to Dr. Jon Strutzenberg. Records on this date indicate Petitioner was a new patient upon referral of Dr. Richardson. Hand written notes show amongst other complaints, Petitioner reported a painful right knee. Also noted was a reported history of a right knee arthroscopy. Petitioner testified that the history of a prior right knee arthroscopy was incorrect. The Arbitrator notes Petitioner's testimony regarding same is borne out by the MRI taken on May 7, 2007. There is no reference to any post-surgical findings on said MRI.

On April 25, 2008, Dr. Strutzenberg noted Petitioner's complaints of a bad right knee pain for less than one year. Dr. Strutzenberg assessed right knee pain and ordered a repeat MRI which when performed May 3, 2008, evidenced a meniscal tear along with a possible remote injury at deep component lateral collateral ligament. While Dr. Nigam noted in May of 2008 that Petitioner fell 3 weeks prior, Petitioner testified that the only fall she had sustained was on February 6, 2007. Petitioner testified to reporting to Dr. Nigam that her right knee felt unstable and was afraid of falling. Petitioner's subsequent records at Ogle County PT and with Dr. Bodner, are consistent with the February 6, 2007 onset of Petitioner's knee symptoms. When seen at Ogle County PT on December 8, 2008, she provided a detailed history of falling down approximately 5 stairs at a client's house in February of 2007. The history described holding a clipboard in one hand and holding a child's hand in the other and falling down the stairs with her right leg underneath her. The record noted that Petitioner had been able to continue working, though with ongoing pain.

The history of the February 6, 2007 onset of right knee symptoms is also consistent with the history provided to Dr. Bodner. On July 16, 2009, at Petitioner's initial visit, she described initially hurting her knee when she fell down stairs while holding a child's hand approximately 2 years prior. Dr. Bodner assessed chronic flexion contracture of two years duration. Petitioner then underwent the knee replacement and manipulation, consistent with Petitioner's injury and the resulting damage to her knee. While Petitioner likely had preexistent degeneration in her right knee, it was clearly aggravated by her February 6, 2007 injury, directly causing the need for her three surgical procedures.

Based on the positive May 3, 2008 MRI, Petitioner underwent a right knee arthroscopy, a full knee replacement, a closed manipulation of her right knee, and several courses of physical therapy.

The Arbitrator recognizes Dr. Coe opined that Petitioner suffered two separate injuries, one in February 6, 2007 and another in March 2008. He opined that there was a causal relationship between Petitioner's injury of March 2008, not her February 7, 2007 accident, and her condition of ill-being of her right knee. Dr. Coe premised his causal connection opinion on his belief that Petitioner's knee complaints commenced after a March 2008 incident. However, as noted above, the evidence submitted reference Petitioner right knee complaints at the "documented" earliest by May 4, 2007, the day her first MRI was performed. Again, said MRI report notes the history that Petitioner had knee pain after falling down stairs in February 2007.

No evidence was presented that would indicate that Petitioner had any issue with her right knee prior to February 6, 2007. Petitioner credibly testified to ongoing symptoms following her injury, improved, but

not eliminated by her surgical procedures. Based on the medical records, there is a clear chain of events connecting Petitioner's meniscal tearing, medial compartment degeneration, and flexion contracture, and her February 6, 2007 injury. Her ongoing symptoms are consistent with the injuries suffered and no significant contradictory medical evidence was admitted at trial.

Therefore, the Arbitrator finds that Petitioner's right foot diagnosis and her present right knee condition of ill-being are causally related to her February 6, 2007 injury.

With respect to (J.) Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds the following:

Having found the requisite causal relationship, the Arbitrator finds that the medical services provided to Petitioner were reasonable and necessary for the injuries she sustained on February 6, 2007. The Arbitrator finds that the treatment Petitioner received at Midwest Orthopedics Institute (Dr. Bodner) and Physician's Immediate Care were reasonable and necessary for her injury. There are no outstanding medical bills related to Petitioner's right knee injury. However, the records from Midwest Orthopedic Institute evidence that Petitioner paid $1,054.48 out of pocket for treatment of her right knee injury. The records from Physician's Immediate Care evidence that Petitioner paid $536.00 out of pocket for treatment of her February 6, 2007 injury.

The Arbitrator finds that Respondent is liable for the treatment provided, as set forth in Petitioner's Exhibit 7. As such, Respondent is liable for out of pocket medical expenses incurred by Petitioner, totaling $1,590.48.

With respect to (K.) What temporary benefits (TTD) are in dispute, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner is owed Temporary Total Disability benefits from June 3, 2008 through July 29, 2008 and from July 23, 2009 through December 14, 2009, for a total of 28-4/7 weeks at the TTD rate of 646.84 per week.

Petitioner initially returned to work, at desk work only, following her injury. She was able to return to her regular job activities for a period of time before requiring surgery on her knee. Due to her ongoing symptoms, Petitioner underwent the right knee arthroscopy, medical meniscectomy, synovectomy, chondroplasty, and lateral release on June 4, 2008. She was off work through July 30, 2008 for that procedure. Petitioner then returned to work until being taken off on January 26, 2009. However, the records indicate that Petitioner was taken off work at that time mainly due to her inability to continue typing due to her right arm symptoms. (See 09 WC 52102) While Petitioner was continuing to undergo physical therapy, she had been working with her knee symptoms at that time. It was not until July 23, 2009, when Petitioner was prescribed a knee replacement, that she was off work once again. Petitioner was off work as a result of her knee replacement and manipulation until December 14, 2009.

As such, the Arbitrator finds that Petitioner reached maximum medical improvement as of December 14, 2009 and is entitled to TTD benefits between June 3, 2008 through July 29, 2008 and from July 23, 2009 through December 14, 2009.

With respect to (L.) What is the nature and extent of the injury, the Arbitrator finds as follows:

The Arbitrator notes that inasmuch as this matter pertains to injuries sustained prior to September 1, 2011, an analysis of the factors pursuant to 820 ILCS 305/8.1b is not appropriate.

Petitioner sustained injuries to her right foot and knee while descending stairs on February 6, 2007. As a result of same, Petitioner was treated conservatively for right foot contusion. With respect to her right knee, she underwent right knee arthroscopy, synovectomy in three compartments, chondroplasty in two compartments, possible medial menisceсtomy posterior area and lateral release. Due to continual complaints, Petitioner subsequently underwent surgery consisting of cemented right total knee replacement with flexion contracture release. Post-operatively, she also underwent a closed manipulation of her right knee. She was ultimately returned her to full duty work effective December 14, 2009. Petitioner testified to ongoing pain and difficulty ambulating due to her right knee. While she experienced some improvement following the knee replacement and manipulation procedures, she continued to have difficulties with activities such as squatting or bending at the knee and traversing stairs. She described difficulty getting on the floor due to difficulty getting back up. She no longer maintains a garden as she has difficulty getting down to the ground and back up. She testified that she generally has someone go with her to the grocery store now. Also, she has a three-level home and no longer traverses to the 3rd floor.

Based on the above, the Arbitrator finds that Petitioner sustained 40% loss of use of the right leg pursuant to Section 8(e) 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 SANGAMON	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SANDRA YOST,

Petitioner,

19IWCC0527

vs.

NO: 17 WC 1045

STATE OF ILLINOIS,
DEPT. OF NATURAL RESOURCES,

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, and nature and extent, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, but makes the following clarifications and modifications to further explain our reasoning.

The Commission clarifies that Petitioner's accident was caused by a risk incidental to her employment with Respondent. The Arbitrator cited *Fermi National Accelerator Lab v. IC*, 224 Ill.App.3d 899 (2nd Dist., 1992), which found a fall compensable when the surface onto which the employee stepped caused an increased risk because of the presence of some pebbles or rocks. *Dec. at 3 (unnumbered)*. Respondent argues *Fermi* is distinguishable because the "defects" in Petitioner's incident were "natural to the area," unlike the pebbles in *Fermi*. *R-brief at 11.* Respondent wrote, "mulch, leaves, and seeds in a flower bed in Illinois during the fall season...are quite natural to the area given the general weather conditions." The flaw in Respondent's argument is that, even if we were to find that wet leaves, etc. are not compensable hazards by themselves, this was not the "defect" that caused Petitioner's injuries. The witness report completed by Robert Bedient states that Petitioner was walking down the sidewalk, which

was buried in leaves, and when she stepped off the sidewalk she lost her balance and fell face forward. *Px2.* Mr. Bedient also noted that there was "about a 2 inch drop off on both sides of the sidewalk." *Id.* Therefore, the "defect" was actually the 2-inch drop off from the edge of the sidewalk to the ground. The fact that this defect was obscured by the leaves and "gumballs," may have been a contributing factor but her injuries were caused by the unexpected defect in the height of the ground relative to the sidewalk. We note that there are witness statements from three additional people. Lisa Janssen wrote, "Sandra fell instantly face down very hard, there were leaves and those gum balls all over the area. She twisted her ankle and then fell on her front side and her left knee hit the sidewalk..." In contrast to Mr. Bedient and Ms. Janssen, Johnna Parrish wrote, Petitioner "suddenly slipped and fell straight to the ground on the concrete sidewalk. When I had approached the smoke hut before Sandra I had noticed that the sidewalk was covered in damp leaves and I almost slid myself but was able to catch myself." In other words, Ms. Parrish seems to indicate that Petitioner slipped on the damp leaves but this is not consistent with Petitioner's testimony or the other witnesses that indicate Petitioner stepped off of the sidewalk. The last witness, Rita Owen, did not actually see Petitioner fall but saw her laying on the ground and helped her get up.

The Arbitrator also cited *First Cash Financial Services v. IC*, 367 Ill.App.3d 102 (1st Dist., 2006), which stated that an employment related risk includes "falling on uneven or slippery ground at the workplace." *Dec. at 3 (unnumbered).* Respondent argues that this case is not controlling because Petitioner was in an area that was open to the public. *R-brief at 11.* Respondent also argues that it "provided no instructions as to how or where the employees were to spend their breaks," that Petitioner made a free choice between two smoking areas and, Respondent did not direct the route the employees were to take. *R-brief at 8-9.* Although Respondent provided two smoking areas, Petitioner testified that she always went to the same one because the other one was on the other side of the building and was too far to walk. *T.21.* She testified that she always took the same route "by choice" but that's because it was "pretty much the only way to go." *T.23.* We find Petitioner was on her way to a designated smoking area, using the sidewalk that was provided and which Respondent was responsible for maintaining. When Petitioner encountered other people on the sidewalk approaching her, she stepped off the sidewalk onto ground that was significantly lower than the sidewalk, which was undetected because the area was covered with leaves. We find that this was a risk incidental to her employment and not a neutral risk.

Respondent next argues that this case can be compared to the Commission decision in *O'Hara v. Illinois, State of/Vienna Correctional Center*, 2017 Ill. Wrk. Comp. LEXIS 116 (17 IWCC 93). In *O'Hara*, the Commission found that the claimant's stepping off of a sidewalk was compensable because his job as a prison guard required him to be vigilant and not look at the ground while he was walking. Respondent argues that, in contrast, Petitioner testified her job did not require her to be vigilant while outside. *T.24.* Respondent argues, "Thus, Petitioner's choice to step off the sidewalk without first looking down, was not an act that was incidental to her employment." *R-brief at 12.* Respondent seems to be arguing that Petitioner's accident could have been avoided if she had looked down or was paying more attention. However, we find that

even if Petitioner had looked down, the defect she encountered was obscured by the leaves. Therefore, it was not her failure to look down that caused her injuries. Furthermore, even if the defect on Respondent's property was more open and obvious, this would not transform Petitioner's risk from one being incidental to employment into a neutral risk. Nor does the fact that this smoking area may have also been accessible to the public require a neutral risk analysis. Petitioner was traversing the sidewalk, which was provided by Respondent for her to walk to one of two designated smoking areas. She encountered an employment related risk; that being a defect on property that Respondent was responsible for maintaining.

Respondent also argues that causation should be terminated because Petitioner sustained a subsequent similar injury. The December 14, 2016 record of Dr. Idusuyi states, "She recently landed on her knee wrong again." Respondent argues that Petitioner presented no medical causation opinion to state that her left knee condition remained causally related to the work accident and was not related to this subsequent fall. We note that Petitioner was not questioned at the hearing about this subsequent incident. Although Dr. Idusuyi ordered an MRI at the time of this visit to rule out a ligament tear, Dr. Idusuyi released Petitioner to work as of December 19, 2016. Petitioner's diagnosis before the MRI was a left knee contusion. After the MRI, on January 4, 2017, Dr. Idusuyi's diagnosis was a "severe" left knee contusion but negative for any ligament tears. He noted that Petitioner continued to have some fluid present in the knee but that Petitioner stated it was decreasing. Based on all of the evidence, we find there is insufficient evidence to find that this "incident" rose to the level of a subsequent intervening accident which broke the chain of causation from the initial injury.

Respondent further argues that Petitioner "testified that she could not attend physical therapy because she could not afford to take off work but then later admitted the appointments were before work." *R-brief at 13.* We do not believe this is an example of Petitioner being dishonest. She testified she did not complete the physical therapy that was prescribed because she could do the exercises at home and could not afford to miss work anymore. *T.14.* We find that just because the few therapy appointments Petitioner did attend were scheduled before work does not mean that all of them could have been. In addition, Respondent argues that Petitioner failed to wear her knee brace and did not fill a prescription for the antibiotic to treat her cellulitis. Although the records do indicate that Petitioner was not compliant with the knee brace and home exercises, Petitioner testified that she does the home exercise only when she has pain which is usually in the mornings and "maybe a couple of times a week, if that." *T.16.* Petitioner also testified that her only current left knee symptom is "stiffness in it every now and then." *T.18.* Therefore, it does not appear that her non-compliance caused any long-term complications. As for Petitioner not filling the cellulitis prescription, the records indicate that condition had also resolved by November 30, 2016.

We do, however, clarify the Arbitrator's decision regarding the precise nature of Petitioner's causally-related condition of ill-being. The most recent office note by Dr. Idusuyi, dated February 25, 2017, includes a diagnosis of right foot plantar fasciitis and "anterior left knee pain with chondromalacia patella." Although we affirm that Petitioner's left knee

19IWCC0527

contusion is causally related to the accident, we find there was no medical opinion to causally relate the diagnosis of chondromalacia patella to her accident. We also find that Petitioner's diagnosis of right foot plantar fasciitis is not causally related to her work injury.

Regarding permanency, the Commission affirms the Arbitrator's award of 3% loss of use of the left leg under §8(e) of the Act. However, we make the following modifications to the analysis of the five permanency factors in §8.1b(b) of the Act. For factor (iv), future earning capacity, we find this factor deserves no weight since there was no direct evidence of a wage loss and Petitioner is earning the same salary. Regarding factor (v), evidence of disability corroborated by the treating medical records, we note that the Arbitrator focused primarily on Petitioner's treatment history as opposed to her current level of disability. Petitioner testified she performs her home exercises "maybe a couple of times a week, if that" and "only when I have any pain or stretching or anything like that." *T.16.* Petitioner's only remaining symptom is "stiffness...every now and then." *T.18.* Although Petitioner takes Pramipexole for restless leg syndrome (*T.35-36)*, we find this is unrelated to her work injury.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 13, 2017, is hereby affirmed and adopted with the changes noted above.

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

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

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: SEP 2 5 2019

Maria E. Portela

Thomas J. Tyrrell

Deborah L. Simpson

SE/
O: 8/13/19
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

YOST, SARAH A Case# **17WC001045**
Employee/Petitioner

SOI-DEPT OF NATURAL RESOURCES **19IWCC0527**
Employer/Respondent

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:

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0502 STATE EMPLOYEES RETIREMENT
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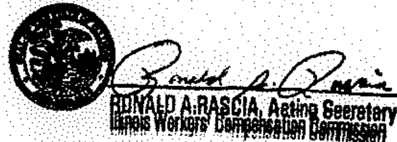
CERTIFIED as a true and correct copy pursuant to 820 ILCS 305/14

NOV 13 2017



STATE OF ILLINOIS)
)
COUNTY OF **SANGAMON**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Sandra A. Yost Case # 17 WC 001045
Employee/Petitioner

v. **Springfield**

State of Illinois – Department of Natural Resources
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, arbitrator of the Commission, in the city of **Springfield**, on **September 22, 2017**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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

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

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

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

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

G. [ ] What were the petitioner's earnings?

H. [ ] What was the petitioner's age at the time of the accident?

I. [ ] What was the petitioner's marital status at the time of the accident?

J. [x] Were the medical services that were provided to petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary 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 the respondent?

N. [ ] Is the respondent due any credit?

O. [ ] Other ____________

FINDINGS

On **November 16, 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 $ **36,372.00**; the average weekly wage was $ **699.46**.

On the date of accident, Petitioner was **44** 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 $ **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.

Pursuant to a stipulation between the parties, Respondent shall receive a credit for any payments made by its group health insurance. Respondent will satisfy any subrogation claim by its group health insurance.

ORDER

The respondent shall pay the Petitioner the sum of $419.68/week for a further period of 6.45 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused a **3% permanent partial disability to her left leg**.

The Respondent shall pay the Petitioner compensation that has accrued from **November 16, 2016** through **December 18, 2016**, and shall pay the remainder of the award, if any, in weekly payments.

The respondent shall pay the further sum of $ 9,010.55 for necessary medical services, as provided in Section 8(a) of the Act. Pursuant to a stipulation between the parties, Respondent will receive a credit for any bills paid through Petitioner's health insurance.

Respondent shall pay Petitioner temporary total disability benefits of $ **466.31** /week for **4 3/7** weeks, commencing November 17, 2016 through December 18, 2016 (excluding November 28, 2016), as provided in Section **8(b)** of the Act.

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

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

Edward Lee
Signature of arbitrator

11/8/17
Date

NOV 13 2017

In support of the Arbitrator's decision relating to (C), the Arbitrator finds the following facts:

A. PETITIONER'S TESTIMONY

Petitioner testified that on November 16, 2016, she was employed by the State of Illinois – Department of Natural Resources. (Arbitration Transcript, hereinafter "A.T." Page 7). Petitioner was an Office Associate II. (A.T., Page 7). That position requires Petitioner to work with titles and registrations for boats and snowmobiles. (A.T., Page 7). Petitioner's department also issues registrations for snowmobiles and reviews watercraft and snowmobiles applications. (A.T., Page 7).

Petitioner testified that her job allows her to take several breaks through the course of a day. (A.T, Page 8). Petitioner testified that she was smoker and that she took smoke breaks during the time of her regularly scheduled breaks. (A.T., Page 8). Petitioner testified that there was an officially designated smoking area for Department of Natural Resources (hereinafter "DNR") employees in the area where she worked. Employees were supposed to smoke in that area if they wanted to do so on their breaks. (A.T., Page 8).

Petitioner testified that on November 16, 2016, the date of her accident, she was on her way to have a cigarette during her regularly schedule break. (A.T., Pages 8 & 9). She was on her way to the designated smoking area. (A.T., Page 9). Petitioner was walking along the sidewalk to the smoking area when another smoker was returning to the office from that area. (A.T., Page 9). Petitioner moved over to make room for that person to pass her on the sidewalk and as she stepped aside, she fell down and twisted her ankle because the ground was uneven. (A.T., Page 9). There were leaves covering the ground, there was also mulch and gum balls from the tree that was there. (A.T., Page 9). The leaves, mulch and gum balls were covering the ground so that Petitioner did not see where the ground broke off. (A.T., Page 9). Petitioner testified that she fell and twisted her right ankle and landed on her left knee. (A.T., Page 10). Petitioner testified that she was then taken to Memorial Prompt Care by a co-worker of hers. (A.T., Page 10). The Respondent stipulated that Petitioner fell and injured herself but denied that her accident arose out of and in the course of her employment. In *Fermi National Accelerator Lab v. Industrial Commission*, 224 Ill.App.3d 899, 586 N.E.2d 750, 166 Ill.Dec. 792 (2nd Dist. 1992), the Appellate Court found a fall compensable when the surface onto which the employee stepped caused an increased risk because of the presence of some pebbles or rocks. In *First Cash Financial Services v. Industrial Commission*, 367 Ill.App.3d 102, 853 N.E.2d 799, 304 Ill.Dec. 722 (1st Dist. 2006) the Appellate Court reversed the Commissions award of benefits to an employee who fell in a company bathroom. The employee did not know what caused her to slip and fall or observed anything whatsoever on the floor. She did not faint or blackout. No one witnesses the claimant fall. The court reviewed the applicable Illinois law in determining whether an employee who falls at work sustains an injury which arises out of and in the course of her employment. As part of its review, the court stated:

> Accordingly, for an injury caused by a fall to arise out of the employment, a claimant must present evidence which supports a reasonable inference that the fall stemmed from a risk associated with her employment ... Employment related risks associated with injuries sustained as a consequence of a fall are those to which risk the general public is not exposed, such as the risk of tripping on a defect at the employer's premises, **falling on uneven or slippery ground at the workplace**, or performing some work related task which contributes to the risk of falling. ([citation omitted] 853 N.E. 2d at 803 - 804)

B. RESPONDENT'S EXHIBIT TWO (2)

Respondent's Exhibit 2 is an email from Dave Kuykendall to Chelsea Grubb, Respondent's attorney. The email states:

> "The smoking area here at IDNR is open to the public as well as our employees here at DNR headquarters, and is one of two areas that are designated just for that purpose as we allow no smoking in or around the buildings. DRN does not own the property here, but we do lease the area from the State of Illinois. We are in charge of maintaining the area as far as keeping it clean and safe to use."

C. CO-WORKER'S STATEMENTS

Statements from Petitioner's co-workers who witnessed this incident are included in the records as Petitioner's Exhibit 2. Johanna Parrish, a co-employee who witnessed this event believed Petitioner fell on the sidewalk. She said when she approached the smoke hut before Sandra, she had noticed the sidewalk was covered in damp leaves and she almost slipped herself but was able to catch herself. She indicated that Petitioner's knee started swelling immediately after she fell. Another co-employee brought her car and took Petitioner to prompt care.

Another of Respondent's employees, Lisa Janssen stated that she was walking to the smoke hut at 300 p.m. and Sandra fell instantly face down very hard. Ms. Janssen noted there were leaves and gum balls all over the area. Ms. Janssen indicated that Petitioner twisted her ankle and then fell on her front side and her left knee hit the sidewalk. Accordingly to Ms. Janssen, Petitioner's ankle and knee instantly began to swell and Petitioner was in a lot of pain. Ms. Janssen took Petitioner to get medical assistance immediately. The sound of Petitioner falling was like someone slammed a brick onto concrete. Lastly, Robert Bedient, another employee of Respondent, authored a report of what he saw. He said that Petitioner was coming outside for her afternoon break. Petitioner was walking down the sidewalk which was buried in leaves and when she stepped off the sidewalk lost her balance and fell face forward onto the concrete slab. He noted that there was a drop off of approximately 2 inches on both sides of the sidewalk. Mr. Bedient was facing Petitioner when she fell. Petitioner was walking abreast of another woman. (This explains the reason why Petitioner stepped off the sidewalk). Mr. Bedient immediately ran to assist Petitioner who was lying face down on the pavement.

D. PETITIONER'S INJURIES DID ARISE OUT OF AND IN THE COURSE OF HER EMPLOYMENT

In a case where an employee is injured in a parking lot, it is immaterial whether the employer owns the lot in determining the employer's liability for parking lot injuries. *De Hoyos v. Industrial Commission*, 26 Ill.2d 110, 185 N.E.2d 885 (1962). The employer's control or dominion over the parking lot is the important factor. *Maxim's of ILL. Inc. v. Industrial Commission*, 35 Ill.2d 601, 221 N.E.2d 281 (1966). Exhibit 2 clearly establishes the State of Illinois' dominion and control over the property where the Petitioner fell. As indicated in that exhibit, the property was leased by the Respondent and the Respondent is in charge of maintaining the area as far as keeping it clean and safe to use.

When an employee sustained a fall as a result of a hole in an alleyway that provided the only ingress to the employee's entrance, the injury was found to be compensable because the employment had created a risk situation. *Bommarito v. Industrial Commission*, 82 Ill.2d 191, 412 N.E.2d 548, 48 Ill.Dec. 197 (1980). The

maintenance of the area adjacent to the sidewalk which lead to and from the designated smoking area and was under the maintenance and control of the Respondent, clearly created a similar risk situation.

Clearly, in this case, the Respondent did not keep the area clear and safe to use. It is certainly foreseeable that if a group of employees are funneled to a designated smoking area, coming and going at different times, those employees are subjected to a risk arising out of and in the course of their employment. Petitioner testified that employees were allowed to take breaks at various times throughout the day. It is certainly foreseeable that Petitioner would have to step off the sidewalk to allow other employees to pass. Her fall, which occurred when stepping onto uneven ground covered with gum ball, mulch and leaves clearly arose out of and in the course of her employment. In fact, the testimony of Petitioner and the statements of her co-workers clearly show the failure to properly maintain the area where Petitioner fell increased the likelihood of her accident. Both the sidewalk and the adjoining area where Petitioner stepped off were covered with leaves. Those leaves obscured the drop off from the sidewalk to the adjacent ground and the unevenness of the adjacent ground. Based upon the Petitioner's unrebutted testimony as well as the Respondent's Exhibit 2, the Arbitrator finds that Petitioner did sustain an accident which arose out of and the course of her employment with Respondent.

In support of the Arbitrator's decision relating to (F), the Arbitrator finds the following facts:

The Arbitrator repeats the findings set forth in support of (C), as if set forth fully herein.

Petitioner testified that she was taken to Memorial Medical Center's Express Care following this injury where a series of x-rays of her ankle and knee were taken. (A.T., Page 11.) Petitioner testified that the personnel at Memorial cleaned the wound on her knee and put a bandage on her knee and told her to follow up if the swelling did not decrease. She was instructed to apply ice and rest. (A.T., Page 11.) Petitioner injured her right ankle and left knee. (A.T., Page 11.) Petitioner testified that before her fall, she was not having any problems whatsoever with her right ankle or left knee. (A.T., Pages 11 & 12.) Petitioner testified that when her problems did not resolve after her visit to Memorial, she went to see Dr. Idusuyi. (A.T., Page 12.) She also saw her family physician, Dr. Gary Rull. (A.T., Page 12.) Petitioner cut her left knee when she fell and then developed cellulitis in the knee as well. (A.T., Pages 12 & 13). Dr. Rull took care of the cellulitis in Petitioner's knee and Dr. Idusuyi took care of the orthopaedic problems in her knee and ankle. (A.T., Pages 12 & 13.) Dr. Idusuyi prescribed anti-inflammatory drugs and physical therapy. He also tried to aspirate her knee and remove fluid from it. (A.T., Pages 13 & 14). Lastly, Dr. Idusuyi prescribed physical therapy for Petitioner. (A.T., Page 14). Petitioner did not complete the physical therapy prescribed by Dr. Idusuyi. (A.T., Page 14). She testified that she had already missed a lot of work and was not getting paid by the State. (A.T., Page 14). She continued to do the exercises she was shown at home and was instructed how the exercises should be preformed by the physical therapist she saw. (A.T., Page 14). She also testified that her mother was ill at the time and she could not afford to miss any more work. (A.T., Page 15). She testified:

> "And I was already not getting paid for being off for injuring myself and I just couldn't afford to do it anymore. And at the same time I lost my other source of income which was my mother at the same time I was dealing with being off work who was then permanently put into a nursing home. So I made a decision that I just – I had to go back to work, I need the pay. I couldn't take nay more time off and ---"

The records from Petitioner's visit to Memorial Express Care are included in the record as Petitioner's Exhibit 3. They note that Petitioner landed on her left knee and twisted her right ankle and was complaining of swelling to both the knee and the ankle. The records indicate that she was seen approximately an hour and a half after

the injury occurred. The records indicate that Petitioner was complaining of pain, swelling and redness following her fall. Movement or standing exacerbated her conditions. She was prescribed an Ace wrap and splint and diagnosed with a knee contusion and effusion as well as a right ankle sprain and a skin abrasion. She was prescribed Tylenol with Codeine for pain and provided with educational materials regarding her knee effusion, contusion and ankle strain. She was instructed to keep antibiotic ointment and band aids on her knee abrasion until it healed and watch for signs of infection.

Dr. Idusuyi's records are included in the record as Petitioner's Exhibit 4. Dr. Idusuyi's initial office note of November 28, 2016, indicates that Petitioner fell and was injured at work and was referred by Memorial Medical Center. Dr. Idusuyi kept Petitioner off work and obtained x-rays of her ankle and knee. No acute fractures were identified and she was instructed to apply antibiotic ointment to her knee and to return in 4 to 6 weeks.

Petitioner saw Dr. Idusuyi again in December of 2016 and January and February of 2017. Her January 4, 2017 office note with Dr. Idusuyi is also included in Petitioner's Exhibit 4. It indicates that she underwent an MRI to rule out a ligament tear. Fortunately, she did not have such a tear. Dr. Idusuyi indicates the MRI of her knee revealed mild osteoarthritis, soft tissue contusion and edema and a large anteriorly situated fluid collection. The assessment was a severe left knee contusion and an MRI which was negative for ligament tears. He recommended physical therapy which he indicated she would like to perform at home. Dr. Idusuyi noted that Petitioner continued to have fluid present on her knee although it was decreasing. He recommended that she continued to wear her Neoprene knee sleeve for comfort and swelling purposes. Dr. Idusuyi previous notes indicate that he allowed Petitioner to return to work on December 19, 2016.

Petitioner last returned to Dr. Idusuyi's office on February 25, 2017. That note is also included in Petitioner's Exhibit 4. Dr. Idusuyi noted that he previously diagnosed Petitioner with a severe contusion to her left knee. She also developed cellulitis in the knee and he had prescribed physical therapy. She was wearing the Neoprene sleeve for comfort and swelling. She continued to take Mobic. She was still experiencing swelling and pain in her knee. She described the pain as sharp. Pain occurred most of the day. She also continued to experience pain in her right ankle and heel. Her pain was aggravated by walking. Dr. Idusuyi noted that the pain interferes with Petitioner's walking and activities of daily living. She was diagnosed as suffering from Plantar fasciitis and an anterior left knee pain with chondromalacia of the patella. Dr. Idusuyi recommended physical therapy. For the reasons set forth above, Petitioner testified that she performed exercises at home and did not attend the formal physical therapy as prescribed by Dr. Idusuyi. Dr. Idusuyi also injected Petitioner's knee with marcaine and depo-medrol to help control her pain.

As indicated above, Petitioner was also seen by Dr. Gary Rull, her family physician. Dr. Rull's office note is included in the record as Petitioner's Exhibit 6. Dr. Rull's note indicates that Petitioner fell on November 16, 2016 and sustained an abrasion on her left knee. She also sprained her ankle. She noticed increased swelling, redness and warmth in her left leg. She went to Memorial Express Care on November 23, 2016, where a Doppler study was done. Dr. Rull diagnosed her as suffering from knee pain and cellulitis of the left lower leg. He instructed her to follow up with Dr. Idusuyi and continue to wear her knee brace. She was also instructed to elevate her leg and apply ice if needed. Dr. Rull's note of November 30, 2016 indicates that the cellulitis largely resolved with treatment.

Based upon the medical records set forth above and the testimony of Petitioner as well as the findings set forth in support of (C), the Arbitrator finds that Petitioner's current condition of ill-being to be casually related to her injury at work.

In support of the Arbitrator's decision relating to (J), the Arbitrator finds the following facts:

The Arbitrator repeats the findings set forth in support of (C) and (F), as if set forth fully herein.

The Respondent's objection to payment of medical bills is based on its contention that Petitioner did not sustain an accident which arose out of and in the course of her employment with Respondent. Given the finding above that Petitioner's injury did arise out of and the course of her employment, the Arbitrator finds the Respondent responsible for payment of the following medical bills pursuant to the fee schedule:

1. Memorial Medical Center in the amount of $3,550.55 (Petitioner's Exhibit 8);
2. Midwest Emergency Department Specialists, Ltd. in the amount of $514.00 (Petitioner's Exhibit 9);
3. Osarentin Idusuyi, M.D. in the amount of $1,817.00 (Petitioner's Exhibit 10);
4. Midwest Imaging in the amount of $2,231.00 (Petitioner's Exhibit 11);
5. Clinical Radiologists in the amount of $254.00 (Petitioner's Exhibit 12);
6. Midwest Rehab in the amount of $501.00 (Petitioner's Exhibit 13); and
7. Gary Rull, M.D. in the amount of $143.00 (Petitioner's Exhibit 14).

In support of the Arbitrator's decision relating to (K), the Arbitrator finds the following facts:

The Arbitrator repeats the findings set forth in support of (C), (F) and (J), as if set forth fully herein.

The parties stipulated that Petitioner was temporary totally disabled for a period of 4 3/7 weeks. This period was from November 17, 2016 through December 18, 2016 with the exception of November 28, 2016. Respondent disputed liability for temporary total disability based on its defense of no accident. Given the Arbitrator's finding above that Petitioner did sustain an accident which arose out of and in the course of her employment with Respondent, the Arbitrator finds that Respondent is responsible for payment of Petitioner's temporary total disability. Petitioner's average weekly wage was $699.46. This yields a daily temporary disability rate of $66.62. As Petitioner was temporarily total disability for 31 days, she is entitled to have from Respondent the sum of $2,065.22 for temporary total disability.

In support of the Arbitrator's decision relating to (L), the Arbitrator finds the following facts:

The Arbitrator repeats the findings set forth in support of (C), (F), (J) and (K), as if set forth fully herein.

The date of this accident is November 16, 2016. Accordingly, 820 ILCS 305/8.1(b) applies to this case. That section of the Act requires permanent partial disability to be established using five (5) criteria. Those criteria are:

1. The AMA reported level of impairment;
2. The occupation of the injured employee;
3. The age of the employee at the time of the injury;
4. The employee's future earning capacity; and
5. Evidence of disability corroborated by the treating medical records.

The statute provides no single factor shall be the sole determinate of disability. The statute requires a written order explaining the relevance and weight of any factors used in addition to the level of impairment as reported by the physician.

In this case, there is no impairment rating included in the evidence. Accordingly, the nature and extent of Petitioner's permanent partial disability must be based upon the remaining four (4) factors.

The Occupation of the Petitioner

Petitioner is employed for the State of Illinois in a clerical position. She is allowed to sit when performing most of her job duties. Although Petitioner continues to have problems with pain in her knee and ankle, she is able to perform her job. Given the fact that Petitioner is able to sit while performing her job, the Arbitrator does not place significant weight on this factor.

Petitioner's Age

At the time of her injury, Petitioner was 44 years old. Petitioner continues to experience problem with stiffness in her knee. She continues to perform exercises on a regular basis to alleviate the stiffness. (A.T., Page 17). Petitioner's ankle continued to bother her for a month and then returned to normal. Since that time, she has not notice any other problems with her ankle. (A.T., Page 18). Petitioner is a young woman and continues to experience a problem with her knee. That problem may continue through the course of her life.

Petitioner's Future Earning Capacity

There was no direct evidence of wage loss in this case. Petitioner is earning the same salary she was earning at the time of the occurrence. Accordingly, the Arbitrator places very little weight on this factor.

Disability Corroborated by the Medical Records

Petitioner's medical records are reviewed above in connection with the section relating to causal connection (C) of this decision. Petitioner developed cellulitis from a cut on her knee and a collection of fluid on her knee which required physical therapy and injections. Petitioner was unable to perform the prescribed course of physical therapy because she was out of personal/vacation time and her mother was undergoing serious health problems at the time. Petitioner was also not receiving temporary total disability during the time she was off. She was treated with pain medications and injections for the knee. She continues to experience stiffness in her knee for which she does exercises which she was taught in physical therapy. Petitioner testified that her ankle has returned to its pre-injury condition.

Considering these factors as a whole pursuant to Section 8.1(b) of the Act, 820 ILCS 305/8.1(b), the Arbitrator finds that Petitioner sustained accidental injuries that caused a 3% loss of use of her left leg. The Arbitrator further finds that Respondent shall pay the Petitioner the sum of $419.68 per week for a further period of 6.45 weeks as provided in Section 8(e) of the Act. The Arbitrator finds that Petitioner did not sustain a permanent disability right ankle.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RAMON CRUZ,

Petitioner,

19IWCC0528

vs.

NO: 14 WC 38125

FIRST GROUP, INC./
GREYHOUND,

Respondent.

DECISION AND OPINION ON REVIEW

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

We find that the Arbitrator's award of 20% of Petitioner-as-a-whole under §8(d)2 of the Act was appropriate for his cervical and lumbar injuries but we add to the analysis and change the weights given to permanency factors (iii) and (v) under §8.1b(b) of the Act.

For factor (iii), Petitioner's age at the time of injury, we affirm the Arbitrator's analysis but change the weight from "greater weight" to "some weight."

For factor (v), evidence of disability corroborated by the treating medical records, we change the weight from "greatest weight" to "great weight." We also add that, although Dr. Alzate released Petitioner to work full duty on April 24, 2017, Dr. Alzate later gave him restrictions of no climbing and limited neck movement (as tolerated), which is reflected in the June 5, 2017 Work Status Report. We find that these restrictions are valid, consistent with a one-level fusion, and are also supported by the examination findings of Respondent's §12 physician, Dr. Lami. At his examination on October 22, 2018 (report dated November 6, 2018), Dr. Lami

indicated that Petitioner had full cervical flexion but only had extension "past 30 degrees." The Commission takes judicial notice that normal cervical extension is 70 degrees, which means Petitioner had difficulty looking up. Dr. Lami also noted limited rotation to the right of 60 degrees and to the left of 45 degrees. Normal rotation would be 90 degrees bilaterally. However, Petitioner's restrictions have already been considered under the "occupation" factor (ii), and we will not give them additional weight under this factor.

To address the parties' specific arguments, we find that Petitioner's non-occupational difficulties such as being unable to ride his motorcycle are due to his limited cervical range of motion and that this was considered and given weight in the "occupation" factor. Respondent's argument that Petitioner is able to drive a car so, therefore, he shouldn't have any problems riding a motorcycle has been considered and is rejected. Respondent also argues that there are no treating medical records to support Petitioner's ongoing pain complaints or to prove that he is being prescribed Norco by his primary care physician. It is true that Petitioner reported no pain to Dr. Alzate on April 24, 2017, but he was taking Norco at that time. Petitioner testified that he had no pain at the time of the hearing but he also sometimes takes 2 to 4 Hydrocodone a day due to the pain from looking up and down. *T.49.* On redirect, he testified that there are some days when he doesn't take it but he has never gone extended periods of time without it. *T.51.* Dr. Alzate's last record, on April 24, 2017, recommended that Petitioner continue taking Norco. Petitioner testified that he currently gets his prescription from his primary care physician, whose records are not in evidence, but when he was examined by Dr. Lami on October 22, 2018, it was noted that Petitioner's "current medication" included Hydrocodone. Therefore, although Dr. Lami's report is not a "treating record," it supports the finding that Hydrocodone was still being prescribed.

The parties did not make specific arguments regarding permanency related to Petitioner's lumbar condition. However, we specifically find that the award of 20% under §8(d)2 accurately compensates Petitioner for both his cervical and lumbar conditions.

We affirm and adopt the Arbitrator's award and analysis regarding the permanency award for the right hand.

Finally, we correct a scrivener's error on page 3 of the decision. The first sentence under the Findings of Fact states, "On November 17, 2014, Petitioner worked as journeyman mechanic for Respondent." We hereby change November 17, 2014 to November 7, 2014, which is Petitioner's undisputed accident date.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $644.53 per week for a period of 121.4635 weeks, as calculated in the Arbitrator's decision.

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

19IWCC0528

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: SEP 2 5 2019

Maria E. Portela

Thomas J. Tyrrell

Deborah L. Simpson

SE/
O: 8/27/19
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CRUZ, RAMON
Employee/Petitioner

Case# **14WC038125**

19IWCC0528

FIRST GROUP INC/GREYHOUND
Employer/Respondent

On 3/12/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.45% 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 DONALD W FOHRMAN & ASSOC
ADAM J SCHOLL
101 W GRAND AVE SUITE 500
CHICAGO, IL 60654

0560 WIEDNER & McAULIFFE LTD
EMMA K JAMERSON
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

19IWCC0528

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

RAMON CRUZ
Employee/Petitioner

Case # **14** WC **38125**

v.

Consolidated cases: ______

FIRST GROUP, INC./GREYHOUND
Employer/Respondent

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert M. Harris**, Arbitrator of the Commission, in the city of **Chicago**, on **1/24/19**. By stipulation, the parties agree:

On the date of accident, **11/7/14**, 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 $**55.859.44**, and the average weekly wage was $**1,072.22**.

At the time of injury, Petitioner was **52** years of age, ***married*** with **0** dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

Respondent shall be given a credit of $**85,428.57** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**85,428.57**.

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 $644.53/week for a further period of 121.4635 weeks, as provided in Sections 8(d)2 and 8(e)9 of the Act, because the injuries sustained caused the **20% (100 weeks)** permanent partial loss of use to the person as a whole under Section 8(d)2 and a **12-1/2% (25.625 weeks)** permanent partial loss of use to the right hand/wrist under Section 8(e)9. Respondent is entitled to a credit of a 2.03% prior loss of use of the right hand (2.03% X 2.04 weeks = 4.1615 weeks credit) based on a prior settlement in 06 WC 44149. (RX4) **The result is a net award of 21.4635 weeks for the hand**. Consequently, Respondent shall pay Petitioner a total of **121.4635 weeks of permanent partial disability benefits (100 + 21.4635 = 121.4635 weeks) at the PPD rate of $644.53, or the total net sum of $78,286.87.**

Respondent shall pay Petitioner compensation that has accrued from **4/24/17** through **1/4/19**, 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.

Robert M. Harris

March 11, 2019

Signature of Arbitrator Robert M. Harris
Dated

MAR 12 2019

ILLINOIS WORKERS' COMPENSATION COMMISSION

Ramon Cruz,	)	
	)	
Employee/Petitioner,	)	Case No.
	)	14 WC 38125
	)	
v.	)	
	)	
First Group, Inc. d.b.a Greyhound,	)	
	)	
Employer/Respondent.	)	

MEMORANDUM OF DECISION OF ARBITRATOR
FINDINGS OF FACT

The parties agree Petitioner sustained a work-related injury on November 7, 2014 and that the resulting injuries to his cervical spine, lumbar spine and right wrist were causally related. The parties agreed Petitioner was temporarily totally disabled from November 10, 2014 through July 17, 2015; August 24, 2015 through October 9, 2015; and from November 5, 2015 through April 24, 2017, for which all TTD benefits were received. The sole issue in dispute is the nature and extent of Petitioner's permanent partial disability.

Findings of Fact

On November 17, 2014, Petitioner worked as journeyman mechanic for Respondent. He testified his job duties required him to perform bumper-to-bumper repairs on the bus fleet of respondent. Petitioner described that the repairs below the bus were performed from a pit underneath. This required him to look and reach upward to perform his job duties. The job also required heavy lifting at times especially when he had to lift heavy parts such as brake drums, alternators or radiators which weigh well over 100 lbs. Petitioner stated that he uses a variety of tools in his job tasks including an impact guns and hand tools consisting of wrenches, screw drivers and hammer.

On the date of the agreed accident, Petitioner was walking in the garage and slipped on piece of plastic that he had stepped on. Petitioner testified he did the "splits" with his legs and fell to the ground. Petitioner stated that as result of the injury, he had pain to his right hand, neck

and lower back. Petitioner testified he did not immediately seek medical care because he presumed his pain would eventually dissipate.

Petitioner sought medical on November 10, 2014 with the Illinois Orthopedic Network. Petitioner reported symptoms to Dr. Sajjad Murtaza of neck pain, lower back pain, bilateral extremity pain and right wrist pain. (PX1, p.2) After performing a clinical exam, Dr. Murtaza diagnosed Petitioner with a cervical and lumbar strain with bilateral lower extremity radiculopathy. (Id.) Petitioner was advised to begin a physical therapy program and was prescribed medications. (Id.) Petitioner initiated physical therapy with New Life Physical Therapy on November 13, 2014. (Id.) Petitioner then came under the care of a chiropractic physician, Dr. Aldin Carrion at New Life Medical Center on November 13, 2014, along with treatment by another chiropractor, Manish Pandya. (PX 2) It was recommended Petitioner undergo at least 24 sessions of chiropractic therapy. It appears Petitioner continued to present for chiropractic treatment far beyond 24 sessions for several times per week for many months until at least October 22, 2015. (Px. 2). Petitioner attended what appears to be an excessive amount of chiropractic treatment visits for his injuries. However, the Arbitrator notes this treatment was not an issue at trial and will therefore offer no further comments (Dr. Lami merely noted he reviewed these records but made no comments about them). Petitioner received conservative treatment only for his low back, and no longer complained of low back pain to his chiropractor as of September 15, 2015. Petitioner's last complaint of back pain to Dr. Sajjad Murtaza, his medical doctor, was on February 23, 2015. No complaints of low back pain appear in petitioner's visit with Dr. Sajjad Muraza on March 11, 2015. (Px. 1.)

Petitioner returned to Dr. Murtaza on December 11, 2014. Petitioner's primary complaints were cervical pain radiating down his right upper extremity, lumbar pain and right wrist pain. (Id. at 7) Dr. Murtaza recommended MRIs of the lumbar and cervical spine and referred him to Dr. Wiesman concerning the right wrist. (Id.)

Petitioner visited Dr. Wiesman on January 21, 2015. Dr. Wiesman examined Petitioner and diagnosed him with a right wrist sprain and a right volar ganglion cyst. (Id. at 11) Dr. Wiesman recommended an MR arthrogram to determine underlying pathology, if any. (Id.)

On January 26, 2015, Dr. Murtaza saw Petitioner. He reported continued pain with neck and intermittent numbness and tingling down to his fingers. (Id. at 14) Dr. Murtaza noted that the MRI of the lumbar spine revealed mild disc bulging at L2-3 through L4-5, but no focal herniations or significant stenosis. (Id.) The MRI of the cervical spine revealed moderate diffuse

disc bulge at C5-6 with associated disc dehydration and moderate diffuse stenosis. (Id.) Petitioner was advised to continue therapy. An epidural injection was recommended but Petitioner refused.

Petitioner returned to Dr. Wiesman on February 18, 2015 following the MRI arthrogram taken on February 5, 2015. Dr. Wiesman noted the MRI arthrogram did not reveal any fractures or a TFC tear. (Id. at 18) Dr. Wiesman indicated he believed Petitioner had carpal tunnel syndrome of the right wrist and recommended an EMG.

On February 23, 2015, Dr. Murtaza saw Petitioner who reported he still had pain with his lumbar spine and neck, his neck being worse. (Id. at 20) Dr. Murtaza wanted Petitioner to reconsider an epidural injection to the neck and continue with physical therapy for his cervical and lumbar spine.

An EMG was performed on March 4, 2015. It was abnormal with evidence highly suggestive of cervical radiculopathy at C6, C7 root levels. (Id. at 24) Dr. Wiesman examined Petitioner on March 11, 2015 and reviewed the EMG results and opined Petitioner's wrist symptoms were related to the median nerve. He recommended a right carpal tunnel release and excision of the ulnar radial ganglion cyst. (Id. at 25)

On April 30, 2015, Dr. Murtaza performed an epidural injection to Petitioner's C5-6 disc level. Petitioner followed-up with Dr. Murtaza on June 1, 2015 and reported one week of very mild relief. (Id. at 29) Dr. Murtaza referred Petitioner to a spine surgeon for further recommendations. (Id.)

Petitioner testified that on June 11, 2015 je was examined under Section 12 at Respondent's request by Dr. Jay Levin who Petitioner testified examined his wrist, low back and neck (which report from Dr. Levin was apparently reviewed by Dr. Lami as indicated in his November 6, 2018 Section 12 report but Dr. Levin's report was not offered into evidence. Petitioner did testify that after this exam with Dr. Levin, wrist surgery was authorized).

On June 19, 2015, Petitioner was examined by Dr. Geoffrey Dixon, a neurosurgeon. Dr. Dixon reviewed the MRI report and performed a clinical examination. On that visit, he held off any recommendations until he reviewed the actual MRI films. (Id. at 31) Dr. Dixon reviewed the MRI films with Petitioner on July 17, 2015 which he felt clearly demonstrated a herniated disc at C5-6. (Id.) Based on the failure of conservative treatment and the findings of the EMG and MRI, Dr. Dixon recommended an anterior cervical discectomy and fusion of C5 and C6. (Id.)

On August 24, 2015, Dr. Wiesman performed surgery to the right wrist consisting of a carpal tunnel release and an excision of the volar ganglion cyst. (Id. at 34)

Petitioner testified he sought a second opinion concerning his neck with neurosurgeon, Juan Alzate, M.D. on August 31, 2015. Dr. Alzate evaluated Petitioner and reviewed the EMG results. He recommended an updated MRI. (PX3, p.25) The MRI was performed on September 9, 2015 and was reviewed by Dr. Alzate on September 21, 2015. Dr. Alzate recommended a one level anterior cervical disc fusion at C5-6. (Id.)

Petitioner had one last visit with Dr. Wiesman on October 3, 2015. Dr. Wiesman ordered continued therapy. (PX2, p.38)

After awaiting medical authorization from Respondent, Petitioner was able to undergo the proposed cervical surgery on June 7, 2016. The surgery consisted of a C5-6 anterior cervical discectomy, interbody fusion using a lordotic bone graft. (PX3, p.27)

On June 27, 2016, Petitioner returned to Dr. Alzate for a post-operative follow-up appointment. Dr. Alzate noted good placement of the graft and screws and recommended that he begin physical therapy. (Id. at 17) Petitioner's next visit with Dr. Alzate occurred on August 8, 2016. Dr. Alzate recommended four additional weeks of physical therapy followed by a functional capacity evaluation. (Id. at 15)

Petitioner underwent a functional capacity evaluation on October 4, 2016. The evaluation revealed that Petitioner did not meet the physical requirements of a diesel mechanic. (Id. at 94) Petitioner tested out at only a light demand work level. (Id.)

Petitioner followed-up with Dr. Alzate on October 24, 2016. Dr. Alzate reviewed the functional capacity evaluation and recommended Petitioner undergo work hardening. (Id. at 11)

Petitioner participated in work hardening and followed with Dr. Alzate periodically. On March 16, 2017, Petitioner had a second functional capacity evaluation. The evaluator determined Petitioner only met 58% of his job demands. (Id. at 56) Dr. Alzate reviewed the evaluation on March 20, 2017 and recommended an additional four weeks of work hardening. (Id. at 5) Petitioner had the additional work hardening and underwent a third functional capacity evaluation on April 20, 2017. The third evaluation indicated Petitioner met 100% of his job demands. (Id. at 50)

On April 24, 2017, Dr. Alzate reviewed the third functional capacity evaluation and examined Petitioner. Dr. Alzate opined Petitioner could return to work full duty with no restrictions.

Petitioner testified that following his doctor's release he returned back to work for Respondent. He stated that Respondent worked with him and provided him job duties that did

not require him to work above his head. Petitioner further stated that he saw Dr. Alzate one last visit on June 5, 2017. Petitioner related his symptoms and Dr. Alzate imposed permanent restrictions of no climbing and limited neck movements as tolerated. (Id. at 31)

Petitioner presented for an IME and AMA impairment rating with Dr. Babak Lami on November 6, 2018. Petitioner reported an injury on November 7, 2014 where he slipped on a piece of plastic and fell forward onto his hands. Petitioner sought initial treatment with Dr. Murtaza on November 10, 2014, a few days after the incident, complaining of neck pain, low back pain, bilateral lower extremity pain, and right wrist pain. (Rx. 2). Petitioner reported to Dr. Lami that he sustained injuries to his neck and right wrist after his November 7, 2014 work incident. Petitioner did not report any injuries to his lumbar spine. Petitioner reported that he was returned to work in July of 2017. (Rx. 2). Dr. Lami reviewed multiple medical records and imaging reports, including MRI and EMG testing. Dr. Lami reported that Petitioner's cervical spine MRI showed a disc bulge at C5-C6 and mild stenosis from C3-C7. The cervical spine EMG showed C6 and C7 radiculopathy. Petitioner underwent a cervical fusion surgery at C5-C6 on June 7, 2016 performed by Dr. Alzate. (Rx. 2).

On physical examination, Petitioner had no atrophy in the upper extremities, and 5/5 intrinsic testing to the upper extremities. Petitioner had full flexion of the cervical spine with extension past 30 degrees, rotation to the right of 60 degrees, and rotation to the left of 45 degrees. Petitioner's cervical, thoracic, and lumbar spine were all nontender to palpation. (Rx. 2).

Dr. Lami opined Petitioner was not reporting any radicular symptoms, but only cervical pain. Based on Dr. Lami's review of the medical records, he opined the cervical fusion was healed and Petitioner was at MMI for his cervical spine fusion. Petitioner neither provided a work restrictions report, nor stated that he was under any work restrictions at his appointment with Dr. Lami. For permanent impairment, Dr. Lami evaluated a 5% whole person permanent impairment for the one-level spinal fusion pursuant to tables 17.2, 17.6, and 17.7 of the AMA Sixth Edition Guidelines to permanent impairment. This rating included a functional history adjustment based on petitioner's functional capacity, along with an evaluation of petitioner's perceived pain disability. (Rx. 2).

Petitioner credibly testified he currently works for Respondent as a mechanic. He mainly performs inspection jobs and electrical and HVAC repairs. These jobs typically do not require extensive head movement. He does not perform any jobs that require him to look up. He stated

that most of his ongoing issues are associated with up and down movements and left to right rotation. These issues have caused him to discontinue riding his motorcycle.

Petitioner further testified he has loss of grip with his right hand and difficulty with the use of wrenches and heavy pulling. Due to the residuals from his accident, Petitioner no longer earns extra money on the side repairing automobiles at his home.

On cross-examination, Petitioner testified for his current pain he takes Hydrocodone prescribed by his personal physician. He will sometimes take the Hydrocodone two to four times in a day based on his symptoms.

Conclusions of Law

What is the nature and extent of the injury?

As a result of the work-related accident, Petitioner sustained injuries to his cervical spine, lumbar spine(minimal) and right wrist for which he is entitled to permanent partial disability.

Petitioner came under the care of Dr. Juan Alzate on August 31, 2015 to obtain a second opinion for his cervical spine condition. An updated MRI of the cervical spine was performed on September 9, 2015 at the American Center for Spine and Neurosurgery, revealing cervical spondylosis disc osteophyte complex at C5-C7. Dr. Alzate opined that this was the cause of petitioner's current complaints and recommended he proceed with surgery. When Petitioner returned to Dr. Alzate on November 2, 2015, he reported that he had returned to work, but his neck pain became severe with numbness and tingling extending into the left upper extremity. Dr. Alzate advised Petitioner would remain off work until further notice.

Dr. Alzate performed an anterior cervical discectomy and fusion surgery at C5-C6 was at Advocate Condell Medical Center on June 7, 2016. Thereafter, Petitioner began physical therapy and a work conditioning program at Athletico on November 2, 2016. After two months of work conditioning, Petitioner met 100% of his goals and he was ultimately discharged from work conditioning on April 20, 2017 at a heavy-demand level. An FCE on April 20, 2017 found petitioner to be capable of 12/12 job demands, and 100% of his job demands at a heavy physical demand level. (Rx. 3). Dr. Alzate agreed with the FCE findings and released Petitioner to return to full duty without restrictions on April 24, 2017.

Petitioner testified Dr. Alzate recommended an anterior cervical discectomy and fusion surgery at C5-C6, which was performed on June 7, 2016. Post surgically, Petitioner testified he

underwent therapy and work hardening for his cervical spine. Petitioner testified he did meet 100% of his goals in work conditioning, which qualified him for a full duty release to work under heavy duty work duties. Petitioner testified Dr. Alzate returned him to full duty work and placed him at MMI with no recommendations for further treatment as of April 24, 2017.

However, Petitioner testified he returned to see Dr. Alzate on June 5, 2017, at which time he was given restrictions of "no climbing and limited neck movement." This is indicated in a record found in PX3, a "Work Status Report" dated June 5, 2017. This form indicates Petitioner was released to full-time work on June 5, 2017 with restrictions of "no climbing and limited neck movement (as tolerated)." Although Petitioner testified he saw Dr. Alzate on that date, inexplicably there is no corroborating medical report of an office visit found in Dr. Alzate's certified records (PX 3). However, there is no doubt this is an authentic "Work Status Report", one of many such forms in the records.

Petitioner testified that he is still able to drive his own car to and from work and is still able to perform the activities of daily life.

Petitioner went on to testify regarding the course of his treatment for his work injuries, including his neck, low back, and right wrist. He did previously have an injury to his right wrist in the form of a right carpal tunnel diagnosis prior to the November 7, 2014 date of injury, for which he received a permanency award of 2.03% loss of use of the right hand after settlement. This pre-existing carpal tunnel diagnosis is the same diagnosis as evaluated in this claim. (Rx 4).

An MR Arthrogram of the right wrist was performed on February 5, 2015, revealing a possible post-traumatic small bone cyst at the ventral portion of the lunate bone with mild degenerative changes at the radiocarpal joint. Petitioner subsequently underwent a right wrist carpal tunnel release and ganglion cyst excision on August 24, 2015 performed by Dr. Irvin Wiesman. Petitioner obtained post-surgical therapy at New Life Medical Center for his right wrist, and was last seen on October 22, 2015 with noted improvement in his right wrist range of motion (Px. 1 &2).

Regarding Petitioner's right wrist, Petitioner testified he still has some residual weakness in his right wrist, but the medical records show Petitioner's last complaints to the right wrist were documented on October 22, 2015. (Px. 2). Petitioner further testified he was not actively involved in treatment related to the right wrist or right hand. Petitioner testified he did not have any restrictions to his right hand or wrist other than no climbing on the busses. Petitioner testified that he was able to climb stairs.

As to the lumbar spine, Petitioner testified that he received minimal, conservative treatment for the lumbar spine, after which his pain resolved completely by September 15, 2015. He did not receive any injections or surgical treatment for his lumbar spine and testified his low back was back to normal with no permanent complaints. Petitioner agreed he was not complaining of any residual lumbar spine complaints as of Dr. Babak Lami's Section 12 examination. Petitioner testified he is not on any restrictions related to his lumbar spine and is not taking any pain medications for his lumbar spine.

A determination of permanent partial disability is governed by Section 8.1(b) of the Illinois Workers' Compensation Act and the five factors enumerated therein. The five factors are as follows:

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that Dr. Babak S. Lami assessed an impairment rating for the cervical spine. It was his opinion Petitioner had impairment of 5% impairment to the whole person. Impairment ratings were not submitted into evidence concerning the lower back and right wrist. Dr. Babak Lami performed an AMA Impairment Rating on November 6, 2018 at the request of the Respondent. (Rx2). Dr. Lami reviewed the treating medical records, obtained the current complaints from the Petitioner and performed physical examination of Mr. Cruz. Petitioner had full flexion of the cervical spine with extension past 30 degrees. Rotation to the right was 60 degrees, and 45 degrees on the left. Dr. Lami's assessment was that Petitioner was at MMI for a cervical spine fusion and assessed a 6% initial default impairment for the one level fusion surgery, with a -1% adjustment given petitioner's functional history adjustment. Petitioner's final impairment rating was a 5% permanent partial impairment to the person as a whole due to the one-level spinal fusion. No AMA impairment ratings have been performed for the right wrist or lumbar spine. Therefore, the Arbitrator gives some weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes Petitioner was able to return back to work as journeyman mechanic with limitations of limited neck movement and no climbing ladders. Respondent has accommodated Petitioner in allowing him to perform duties that do not require him to work overhead or jobs that

require side-to-side movement. Petitioner testified that is no longer able to earn side income at home. Arbitrator therefore gives great weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes Petitioner was 52 years old at the time of the accident and 56 years old as of the date of hearing, with years remaining in his work-life expectancy. Because of his age and the fact that he has permanent disability that will affect his daily living, 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 was able to return back to work for Respondent and his future earnings were not affected. Petitioner testified he was earning more after his return to work than at the time of the agreed accident. 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. On June 7, 2016 the **Petitioner had an anterior cervical discectomy and fusion at C5-C6** performed by Dr. Alzate. (Px 3). On April 24, 2017, Petitioner had a visit with Dr. Alzate, who noted that the surgical incision was healed and Petitioner was doing well with no pain. Dr. Alzate returned Petitioner to work full duty. Petitioner has not returned to Dr. Alzate for any additional medical care since June 5, 2017.

Petitioner underwent a **right wrist carpal tunnel release and ganglion cyst excision** on August 24, 2015. Petitioner is not currently under any restrictions related to the right wrist and has returned to work full duty with regard to the right wrist. Petitioner has a prior diagnosis of right carpal tunnel for which he received a 2.03% permanency settlement on April 9, 2010.

Petitioner had minimal complaints of lumbar pain, which resolved with conservative treatment.

The medical records of Dr. Alzate, and the IME and AMA impairment rating report from Dr. Lami, support that Petitioner obtained a C5-C6 anterior cervical discectomy and fusion, with a strong recovery, and that he reached MMI on April 24, 2017.

The Arbitrator further notes Petitioner's primary injury involved his cervical spine, but he also sustained permanent disability to his right wrist and minimal permanency to his lower back. As to his cervical motion, he has limited range of motion and associated pain that he takes

Hydrocodone for relief on a regular basis. With regard to the right wrist, Petitioner has issues with strength and grip of the right hand. As to the lower back, Petitioner received physical therapy and reported improvement of symptoms after a year or so. The Arbitrator gives greatest weight to this factor.

Award Conclusion:

Therefore, based on the above factors, and the record taken as a whole, the Arbitrator finds that due to the injuries Petitioner sustained to his neck/cervical spine (mainly) and lower back (minimally) Petitioner is entitled to permanent partial disability to the extent of **20% to the person as a whole pursuant to Section 8(d)(2) of the Act (100 weeks).**

With regard to **Petitioner's right wrist/hand, Petitioner is entitled to permanent partial disability to the extent of 12-½% loss of use of the right hand (25.625 weeks).** Respondent is entitled to a credit of 2.03% prior loss of use of the right hand (2.03% X 2.04 weeks = 4.1615weeks credit) based on a prior settlement in 06 WC 44149. (RX4) **The result is a net award of 21.4635 weeks for the hand**. Consequently, Respondent shall pay to Petitioner a total of **121.4635 weeks of permanent partial disability benefits (100 + 21.4635 = 121.4635 weeks) at the PPD rate of $644.53, or the total net sum of $78,286.87.**

Robert M. Harris

Robert M. Harris, Arbitrator

Dated: March 11, 2019

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jeffrey Stone,
Petitioner,

vs. No. 11 WC 4883

19IWCC0529

Stork's Mower Shop/
Injured Workers' Benefit Fund,
Respondents.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent Stork's Mower Shop herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary disability, permanent disability and evidentiary rulings, and being advised of the facts and law, modifies the Corrected 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, 52, worked for Respondent Stork's Mower Shop as a small engine mechanic. He testified that on November 10, 2010, he worked on six or seven different gas engines, each of which had to be pull-started multiple times. The following morning Petitioner was unable to pick up his coffee cup with his right arm. He presented at the Sparta Hospital Emergency Room on November 11, 2010 and provided the history noted above of, "pull started 6 or 7 small engines each 2 or 3 times. This morning couldn't pick up coffee cup." He was diagnosed with a right shoulder muscle strain and provided a cortisone shot. A subsequent MRI of his right shoulder performed on December 13, 2010 revealed a partial tear of the distal supraspinatus tendon, along with a subluxation of his biceps tendon. On January 26, 2011, Petitioner underwent the following surgery to his right shoulder with Dr. Chien: an arthroscopic debridement of a SLAP lesion, acromioplasty debridement of the bicipital tendon, open rotator cuff repair, open acromioplasty, and open distal clavicle resection.

19IWCC0529

Thereafter, Petitioner underwent extensive physical therapy. In July 2011, Dr. Chien diagnosed Petitioner with right shoulder pain and adhesive capsulitis, and recommended a manipulation under anesthesia of Petitioner's right shoulder. That procedure was performed on March 8, 2012. Petitioner underwent further physical therapy until he was discharged on June 5, 2012.

On review, Respondent Stork's claims the Arbitrator erred by finding that Petitioner proved accident and causation without presenting testimony of an expert, which, Respondent claims, "is necessary to show that the claimant's work activities caused the condition of ill being." The Commission finds that Petitioner has proven causation under a chain of events theory. Petitioner testified that he had no problems with his right shoulder prior to November 10, 2010, had no medical treatment on his right shoulder prior to November 10, 2010 and no issues performing any of his job duties. After pull-starting several small engines on November 10, he could not lift a coffee cup the next morning. He sought medical treatment that day, November 11, 2010, which continued through June of 2012. Petitioner has met his burden and proved that his work activities were a cause of his right shoulder injuries.

Furthermore, the Commission finds sufficient proof of causation in Dr. Chien's January 14, 2011 report, which stated that Petitioner, "injured himself while at work on November 18 (sic), 2010. He was pulling to start small engines while at work. He noticed severe pain and stiffness in the right shoulder the next morning." The Commission notes that Dr. Chien's medical record lists an accident date of November 18. However, whether Petitioner provided the wrong date or Dr. Chien's office mistakenly listed the wrong date is not significant. The history contained in it is nearly identical to that contained in the Sparta Emergency Room records of November 11, 2010. Other contemporaneous medical records report the accident date as November 10, 2010.

Respondent Stork's also raises evidentiary issues. First, Respondent claims the Arbitrator erred in sustaining an objection to this question asked of Petitioner at the arbitration hearing: "[D]o you know how it is that pulling a cord on a small engine could have caused the injury to your right shoulder?" The basis for that objection given by counsel for Petitioner was that Petitioner was not qualified to give an opinion on causation. The Commission agrees; no foundation was laid to establish that Petitioner was qualified to give such an opinion.

With regard to temporary total disability, the Arbitrator awarded Petitioner one week of temporary total disability benefits for the period November 10, 2010 through November 17, 2010. The Commission views the evidence on this issue differently than the Arbitrator. Petitioner was under medical care for his right shoulder injury from November 11, 2010 through the date he was discharged from physical therapy on June 5, 2012. During that period, he underwent two surgical procedures followed by extensive therapy. During that time, Petitioner was unable to perform his usual duties as a small engine mechanic for Respondent Stork's and Respondent was unable to accommodate him by providing light duty work. The Commission finds that Petitioner was unable to work for a period of 81-6/7 weeks, from November 11, 2010 through June 5, 2012, the date he attained MMI. The Commission finds Petitioner entitled to TTD benefits for that period.

With regard to Petitioner's medical expenses, the Arbitrator ordered Respondent to pay the reasonable and necessary medical services as contained in Petitioner's Exhibits 2, 3, 4, 5 and 6.

The Commission affirms that award. However, in so doing, the Commission notes that the parties, in their Request for Hearing form and in their briefs, have reported totals for those medical expenses which do not comport with the amounts stated in Petitioner's Exhibits 2, 3, 4, 5 and 6. The Commission awards Petitioner, for his medical expenses, only those amounts expressly reflected in the bills and receipts contained in Petitioner's Exhibits 2, 3, 4, 5 and 6, per the fee schedule.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Corrected Decision of the Arbitrator filed January 18, 2018, 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. Respondent shall pay Petitioner temporary total disability benefits of $303.51 per week for 81-6/7 weeks, commencing on November 11, 2010 through June 5, 2012, as provided by §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay, according to the fee schedule, the reasonable and necessary medical bills only as submitted in Petitioner's Exhibits 2, 3, 4, 5 and 6 as provided in §8(a) and §8.2 of the Act.

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 the award of permanent partial disability is affirmed.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $35,200.00. 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: SEP 25 2019

o-09/12/19
mp/mcp
68

Marc Parker

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

STONE, JEFFREY
Employee/Petitioner

Case# **11WC004883**

19IWCC0529

STORK'S MOWER SHOP/INJURED WORKERS' BENEFIT FUND
Employer/Respondent

On 1/11/2018, 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:

4888 LAW OFFICE KEITH SHORT
1355 N BLUFF RD
UNITS C-D
COLLINSVILLE, IL 62234

1437 DARRELL DUNHAM & ASSOCIATES
308 W WALNUT
CARBONDALE, IL 62901

0558 ASSISTANT ATTORNEY GENERAL
KENTON OWENS
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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
CORRECTED ARBITRATION DECISION

Jeffrey Stone
Employee/Petitioner
v.
Stork's Mower Shop/
Injured Workers' Benefit Fund
Employer/Respondent

Case # **11** WC **4883**

Consolidated cases: **n/a**

19IWCC0529

An *Application for Adjustment 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 17, 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 **Motion to Dismiss Filed by Respondent IWBF**

FINDINGS

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

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent Stork's Mower Shop.

Petitioner's earnings during the year preceding the injury were **$16,389.25**, and the average weekly wage was that of **$455.26.**

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment with Respondent Stork's Mower Shop.

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

On the date of accident, Petitioner was **52** years of age, ***single*** with **0** dependent children.

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

Respondent Stork's Mower Shop ***has not*** paid all appropriate charges for reasonable and necessary medical expenses.

Respondent Stork's Mower Shop shall be given a credit of $**10,439.94** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**10,439.94**.

Respondent is entitled to a credit for all medical bills paid as set forth in Respondent Stork's Mower Shop Exhibit 10.

ORDER

Respondent IWBF's Motion to Dismiss is denied.

Respondent Stork's Mower Shop shall pay Petitioner temporary total disability benefits of **$303.51**/week for **1 week**, commencing **November 10, 2010 through November 17, 2010,** as provided in Section 8(b) of the Act.

Respondent Stork's Mower Shop shall pay the reasonable and necessary medical services **as contained in Petitioner's Exhibits 2, 3, 4, 5 and 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 medical bills paid as set forth in Respondent Stork's Mower Shop Exhibit 10.

Respondent Stork's Mower Shop shall pay Petitioner the sum of **$273.16/week** for a further period of **62.5** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **12.5% loss of use of the person-as-a-whole**.

Respondent Stork's Mower Shop shall be given a credit of $**10,439.94** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**10,439.94**.

The Illinois State Treasurer, *ex-officio* custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act. In the event the Respondent Stork's Mower Shop fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act. Respondent Stork's Mower Shop shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent Stork's Mower Shop that are paid to the Petitioner from the Injured Workers' Benefit Fund.

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

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

Melinda M. Rowe-Sullivan
Signature of Arbitrator

1/10/18
Date

JAN 11 2018

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

Jeffrey Stone Case # **11** WC **4883**
Employee/Petitioner

v. Consolidated cases: **N/A**

Stork's Mower Shop/
Injured Workers' Benefit Fund
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that he is currently 59 and lives in Sparta. He testified that he is currently employed by Gilster-Mary Lee and that he began working there in November of 2012. He testified that prior to that, he had been employed by Respondent Stork's Mower. He testified that his job title was that of a mechanic and that he fixed things like lawn mowers, chainsaws, leaf blowers, string trimmers and other items with a gas engine. He testified that Respondent Stork's Mower sold new machines as well as performing repairs. He testified that he worked in Respondent Stork's Mower shop, that he did repairs on the engines in the shop and that he would answer phone calls and sell parts when Mr. and Mrs. Stork were not present.

Petitioner testified that when he was approached by Charlie Stork in 2008 to return to work for the business for a second time, he did not own a small engine repair business but did this for friends and relatives. He testified that he never had a formal business with a sign and tax ID number. He testified that when he returned to work for Charlie Stork for the second time it was in 2008, and that he was paid at the rate of about $11.00 per hour. He testified that he was not working for any other enterprise or himself when he returned to work for Respondent Stork's Mower in 2008.

Petitioner testified that he would sometimes do repair pick-ups and that the truck that he drove had Respondent Stork's Mower name on the side of it. He testified that he did not wear a Respondent Stork's Mower uniform. He testified that he was paid weekly and that taxes were withheld by the Storks, including both state and federal income taxes. He testified that the tools that he used were some of his own as well as some of Respondent Stork's Mower. He testified that when he had to purchase a part to do a repair, the Storks paid for it. He testified that when doing the activities that precipitated his injury in 2010, he was not working for any other enterprise or business.

Petitioner testified that prior to November 10, 2010, he did not have any problems with his right shoulder nor had he ever received any treatment for his right shoulder. He testified that prior to the date of accident, he had no work restrictions that prevented him from doing his work or activities on the job and that he was able to perform the essential functions of his job. He testified that on the date of accident, he was pull starting small engines including chainsaws, leaf blowers and push mowers, that he worked on about 6-8 different pieces of equipment on that date and that the number of times that he had to pull start varied in the range of 2-5 times per piece of equipment.

Petitioner testified that when he got to work that morning, he did not have any problems with his right shoulder. He testified that Mr. and Mrs. Stork were at the shop that day, that they were in the front area doing paperwork and that when he left that day, he did not tell them about his arm. He testified that he did not know anything was wrong until the next morning when he could not pick up his coffee cup. He denied that anything occurred to his right shoulder from the time of the end of work to the next morning.

Petitioner testified that he called Mrs. Stork and said that he could not pick up his coffee cup, that his shoulder hurt and that he was going to see a doctor. He testified that he went to the emergency room at Sparta Community Hospital. He testified that he was told to see his primary care physician, Dr. Preuss. He denied ever having previously seen his primary care physician for his right shoulder. Petitioner testified that his primary care physician referred him to an orthopedic surgeon, Dr. Chien. He testified that he had an MRI of shoulder and that on January 26, 2011, he had surgery. He denied having returned to work at any point after November 10, 2010.

Petitioner testified that after surgery, he went to physical therapy at Sparta Community Hospital and that he was released to return to work after surgery in February of 2012. He testified that after surgery and physical therapy in 2011, he noticed that he could not raise his arm all the way up and that it was still painful. He testified that he received benefits from the Storks while he was off work recovering from his injury. He testified that he did not talk to the Storks about his medical bills and that he did not know if any of his bills were paid by them.

Petitioner testified that after he was released by Dr. Chien, he ended up having to go back to Sparta Community Hospital in March of 2012 because his shoulder still could not be raised up and was still painful. He testified that he underwent a second procedure for adhesive capsulitis after which he had some additional physical therapy.

Petitioner testified that today, his right shoulder is still painful and that it does not raise up correctly. He testified that the activities that he has difficulty performing include fishing, playing pool and combing his hair. He testified that he is right hand dominant. He testified that at Gilster-Mary Lee, he avoids raising his arm up. He testified that he is mostly able to perform his job activities in Gilster-Mary Lee's store and that he lifts boxes overhead with his left hand instead of his right.

Petitioner testified that the Storks said that they did not have worker's compensation insurance coverage in either January 2011 or late December 2010. He testified that he spoke with Charlie Stork and stated that he was trying to get benefits paid to him, and that Charlie Stork stated that he would have his unemployment benefits cut off if he did not straighten up. He testified that he had applied for unemployment and that he received it for about five months. He testified that at some point, the Storks started paying him directly.

On cross examination, Petitioner admitted that he did not know exactly what Dr. Chien did to his right shoulder. When asked what activities he was doing on November 10th that he attributed to the pain that he had in the right shoulder, Petitioner responded that he was pull starting small engines, diagnosing them, pull starting them again, adjusting them and starting them again. He denied doing anything else on November 10th that he attributed to the pain in his right shoulder.

On cross examination, Petitioner testified that on the date of accident he left work at 4 p.m. and that between the time that he got home and the time that he went to bed, he sat in the recliner and watched TV which was his normal routine.

On cross examination when asked if he would ever sell lawn mowers and advertise them for sale in front of his house, Petitioner responded that he would sometimes buy a broken mower, fix it and sell it. He testified that he did not report the income from the sale of used mowers on his tax returns.

Patricia Stork was called as a witness by Respondent Stork at the time of arbitration. She testified that she owned the business with her husband. She denied having threatened to cut off Petitioner's unemployment benefits. She testified that she did not recall whether she ever had any conversations with Petitioner about not having insurance. She testified that for a period of time she paid Petitioner money while he was not working because her first lawyer told her to do so. She testified that she also paid some medical bills because she hoping to get her mechanic back. She testified that she stopped paying benefits because the attorney said not to.

Ms. Stork testified that Petitioner had a "side business" where he would repair engines and mowers and that he sold them. She testified that Petitioner had engaged in that for several years and that he was doing it in 2010.

On cross examination, Ms. Stork testified that Petitioner worked for them and that they withheld taxes just like a normal employee. She testified that she did not have any information that Petitioner hurt his shoulder somewhere else.

The medical records of Sparta Community Hospital were entered into evidence at the time of arbitration as Petitioner's Exhibit 1. The records reflect that Petitioner underwent right shoulder x-rays on March 21, 2012, which were interpreted as revealing mild degenerative changes; stable. The History and Physical dated March 8, 2012 noted that Petitioner returned to the clinic for his right shoulder and that he had open rotator cuff repair on January 26, 2011. It was noted that Petitioner was still complaining of pain, that he still had decreased range of motion in the right shoulder and that he had been doing therapy but still had persistent decreased range of motion. It was noted that Petitioner had difficulty with any overhead activities and that the intensity of pain was about 4/10. The assessment was noted to be that of (1) right shoulder pain; (2) adhesive capsulitis of the right shoulder; (3) rotator cuff tear of the right shoulder, status post open repair. Petitioner was recommended to undergo manipulation under anesthesia of the right shoulder. The Operative Report dated March 8, 2012 noted that Petitioner underwent manipulation under anesthesia of the right shoulder by Dr. Chien for a pre- and post-operative diagnosis of adhesive capsulitis of the right shoulder. (PX1).

The records of Sparta Community Hospital reflect that a script for physical therapy was issued on March 21, 2012 for a diagnosis of adhesive capsulitis of the right shoulder. A script for physical therapy was issued on April 19, 2012 for a diagnosis of adhesive capsulitis of the right shoulder. The Sparta Physical Therapy and Sports Medicine Initial Evaluation dated March 8, 2012 noted that Petitioner was a 54-year-old male with a history of right shoulder rotator cuff repair in January 2011, that he stated that he had difficulty regaining range of motion of the right shoulder, that he was not status post manipulation and that he stated that he took pain medication before coming to therapy. The Discharge Note dated June 5, 2012 noted that Petitioner did not return to therapy after May 15, 2012. (PX1).

The records of Sparta Community Hospital reflect that a script for physical therapy was issued on February 11, 2011 for a diagnosis of rotator cuff tear of the right shoulder and that Petitioner was to start therapy on February 23, 2011. A script for physical therapy was issued on April 15, 2011 for a diagnosis of rotator cuff tear of the right shoulder. A script for physical therapy was issued on May 11, 2011 for a diagnosis of rotator cuff tear of the right shoulder. A script for physical therapy was issued on June 10, 2011 for a diagnosis of right rotator cuff tear. The Sparta Physical Therapy and Sports Medicine Initial Evaluation dated February 23, 2011 noted that Petitioner underwent right rotator cuff repair on January 26, 2011 and that he had injured his right shoulder on November 10, 2010. It was noted that Petitioner had pull started several pieces of equipment and that the next morning he was unable to lift the arm and could not reach out without his arm "dropping down." It was noted that after the surgery Petitioner was able to move the arm some, but that it felt stiff and tight and ached. It was noted that Petitioner rated his pain as 3-3.5/10 with pain medications. (PX1).

The records of Sparta Community Hospital reflect that an Accident Report was completed on November 11, 2010 and that the date first seen for the injury was that of November 11, 2010. It was noted that Petitioner requested that his bills be sent to Stork's Mower Shop. It was noted that Petitioner pull started 6 or 7 small engines, each 2 or 3 times, that morning and that he could not pick up a coffee cup. It was noted that the physician findings on examination were that of a right shoulder muscle strain, that Petitioner was given a steroid shot, that he was to continue his medications for pain and that he was to do minimal lifting 10 pounds max and no repetitive movements for one week. (PX1).

The records of Sparta Community Hospital reflect that Petitioner underwent x-rays of the right shoulder on April 15, 2011, which were interpreted as revealing post-operative changes as noted. It was noted that there had been interval removal of the skin staples and that there was no evidence of acute fracture, dislocation or frank bony destruction. Petitioner underwent x-rays of the right shoulder on February 11, 2011, which were interpreted as revealing post-operative changes noted; skin staples were noted about the top of the shoulder. The note dated January 14, 2011 noted that Petitioner was being seen by Dr. Chien at the consultation request of Dr. Preuss for evaluation and treatment of his right shoulder pain. It was noted that Petitioner injured himself at work on November 18, 2010, that he was pulling to start small engines at work, that he noticed severe pain and stiffness in the right shoulder the next morning and that the pain was so severe that he was unable to hold a coffee cup in his right hand. It was noted that Petitioner received a corticosteroid injection in the right shoulder recently without improvement of his symptoms and that he had noticed that his symptoms were progressively worsening. It was noted that Petitioner denied any previous symptoms in the right shoulder prior to his injury at work. The assessment was noted to be that of (1) right shoulder pain; (2) rotator cuff tear of the right shoulder; (3) rotator cuff tendinitis of the right shoulder; (4) subluxation of the bicipital tendon from the biceps total groove in the right shoulder; (5) bicipital tendinitis of the right shoulder; (6) impingement syndrome of the right shoulder; (7) painful degenerative joint disease of the right acromioclavicular joint. Petitioner was recommended to undergo arthroscopic surgery of the right shoulder with acromioplasty, distal clavicle resection and open rotator cuff repair. It was noted that a discussion was also had regarding the possible repair of the ligament to stabilize the bicipital tendon to prevent further subluxation out of the bicipital groove in the right shoulder. It was noted that Petitioner was instructed not to use the right upper extremity while at work. The Operative Report dated January 26, 2011 noted that Petitioner underwent (1) arthroscopic debridement of the SLAP lesion in the right shoulder; (2) acromioplasty debridement of the bicipital tendon tear of the right shoulder; (3) open rotator cuff repair in the right shoulder; (4) open acromioplasty of the right shoulder; (5) open distal clavicle resection of the right shoulder for pre-operative diagnoses of (1) rotator cuff tear of the right shoulder; (2) subluxation of bicipital tendon in the right shoulder; (3) impingement syndrome of the right shoulder; (4) painful acromioclavicular joint of the right shoulder and post-operative diagnoses of (1) rotator cuff tear of the right shoulder; (2) impingement syndrome of the right shoulder; (3) painful degenerative joint disease of the right acromioclavicular joint; (4) type 1 SLAP lesion of the right shoulder; (5) torn proximal bicipital tendon of the right shoulder by Dr. Chien. (PX1).

The records of Sparta Community Hospital reflect that Petitioner underwent an MRI of the right shoulder on December 13, 2010, which was interpreted as revealing small partial tear involving distal supraspinatus tendon; proximal portion of the long head of the biceps tendon appears to be subluxed medially out of the bicipital groove. The History and Physical dated July 20, 2011 noted that Petitioner returned to the clinic for check up on his right shoulder on July 8, 2011 and that he had rotator cuff repair on the right shoulder on July 26, 2011. It was noted that Petitioner still had persistent decreased range of motion on the right shoulder, that he was still complaining of pain on the right shoulder with pain intensity of 3/10 and that he had been using Vicodin for pain control. It was noted that Petitioner had been doing therapy for several weeks but still had persistent decreased range of motion, that he had difficulty with any overhead activities and that he still had difficulty combing his hair. The assessment was noted to be that of (1) right shoulder pain; (2) adhesive capsulitis of the right shoulder; (3) rotator cuff tear of the right shoulder status post open repair. Petitioner was recommended to undergo a manipulation under anesthesia of the

right shoulder. It was noted that Petitioner was to continue with physical therapy both before and after the procedure and that he could return to work with restrictions of no lifting more than 20 pounds with the right shoulder. (PX1).

The medical bills of Quality Healthcare Clinics were entered into evidence at the time of arbitration as Petitioner's Exhibit 2. The medical bills of Community Orthopaedics were entered into evidence at the time of arbitration as Petitioner's Exhibit 3. The medical bills of Dugan Radiology Associates were entered into evidence at the time of arbitration as Petitioner's Exhibit 4. The Out of Pocket Expenses paid by Petitioner were entered into evidence at the time of arbitration as Petitioner's Exhibit 5. The medical bills of Sparta Community Hospital were entered into evidence at the time of arbitration as Petitioner's Exhibit 6.

Petitioner's Pay Stubs were entered into evidence at the time of arbitration as Petitioner's Exhibit 7. Various Letters were entered into evidence at the time of arbitration as Petitioner's Exhibit 8.

Petitioner's Response to IWBF Motion to Dismiss was entered into evidence at the time of arbitration as Petitioner's Exhibit 9. The Response argued that the Commission had determined that the statute of limitations does not apply to the IWBF and that in the *Fusco* case, the Commission unanimously found that the statute of limitations in section 6(d) of the Act did not apply to the IWBF and stated that a timely-filed Application against the respondent-employer negated any claim for a statute of limitations defense by the Fund. *Fusco v. Play N Trade & Illinois Treasurer, as Ex Officio Custodian of the Injured Workers' Benefit Fund,* 16 IWCC 0569. (PX9).

Respondent Stork Mower's Photo was entered into evidence at the time of arbitration as Respondent's Exhibit 7. Respondent Stork Mower's Photo was entered into evidence at the time of arbitration as Respondent's Exhibit 8. Respondent Stork Mower's Photo was entered into evidence at the time of arbitration as Respondent's Exhibit 9.

Respondent Stork's Mower Documentation showing Payment of Medical Bills were entered into evidence at the time of arbitration as Respondent's Exhibit 10. Respondent Stork's Mower Documentation showing TTD Payments were entered into evidence at the time of arbitration as Respondent's Exhibit 11.

Respondent IWBF's IWCC Case Motions/Case Docket was entered into evidence at the time of arbitration as Respondent's Exhibit 1.

Respondent IWBF's Motion to Dismiss Injured Workers' Benefit Fund as Respondent was entered into evidence at the time of arbitration as Respondent's Exhibit 2. The Motion argued that at the time Petitioner filed to amend the Application for Adjustment of Claim adding the IWBF as a party, it was after the expiration of the three-year statute of limitations applicable to the underlying claim and that a lengthy delay in naming the IWBF as a Respondent denied it due process and its ability to adequately investigate and defend the claim. (RX2).

CONCLUSIONS OF LAW

With respect to disputed issue (B) pertaining to whether an employer-employee relationship existed between the parties, the Arbitrator finds that Petitioner has met his burden of proving an employer-employee relationship existed between Petitioner and Respondent Stork's Mower at the time of the alleged accident.

The existence of an employment relationship is a prerequisite for any award of benefits under the Act. There is no specific litmus test for determining whether an employer-employee relationship exists.

Instead, there are multiple factors to consider when assessing the nature of the relationship between the parties. *Ware v. Indus. Comm'n.*, 318 Ill. App. 3d 1117, 1122 (1st Dist. 2000). Among these are: (1) whether the employer may control the manner in which the person performs the work; (2) whether the employer dictates the person's schedule; (3) whether the employer pays the person hourly; (4) whether the employer withholds income and social security taxes from the person's compensation; (5) whether the employer may discharge the person at will; (6) whether the employer supplies the person with materials and equipment; and (7) whether the employer's general business encompasses the person's work. *See Robertson v. Indus. Comm'n.*, 866 NE.2d 191, 200 (Ill. 2007). Other relevant factors include the label the parties place on their relationship, and whether the parties' relationship was "...long, continuous, and exclusive." *Ware*, 318 Ill.App. at 1122, 1126. No single factor is determinative and such determination of the employer-employee relationship rests on the totality of the circumstances. *Roberson*, 866 NE.2d at 200.

In the case at hand, the evidence reveals that Petitioner worked at Respondent Stork's Mower facility in Sparta and that they had him do mechanical repair work as well as having him do pick-ups and deliveries. Petitioner was paid by the hour on a weekly basis and both state and federal taxes were withheld from his earnings, as reflected in Petitioner's Exhibit 7. Petitioner testified that the tools that he used were some of his own as well as those owned by Respondent Stork's Mower. Having considered the entirety of the witness and documentary evidence, the Arbitrator finds that Petitioner has met his burden of proving an employer-employee relationship existed between Petitioner and Respondent Stork's Mower at the time of the alleged accident.

With respect to disputed issue (C) pertaining to the issue of accident, the Arbitrator finds that Petitioner sustained an accident arising out of and in the course of his employment with Respondent Stork's Mower on November 10, 2010.

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 exposed to a risk distinctly associated with his employment while performing his duties as a mechanic when he was injured while working for Respondent Stork's Mower. Petitioner testified that on November 10, 2010, he was pull starting small engines including chainsaws, leaf blowers and push mowers, that he worked on approximately 6-8 different pieces of equipment on that date and that the number of times that he had to pull start the machines varied in the range of 2-5 times each and that some required that they be pull started again after adjustments were made to ensure that the equipment was working satisfactorily. Finding Petitioner to have been a credible witness at the time of arbitration as he described the work activities performed on the date at issue, the Arbitrator finds that Petitioner has met his burden of proof in establishing that he sustained accidental injuries that arose out of and in the course of his employment with Respondent Stork's Mower on November 10, 2010.

With respect to disputed issue (F) pertaining to the issue of causation, the Arbitrator finds that Petitioner has met his burden of proving that his current condition of ill-being is causally related to the accident of November 10, 2010.

At the outset, the Arbitrator notes that no medical evidence was proffered by Respondent Stork's Mower at the time of arbitration, nor were any pre-accident medical records proffered by Respondent Stork's Mower demonstrating that Petitioner had undergone any treatment for the right shoulder at any point prior to the date of accident at issue. At the time of arbitration, Respondent's counsel inquired of Petitioner whether he might have injured himself in some capacity other than at work, but there was no evidence offered suggesting that Petitioner was engaged in any work activities outside of those performed for Respondent Stork's Mower less than 24 hours prior to the first medical care received on November 11, 2010. While Respondent Stork's Mower inquired whether Petitioner had a home business doing small engine repairs for which Petitioner admitted that he occasionally did repairs for family and that he would, from time to time, buy a broken mower and repair it and then sell it in front of his house, there was no evidence that Petitioner was doing these activities between the time he left work on November 10th and the time that he sought medical treatment on the morning of November 11th.

The Arbitrator notes that the Sparta Physical Therapy and Sports Medicine Initial Evaluation dated February 23, 2011 noted that Petitioner underwent right rotator cuff repair on January 26, 2011 and that he had injured his right shoulder on November 10, 2010. It was noted that Petitioner had pull started several pieces of equipment and that the next morning he was unable to lift the arm and could not reach out without his arm "dropping down." (PX1). The records of Sparta Community Hospital reflect that an Accident Report was completed on November 11, 2010 and that the date first seen for the injury was that of November 11, 2010. It was noted that Petitioner pull started 6 or 7 small engines, each 2 or 3 times, that morning and that he could not pick up a coffee cup. (*Id.*). In addition, the note dated January 14, 2011 noted that Petitioner was being seen by Dr. Chien at the consultation request of Dr. Preuss for evaluation and treatment of his right shoulder pain. It was noted that Petitioner injured himself at work on November 18, 2010 [*sic*], that he was pulling to start small engines at work, that he noticed severe pain and stiffness in the right shoulder the next morning and that the pain was so severe that he was unable to hold a coffee cup in his right hand. It was noted that Petitioner denied any previous symptoms in the right shoulder prior to his injury at work. (*Id.*).

Having considered the entirety of the medical evidence in the case, the Arbitrator finds that Petitioner has met his burden of proving that his current condition of ill-being is causally related to the accident of November 10, 2010.

With respect to disputed issue (G) pertaining to Petitioner's earnings, the Arbitrator notes that the average weekly wage was placed in dispute on the basis of the lack of an employer-employee relationship. (AX1). In light of the Arbitrator's aforementioned conclusions, the Arbitrator finds that Petitioner's earnings in the year preceding the injury were $16,389.25 and the average weekly wage, calculated pursuant to Section 10 of the Act, was $455.26.

With respect to disputed issue (J) pertaining to the issue of medical services, in light of the Arbitrator's aforementioned conclusions, the Arbitrator finds that Petitioner's care and treatment was reasonable, necessary and causally related to his work accident of November 10, 2010. As a result thereof, Respondent shall pay all reasonable and necessary medical services as contained in Petitioner's Exhibits 2, 3, 4, 5 and 6 as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit for all medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

With respect to disputed issue (K) pertaining to the issue of temporary total disability benefits, the Arbitrator notes that Petitioner claims that he is entitled to temporary total disability benefits for the timeframe of November 10, 2010 through February 10, 2012. (AX1).

"[T]o prove temporary total disability, the employee must demonstrate not only that he did not work, but also that he was unable to work." *Ming Auto Body/Ming of Decatur, Inc. v. Industrial Comm'n*, 387 Ill. App. 3d 244, 256, 899 N.E.2d 365, 378, 326 Ill. Dec. 148 (2008). The Arbitrator finds that Petitioner has demonstrated that he did not work and was unable to work for the timeframe of November 11, 2010 through November 17, 2010, but that he has failed to demonstrate that he did not work and was unable to work during the timeframe of November 18, 2010 through February 10, 2012.

In so concluding, the Arbitrator notes at the outset that no work slips were entered into evidence at the time of arbitration. The notations in the medical records pertaining to work restrictions were those as contained in the Sparta Community Hospital note of November 11, 2010, which noted that Petitioner was to do minimal lifting 10 pounds max and no repetitive movements for one week. (PX1). While the Arbitrator acknowledges that the History and Physical dated July 20, 2011 noted that Petitioner could return to work with restrictions of no lifting more than 20 pounds with the right shoulder, the Arbitrator notes that no specific timeframe was indicated as to how long such work restrictions were to remain in effect. (PX1). As the Arbitrator declines to speculate as to the duration of such work restrictions, the Arbitrator finds that Petitioner has failed to demonstrate that he did not work and was unable to work during the timeframe of November 18, 2010 through February 10, 2012. As a result of the foregoing, the Arbitrator finds that Respondent shall pay temporary total disability benefits for a period of 1 week, commencing November 11, 2010 through November 17, 2010.

With respect to disputed issue (L) pertaining to the nature and extent of Petitioner's injuries, the Arbitrator notes that Petitioner's injuries occurred on November 10, 2010 and, as such, the Arbitrator will not specifically be addressing the five factors under Section 8.1b of the Act in the determination of permanent partial disability.

The Arbitrator finds that the medical records in this case demonstrate that Petitioner underwent (1) arthroscopic debridement of the SLAP lesion in the right shoulder; (2) acromioplasty debridement of the

bicipital tendon tear of the right shoulder; (3) open rotator cuff repair in the right shoulder; (4) open acromioplasty of the right shoulder; (5) open distal clavicle resection of the right shoulder by Dr. Chien. (PX1). The records further reflect that on March 8, 2012, Petitioner underwent manipulation under anesthesia of the right shoulder by Dr. Chien for a pre- and post-operative diagnosis of adhesive capsulitis of the right shoulder. (*Id.*). Having reviewed the record in its entirety, the Arbitrator concludes that Petitioner sustained permanent partial disability to the extent of 12.5% loss of use of the person-as-a-whole under Section 8(d)2 of the Act.

With respect to disputed issue (O) pertaining to the Motion to Dismiss filed by the Injured Workers' Benefit Fund, the Arbitrator denies said Respondent IWBF's motion.

The Arbitrator notes that Respondent IWBF in its Motion to Dismiss cites to the Arbitration Decision in *Casey Lee Osborne v. Connor Construction & Illinois State Treasurer as Ex Officio Custodian of the Injured Workers' Benefit Fund*, 12 WC 41101, as authority supportive of its position that the IWBF should be dismissed as a party as Petitioner failed to timely name the IWBF pursuant to 820 ILCS 305/6(d) in light of the fact that the IWBF was not added as a party until April 26, 2016. (RX2). Petitioner in his Response to IWBF's Motion to Dismiss cites to the Commission's Decision in the *Fusco* case, where the Commission unanimously found that the statute of limitations in section 6(d) of the Act did not apply to the IWBF and stated that a timely-filed Application against the respondent-employer negated any claim for a statute of limitations defense by the Fund. *Fusco v. Play N Trade & Illinois Treasurer, as Ex Officio Custodian of the Injured Workers' Benefit Fund,* 16 IWCC 0569. (PX9).

As the Arbitrator finds that the evidence reveals that Petitioner's original Application for Adjustment of Claim was timely filed on February 9, 2011, the Arbitrator denies the Motion to Dismiss filed by the Injured Workers' Benefit Fund.

The Illinois State Treasurer, *ex-officio* custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act. In the event the Respondent Stork's Mower Shop fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act. Respondent Stork's Mower Shop shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent Stork's Mower Shop that are paid to the Petitioner from the Injured Workers' Benefit Fund.

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

MIGUEL ARAMBULA,

Petitioner,

vs. NO. 16 WC 22280

CITY OF CHICAGO,

Respondent.

19IWCC0530

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of nature and extent of 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.

Permanent Disability

The Commission views the evidence differently with respect to Section 8.1b(b) factors (iv) and (v).

(iv) the employee's future earning capacity

Petitioner returned full-duty to his pre-injury job as a laborer on a garbage truck following surgery for a right medial meniscus tear. Thereafter he transitioned to a different position with respondent in the rodent control department that was less physically challenging. Petitioner sustained no wage loss as a result of his work injury. The Commission finds this factor weighs in favor of decreased permanent disability.

(v) evidence of disability corroborated by treating medical records

19IWCC0530

Petitioner completed a two- week work conditioning program and was returned to full-duty employment by his treating physician Dr. Maday. Petitioner last sought medical treatment on November 16, 2016 at which time Dr. Maday determined that he was at MMI. The Commission finds that Petitioner has not sought further medical treatment since that time and that this factor weighs in favor of decreased disability.

Having weighed the evidence and analyzed the Section 8.1b(b) factors, the Commission finds Petitioner sustained a 27.5% loss of use of the right leg.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $755.22 per week for a period of 59.15 weeks, as provided in §8e) of the Act, for the reason that the injuries sustained caused the loss of use of 27.5% of use of the right leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner compensation that has accrued from November 16, 2016 through March 18, 2019, and shall pay the remainder of the award, if any, in weekly payments.

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

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

No bond is required for removal of this cause to the Circuit Court.

19IWCC0530

The 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: SEP 2 6 2019
d-9-4-19
SM/msb
44

Stephen J. Mathis

L. Elizabeth Coppoletti

DISSENT

I respectfully dissent. I would adopt and affirm the well-reasoned Decision of the Arbitrator.

Douglas D. McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ARAMBULA, MIGUEL
Employee/Petitioner

Case# **16WC022280**

CITY OF CHICAGO
Employer/Respondent

19IWCC0530

On 4/4/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.38% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0233 DEPAOLO & ZADEIKIS
DONNA ZADEIKIS
309 W WASHINGTON ST SUITE 550
CHICAGO, IL 60606

0010 CITY OF CHICAGO LAW DEPT
D TAYLOR CHITTICK
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

19IWCC0530

STATE OF ILLINOIS)
)SS.
COUNTY OF **COOK**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

Miguel Arambula
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **16** WC **22280**

Consolidated cases: **n/a**

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **3/18/19**. By stipulation, the parties agree:

On the date of accident, **4/12/16**, 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 $**72,746.01**, and the average weekly wage was $**1,398.96**.

At the time of injury, Petitioner was **59** years of age, ***married*** with **0** dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

Respondent shall be given a credit of $**26,648.28** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**26,648.28**.

19IWCC0530

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner the sum of $**755.22**/week for a further period of **75.25** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **35% loss of use of the right leg**.

Respondent shall pay Petitioner compensation that has accrued from **11/16/16** through **3/18/19**, 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.

Molly C Mason

Signature of Arbitrator

4/3/19

Date

APR 4 - 2019

Summary of Disputed Issues

The parties agree that Petitioner injured his right knee while working as a laborer/garbage collector for Respondent on April 12, 2016. Petitioner underwent right knee surgery on July 25, 2016 and was released to full duty in October 2016. Petitioner testified he returned to his laborer duties at that point but wore a knee brace on a daily basis at the recommendation of his surgeon, Dr. Maday. Petitioner further testified he continued performing his laborer duties until April 2018, at which point he transferred to Respondent's rodent control division at his request. He testified he requested the transfer due to ongoing right knee pain and instability. He acknowledged he has not undergone any additional right knee care since his last visit to Dr. Maday in November 2016.

The sole disputed issue is nature and extent. Arb Exh 1.

Arbitrator's Findings of Fact

Petitioner testified he worked as a laborer for Respondent's Department of Streets and Sanitation as of April 12, 2016. His job consisted of collecting garbage in alleys. He spent part of each workday walking. When his crew changed "lines," he would ride on the back of the garbage truck to the next location. He held onto a bar and stood on a step that was about 18 inches above ground level while riding on the back of the truck.

Petitioner denied having any right knee problems before his injury on April 12, 2016. On that date, he was riding on the back of the garbage truck in an alley behind 108th Place. There were some tree branches blocking part of the alley. He began to get down from the back of the truck so that he could move the branches. As he stepped down, his right foot came into contact with a rock. His right leg bent backward. He felt an abrupt onset of pain in his right knee. After finishing his shift, he notified his supervisor of the accident and went to an office. He verbally reported the accident to a clerk who told him to return the next morning to complete a written report. He completed this report the following day and was then sent to MercyWorks.

The MercyWorks records (PX 1) reflect that Petitioner saw Dr. Ali on April 13, 2016. The doctor recorded a consistent history of the work accident and noted that Petitioner rated his right knee pain at 6-7/10. He described Petitioner as walking with a mild limp. On right knee examination, he noted mild diffuse swelling and mild diffuse tenderness, mostly over the medial joint line. He also noted a full range of motion with pain on forward flexion. McMurray's testing was equivocal. Right knee X-rays showed mild medial and patellofemoral compartment narrowing. Dr. Ali diagnosed a right knee sprain. He took Petitioner off work and prescribed an elastic support and Motrin. PX 1.

On April 18, 2016, Petitioner returned to MercyWorks and saw a different physician, Dr. Diadula. The doctor noted a complaint of 8-9/10 right knee pain, popping and instability. He indicated that Petitioner reported being unable to put much weight on his right leg. On examination, he noted slight swelling, tenderness in the medial, inferomedial and popliteal regions and positive McMurray's testing. He continued to keep Petitioner off work and prescribed a right knee MRI. PX 1.

The MRI, performed without contrast on May 9, 2016, showed a "large horizontal tear involving the posterior horn of the medial meniscus with extension to the superior articulating surface." The radiologist described this tear as extending into the body and partially into the anterior horn of the medial meniscus. He also noted moderate irregular thinning of the medial joint compartment cartilage, slight blunting of the free edge of the posterior horn of the lateral meniscus, mild quadriceps tendinopathy and a small joint effusion. PX 1, 3.

Petitioner returned to MercyWorks on May 12, 2016 and saw a third physician, Dr. Cerniak. The doctor noted that Petitioner rated his right knee pain at 6/10 when sitting and 10/10 when walking. After reviewing the MRI, he recommended that Petitioner stay off work, keep his knees and feet elevated, continue the Ibuprofen and see an orthopedic surgeon as soon as possible. He referred Petitioner to Dr. Maday of Midland Orthopedics. PX 1.

Petitioner first saw Dr. Maday on May 18, 2016. The doctor recorded a consistent history of the work accident and subsequent care. He noted that, since the accident, Petitioner had experienced multiple episodes of his right knee giving out and had recently been experiencing locking of the knee as well. He indicated that Petitioner had worked for Respondent for approximately twenty years without any previous injury.

On initial right knee examination, Dr. Maday noted approximately 10 to 20 ccs of an effusion, no tenderness over the quadriceps tendon or patellar tendon, 2 to 3+ medial joint line tenderness, minimal lateral joint line tenderness, positive flexion McMurray's, negative Lachman, negative anterior and posterior drawer, no opening with varus or valgus stressing at 0 to 20 degrees and a range of motion from 0 to 120 degrees. After reviewing the MRI, he recommended arthroscopic surgery to address the meniscal pathology. He indicated that Petitioner would be unable to resume working if he did not undergo surgery. He continued to keep Petitioner off work. He informed Petitioner that the degenerative changes could not be addressed arthroscopically. PX 2.

On July 25, 2016, Dr. Maday operated on Petitioner's right knee at Mercy Hospital, performing an arthroscopy and partial medial meniscectomy. In his operative report, he documented a complex tear of the posterior horn of the medial meniscus "with a significant horizontal split and flap tear" involving approximately 40 to 50% of the posterior horn. He described this tear as "irreparable" and in the "white-white zone." He noted no tearing of the lateral meniscus. He described the anterior and posterior cruciate ligaments as intact. He noted Grade II to III chondrosis of the patella, Grade III chondrosis of the medial femoral condyle and Grade 1 to II chondrosis of the medial tibial plateau. PX 2, 3.

At the first post-operative visit, on August 3, 2016, Dr. Maday noted no evidence of an infection and a range of motion from 0 to 90 degrees. He prescribed physical therapy and directed Petitioner to remain off work. PX 2.

Petitioner underwent an initial evaluation at ATI Physical Therapy on August 9, 2016. The evaluator noted a complaint of 8-9/10 right knee pain and difficulty walking, using stairs, squatting, standing after extended sitting and lifting. PX 4.

Petitioner continued attending therapy on a regular basis thereafter. In a note dated August 24, 2016, the therapist indicated that Petitioner's gait was still antalgic and that he had made "minimal objective improvement" with range of motion. PX 4.

Petitioner returned to Dr. Maday on August 24, 2016. The doctor noted a range of motion from 0 to 100 degrees and mild tenderness over the medial compartment. He prescribed an anti-inflammatory cream. He prescribed additional therapy and directed Petitioner to remain off work. PX 2.

Petitioner continued attending therapy through September 15, 2016. On that date, his therapist recommended two to four weeks of work conditioning. PX 4.

On September 21, 2016, Dr. Maday described Petitioner as doing well and experiencing less pain. On re-examination, he noted a full range of motion, minimal joint line tenderness, negative Lachman, negative drawer testing and no opening with varus or valgus stressing at 0 or 20 degrees. He recommended that Petitioner transition from therapy to work conditioning. PX 2.

Petitioner began a course of work conditioning on September 27, 2016. In a progress report dated October 5, 2016, Ryan Stachorek, ATC, reported that Petitioner appeared to have entered work conditioning at a medium physical demand level. Stachorek described Petitioner's garbage-related duties as heavy, with occasional lifting of 100 pounds. On October 7, 2016, Stachorek noted that Petitioner was still at a medium physical demand level and reporting "mild increased knee pain with functional strengthening exercises." He recommended two more weeks of work conditioning. PX 4.

On October 12, 2016, Dr. Maday noted that Petitioner had completed two weeks of work conditioning and felt able to resume working. He also noted the therapist's recommendation of additional work conditioning. On re-examination, he noted a full range of motion, no medial or lateral joint line tenderness, negative Lachman, negative drawer testing and no opening with varus or valgus stressing at 0 or 20 degrees. He released Petitioner to full duty as of October 17, 2016 and directed him to return in four weeks. PX 2.

Dr. Maday's last note of November 16, 2016 reflects that Petitioner had been back to work for only one week due to having to take his vacation. He also noted that Petitioner was performing home exercises. He noted no abnormalities on re-examination. He found Petitioner to be at maximum medical improvement and allowed him to continue full duty. PX 2.

Petitioner testified he resumed his regular garbage collection duties but wore a knee brace throughout each shift. He testified that Dr. Maday prescribed this brace and that it helped a little. He was able to work but "not like a regular person." He put all of his body weight on his left leg. He continued to experience right knee pain, although it was less severe than it had been prior to the surgery. He had difficulty bending his right knee and stepping onto and off the step on the back of the garbage truck.

Petitioner testified he continued performing his garbage collection duties until approximately April 2018, at which point he transferred to a laborer job in Respondent's rodent control division. He put in for a transfer to this division because he knew the rodent control duties were lighter than those of a garbage collector. He still had to walk throughout each shift but he was no longer required to lift or step on and off of the back of a truck. His new duties consisted of looking for rat holes, laying bait and checking residents' backyards. When his crew moved from one location to another, they rode in a passenger van, not a truck.

Petitioner testified he is still working in rodent control. He continues to experience right knee pain. His right knee gives way, which causes him to lose his balance. He addresses his symptoms by applying ice to his knee, keeping his leg elevated and wearing the brace. He testified he wears the brace "all the time," regardless of whether he is at work.

Petitioner testified he has difficulty navigating the stairs in his house that lead to the basement. He has to hold both sets of railings when climbing or descending these stairs. It is especially difficult for him to step up with his right leg. He is able to kneel when he attends church but only on his left knee. He keeps his right leg extended due to pain. He also keeps his right leg extended when he sits on a toilet. He uses his left leg to "push up' from a seated position. Because he continues to avoid putting weight on his right leg, he is worried about his left leg. If his job came to an end, he would have to look for something light that required no lifting.

Under cross-examination, Petitioner denied having any right leg symptoms before the work accident. Dr. Maday released him to unrestricted duty as of October 17, 2016. He resumed his regular laborer duties at that point, with no reduction in his earnings. He has not returned to Dr. Maday since November 2016. He has not undergone any other right knee care since November 2016. He performed his regular laborer duties between October 2016 and April 2018, when he began working in rodent control. No one told him he was physically unable to continue working as a laborer.

Respondent did not call any witnesses. Respondent offered into evidence a print-out of the temporary total disability benefits and medical expenses it paid in this claim. RX 1.

Arbitrator's Credibility Assessment

Petitioner did not identify his hire date but Dr. Maday described him as having worked for Respondent for twenty years. That lengthy tenure weighs in Petitioner's favor, credibility-wise.

Petitioner came across as hard-working. He did not overstate his complaints. None of his treating physicians noted any symptom magnification. The Arbitrator found him very credible.

Arbitrator's Conclusions of Law

<u>What is the nature and extent of the injury?</u>

Because the accident occurred after September 1, 2011, the Arbitrator looks to Section 8.1b of the Act for guidance in determining the nature and extent of Petitioner's injury. That section sets forth five factors to be considered in assessing permanency, with no single factor predominating. The Arbitrator views the first factor, any AMA Guides impairment rating, as irrelevant since neither party offered such a rating into evidence. The Arbitrator assigns weight to the second factor, Petitioner's occupation. On October 7, 2016, Petitioner's therapist recommended two more weeks of work conditioning, noting that Petitioner's job was heavy and that he was still functioning at a medium physical demand level. On October 12, 2016, Dr. Maday noted this recommendation but nevertheless released Petitioner to full duty. Petitioner testified he resumed his regular garbage collection duties thereafter but also testified he did not work in a normal fashion in that he wore a brace on his right knee, as prescribed by Dr. Maday, and put all of his weight on his left leg. He indicated that Dr. Maday told him to use the brace for "safety and support." Dr. Maday's records do not mention the brace but the Arbitrator finds Petitioner's detailed testimony on this point credible. Petitioner also credibly

testified that, in 2018, he applied for a transfer to a somewhat lighter rodent control job because, while that job still involved significant walking, it did not require him to lift heavy items or step up a distance of 18 inches to ride on the back of a garbage truck. Petitioner was still performing the rodent control job as of the hearing, albeit not without difficulty. The Arbitrator also assigns weight to the third factor, Petitioner's age at the time of the accident. Petitioner was 59 as of the April 12, 2016 accident. The Arbitrator views him as an older individual who is rapidly approaching typical retirement age. This factor cuts both ways in the sense that, while Petitioner might not work for much longer, he will still have to deal with his right knee symptoms when performing routine activities as a retiree. The Arbitrator also assigns weight to the fourth factor, future earning capacity. Petitioner readily acknowledged he remained at the same rate of pay when he resumed working as a laborer in the fall of 2016. He did not claim any diminution of earnings secondary to his transfer to the rodent control division. As for the fifth and final factor, evidence of disability corroborated by the treatment records, the Arbitrator notes the MRI report, Dr. Maday's operative report, which describes the meniscal tear as "complex, irreparable and in the white-white zone," the fact that Petitioner did not reach a heavy physical demand level during work conditioning and Dr. Maday's essentially negative examination findings on October 12 and November 16, 2016.

The Arbitrator, having considered the foregoing, finds that Petitioner is permanently partially disabled to the extent of 35% loss of use of the right leg, representing 75.25 weeks of benefits, under Section 8(e) 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 COOK	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michael Bonadona,

Petitioner,

vs. No. 11 WC 07540

City of Chicago,

19IWCC0531

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review under §19(b) having been filed by the parties herein and proper notice given, the Commission, after considering the issues of accident, causal connection, medical expenses, prospective medical care, temporary disability, penalties and attorney fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary compensation, medical benefits or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327 (1980).

The Commission finds Petitioner failed to prove he is entitled to temporary disability benefits after September 1, 2014. After the right hip replacement surgery, Dr. Hopkinson released Petitioner to return to work full duty on or about February 11, 2013. Petitioner worked full duty until he retired from his employment on September 1, 2014. Regarding the circumstances of his retirement, Petitioner testified on cross-examination that it was his choice to retire and he was not under any medical restrictions at the time. There are no restricted duty or off work slips in evidence after February 11, 2013.

19IWCC0531

The Commission affirms the Arbitrator's finding that both the right hip and the left hip conditions are causally related to Petitioner's work activities for Respondent. The Commission affirms the awards of medical expenses for the 2012 right hip replacement and prospective medical care in the form of the left hip replacement recommended by Dr. Hopkinson.

Lastly, the Commission agrees with the Arbitrator that penalties and attorney fees are not warranted, as there was a *bona fide* dispute regarding repetitive trauma and causation.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 24, 2018, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $1,202.67 per week for a period of 11 6/7 weeks, from November 21, 2012 through February 11, 2013, 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 compensation, medical benefits or of compensation for permanent disability, if any. The award of temporary disability benefits beginning September 1, 2014 is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay medical expenses of $46,782.00 pursuant to §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for the left total hip replacement recommended by Dr. Hopkinson and incidental care, pursuant to §§8(a) and 8.2 of the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent 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.

19IWCC0531

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: SEP 2 6 2019
o-08/28/2019
SM/sk
44

Stephen Mathis

Douglas McCarthy

Deborah Simpson

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

BONADONA, MICHAEL
Employee/Petitioner

Case# **11WC007540**

19IWCC0531

CITY OF CHICAGO
Employer/Respondent

On 7/24/2018, 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 2.14% 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:

0391 HEALY SCANLON LAW FIRM
DAVID P HUBER
111 W WASHINGTON ST SUITE 1425
CHICAGO, IL 60602

0010 CITY OF CHICAGO LAW DEPT
D TAYLOR CHITTICK
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

19IWCC0531

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)

Michael Bonadona
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **11 WC 07540**

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 **Brian T. Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **November 22, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Petitioner's earnings?

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

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

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

K. ☒ 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: Does Respondent have the right to obtain a second Section 12 examination?

FINDINGS

On **January 12, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**93,808.00**; the average weekly wage was $**1,804.00.**

On the date of accident, Petitioner was **51** years of age, *single* with *1* dependent child.

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

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

Respondent shall receive an 8(j) credit in the amount of $**12,741.77** for medical bills paid through a group medical plan.

ORDER :

Respondent shall pay Petitioner TTD benefits from 11-22-2012 through 2-11-2013 (11-4/7 weeks at $1,202.67/week); from 9-1-2014 through 4-1-2015 (30-3/7 weeks at $1,202.67/week); from 7-1-2015 through 4-1-2017 (91-4/7 weeks at $1,202.67/week) and TPD benefits from 4-2-2017 through 11-22-2017 (33-3/7 weeks at $1,034.67/week), in accordance with Section 8(b) and Section 8(a) of the Act.

Respondent shall pay the unpaid medical bills included in Petitioner's Exhibit 4, Dr. William Hopkinson and Loyola University Medical Center, in the amount of $46,782.00, pursuant to §8(a) and subject to §8.2 of the Act.

Respondent shall authorize and pay for the left total hip replacement that Dr. Hopkinson has prescribed.

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

7-24-18
Date

JUL 24 2018

Michael Bonadona v. City of Chicago

11 WC 7540

Findings of Fact

Petitioner's Testimony:

Petitioner testified that his date of birth is January 20, 1960. He weighs 180 pounds, is 5'10" tall, and is right-handed. In 2011, he was divorced with 1 child under 18 years of age. After he finished high school, he attended Oakton Community College where he earned his associate's degree in business.

Petitioner began working for Respondent on November 30, 1981 as an apprentice operating engineer. He is a member of Local 150 of that Union. When he began as an operating engineer, he had many different job duties. He drove machines such as the Linkbelt machine, which is depicted and described in Petitioner's Exhibit 6. He had to maintain and prepare machines, and pretty much learned how to operate the machines.

By 2011, he worked for the Sewer Department and was involved in new construction as an operating engineer.

Petitioner operated an excavating machine. He worked on the Linkbelt 330. Petitioner's Exhibit 6 displays the exact make and model of the machine that he operated. He first started on the excavating machine in 1984, immediately after he started working for Respondent. In operating the excavating machine, he started earlier than the rest of the crew. He had to warm up the machine, grease it, and fuel it. He would check over the machine to make sure nothing was dangerous. As an operator, he had to climb in and out of the machine. To get in and out of the machine, he had to climb up and down a ladder. The height to which he had to climb was 5'4". At the start of the day, he had to climb into the machine. For the coffee break, he had to climb out of the machine. After the coffee break, he would have to climb back into the machine. At lunchtime, he would climb out of the machine, and after lunch, he would climb back into the machine. At the end of the day, he would climb out of the machine. This was his normal in-and-out routine. There were 3 different buckets and a hydraulic jackhammer. He would not need to get out of the machine to change the buckets, but he would in order to connect or disconnect a bucket for a hammer and vice versa. He always loaded the machine on a truck or a low boy. It is difficult to climb into the machine when it is on the low boy because it is 2-3 feet up.

When he operated the excavating machine, his hands and feet were moving and he bounced around in the machine when going over the terrain. There was vigorous movement. When he was greasing and fueling the machine, he found it difficult to climb up on the machine. Petitioner operated the excavating machine from 1984-2010.

In 2010, he moved to the front-end loader machine. This machine is depicted and described in Petitioner's Exhibit 7. Operating a loader (Px7) is different than operating an excavator (Px6). When operating a loader, his hands and feet moved all day, just like other machines. However, he bounced around more in a loader because the machine was on tires and

moved on street pavement that were often rough. He had to get in and out of the machine. On the construction sites, the terrain was uneven, unpaved, sometimes muddy, and sometimes hilly.

This type of work is seasonal, but he worked all year long, even in the winter. In 2011, the rate of pay was $46.10/hour. He worked 40-hour weeks. He started at 6:30 in the morning. He got ½ hour to prepare the excavator, but not the loader or any other machine. He often used the hammer on the excavator to break up the street pavement.

In 1972, he sustained an injury to his left hip, which was repaired with screws. In 1991, he underwent surgery that consisted of a left total hip replacement. Dr. Chuck Schwartz performed the surgery.

Petitioner testified that his left hip felt very good up until 2010. He had switched to Dr. Hopkinson for his hip and saw him every year up to 2010. At some point, he began experiencing problems with his left leg while at work. Sometime around 2010, he saw Dr. Hopkinson and discussed it. It was not only due to the climbing activities, but also being shaken around in the machine during the day. It was difficult for him to get around the job site.

In 2011, Dr. Hopkinson recommended a re-do of the total hip replacement.

In 2012, he told Dr. Hopkinson that his right hip was causing symptoms at that time. Because he was told that there would be problems if he re-did his left hip first, he elected to undergo a right total hip replacement on November 25, 2012. Petitioner believed that he did physical therapy at Athletico. He returned to Dr. Hopkinson in January of 2013; Dr. Hopkinson returned him to work at that time.

While he worked for Respondent, he had x-rays taken of both hips. Petitioner's health insurance, through Respondent, was Blue Cross/Blue Shield. They paid for the visits to Dr. Hopkinson and the tests that he ordered.

After the right total hip surgery, Petitioner was off work from November 21, 2012 through February 11, 2013. When he went back to work, he did not go back to the loader. (Px7) Instead, he operated an air compressor. He had to fuel this machine, watch over it, and turn it on and off. He did not need to climb on or under this machine, move it, or traverse a construction zone with it.

Petitioner further testified that the activities he was required to perform to operate the air compressor caused diminished symptoms to his left hip. He did not have symptoms to his left hip when operating the air compressor. He operated the air compressor for 2 months.

After that, he was put to work on the front-end loader. He felt symptoms with the daily operation of this machine.

He saw Dr. Sheinkop on 2 occasions, and each exam lasted about ½ hour. The first exam took place in October of 2012, and the second exam took place in October 2014.

In 2014, his supervisor was John Ware. He was the foreman for operating engineers. In 2013 or 2014, when Petitioner changed from operating an air compressor to a front-end loader,

his supervisor was Tom McMahon. After Petitioner switched to operating the loader, he told his supervisors he had problems with his left hip. Petitioner was told that there was no availability of any machine other than the loader.

Petitioner continued to have left hip pain while operating the loader until he left the employ of Respondent on September 1, 2014. He left the employ of Respondent because of problems with his left hip; Respondent was not able to give him another machine. Petitioner would not have left the employ of Respondent if they had offered him a job that did not cause pain in his left hip. Because he was not able to operate the loader, he decided to retire from his job with Respondent.

Petitioner's dad was employed as an operating engineer for Respondent for 47 years.

Petitioner had hoped to work much longer. If he were able, he would have liked to work as an operating engineer for Respondent today. They offer good pay and benefits. After he retired, COBRA handled his health benefits. Insurance is not being paid by Respondent now.

Dr. Hopkinson has recommended that he undergo a left total hip revision, but Respondent has not authorized this treatment. Respondent did not authorize the *right* total hip replacement. Petitioner used Blue Cross/Blue Shield for the right hip.

If the Arbitrator awards the left total his revision surgery, Petitioner would have it done. Petitioner cannot afford the co-pays to have it done through his own health insurance. When Dr. Hopkinson Petitioner on October 29, 2017, he continued to recommend the left total hip revision.

After Petitioner left Respondent, he got a job at P & M Sewer and Water. He started working for them on April 2, 2015. He used a large excavator at that job, which was similar to a Linkbelt 330. Petitioner experienced pain in his hips; he left that job after 3 months due to pain in his hips.

Then, he started working at Chicago Foliage. He used a van or a box truck that had automatic transmission. He does not have symptoms in his hips like he did at P & M. He earns $14.00/hour and works 12 hours a week. He works 2 days a week. He has a much lighter workload at Chicago Foliage.

Petitioner has seen medical bills from Dr. Hopkinson and Loyola University Medical Center. Blue Cross/Blue Shield paid some of these bills and some of these bills remain outstanding.

On cross-examination, Petitioner testified that he has had earlier hip and pelvis surgery. He was hit by a car 31 years ago, and underwent left hip surgery. He subsequently underwent left hip replacement surgery, which he had before the date of accident. Also, at the time of that motor vehicle accident, he dislocated his right hip. He did *not* undergo right hip surgery for the dislocated hip after the motor vehicle accident.

Following his left hip replacement surgery, he periodically followed up with Dr. Schwartz. Dr. Schwartz looked at the prosthesis.

Petitioner first saw Dr. Hopkinson in 2004. Petitioner's understanding, at these periodic check-ups by Dr. Hopkinson, was that he would need left hip revision surgery since he was 31 years old at the time of the original left hip replacement.

After the motor vehicle accident, Petitioner did not experience right hip pain. Petitioner started experiencing right hip pain probably around 2010. That pain got progressively worse as time went on. It led to his right hip replacement in 2012. Dr. Hopkinson performed that surgery.

Petitioner testified that he retired on August 31, 2014. Ultimately, it was his choice to retire. Petitioner was not aware of any medical restrictions that compelled him to retire. Petitioner was eligible to receive a pension at the time he retired.

Following the motor vehicle accident, Petitioner testified, he did not experience any right hip symptoms. He seemed to remember that one of his injuries was a right hip dislocation.

Currently, he experiences pain on the left side. His legs are not exactly the same length because of the wear and tear of the hip prosthesis. Petitioner understands that the more the hip is used, the more the prosthesis will wear out. Petitioner testified that he never ran. He never went for long walks. He made sure that he did not overuse his legs and hips.

On redirect examination, Petitioner testified that he made efforts not to abuse his hip. Most of his symptoms occurred with work activities versus other activities at home. Petitioner further testified that he has spoken with Dr. Hopkinson and he said that pain indicates that activity worsens it and that the timing of a left hip revision would be based on the amount of wear and tear on the prosthesis. Petitioner's understanding is that the more activity he is engages in, the more wear and tear occurs - - and this would speed up the need for a hip replacement.

Medical Opinions:

William J. Hopkinson, M.D.

Dr. Hopkinson's evidence deposition was taken July 2, 2015. It appears as PEX 5. Dr. Hopkinson testified that he is Petitioner's treating orthopedic surgeon. He went to West Point United States Military Academy and got a B.S. in engineering. Upon graduating from West Point, he went to Loyola University Medical School where he obtained his M.D. He did an internship in general surgery at Simon's Army Medical Center in Colorado and a 4-year orthopedic surgery residency in Colorado. He finished his residency in 1982 thereafter he did a fellowship in sports medicine. He did his first assignment at the United States Military Academy at West Point and then a second fellowship in joint replacement surgery prior to going to Walter Reed Army Medical Center. He has worked at Loyola University Hospital since 1994. He is board certified in orthopedic surgery. At the time of his deposition he was board certified in orthopedic surgery. At the time of his surgery he was surgeon-in-chief at Loyola University Medical Center starting in 2013. He testified that he treats patient with orthopedic and hip

conditions like the conditions he treated Petitioner for "all the time." PEX 5, pg. 6. Dr. Hopkinson's curriculum vitae is 19-1/2 pages long. PEX 5, Dep. Ex. 1.

Dr. Hopkinson testified that he first began seeing Petitioner on October 25, 2004 for a routine follow-up with his joint replacement surgery done by Dr. Schwartz. Dr. Hopkinson saw Petitioner three times between 2004 and 2010, in 2004, 2007 and 2008.

Dr. Hopkinson generated a document that he titled "A Complete Office Evaluation" for Petitioner on October 22, 2011. See PEX 1. Dr. Hopkinson described Petitioner's chief complaint as bilateral hip pain. He confirmed that Petitioner underwent a left total hip arthroplasty by Dr. Schwartz in 1991 and that he strongly recommended hip revision surgery on the left side due to periacetabular osteolysis and right hip replacement due to progressive osteoarthritis. Dr. Hopkinson noted that Petitioner was taking Meloxicam and Tramadol for pain. Dr. Hopkinson's impression was that Petitioner had suffered from 1. osteoarthritis, right-hip, severe, work aggravated and 2. left articular bearing surface wear with periacetabular osteolysis, work-aggravated and accelerated. Dr. Hopkinson note that Petitioner's radiographs showed progressive wear-related issues in his left hip which were stable in 2011, however Dr. Hopkinson noted that with time, there may be loosening of the hip prosthesis which if it occurred might require catastrophic and urgent surgery. Dr. Hopkinson recommended Petitioner undergo bilateral hip replacements.

Dr. Hopkinson testified that he saw Petitioner January 24, 2011 and noted that Petitioner was having more and more problems with activities of daily living and was almost completely miserable by the end of the work week. Petitioner was taking tramadol for pain, and the right hip was becoming more and more of a problem for him than the left. Dr. Hopkinson testified that the left hip pain Petitioner was experiencing showed that the left hip prosthesis installed in 1991 was wearing out. PEX 5, pg. 10. On January 24, 2011, Dr. Hopkinson testified that his treatment plan was to replace Petitioner's left hip and thereafter replace Petitioner's right hip. However, Dr. Hopkinson testified that his treatment plan changed because eventually his right hip was so miserable that he didn't know how he could do rehabilitation on his left hip by putting the full weight on his now sore right hip. PEX 5, pg. 12. Dr. Hopkinson testified that he saw Petitioner on October 26, 2011 and that by that time he had severe pain in both groins by the end of the work day. He was taking Meloxicam and Tramadol which Dr. Hopkinson testified was reasonable and necessary considering the condition of Petitioner. In October of 2011 it was Dr. Hopkinson's impression that Petitioner suffered from 1. osteoarthritis, right hip, severe, work-aggravated and 2. left articular bearing surface wear with periacetabular osteolysis, work-aggravated or accelerated.

Dr. Hopkinson strongly recommended Petitioner proceed with the left hip revision surgery because it's impending failure was possible. PEX 5, pg. 15. At that time, it was Dr. Hopkinson's opinion that Petitioner was suffering from wear in the hips that was at least aggravated or accelerated by his occupation. PEX 5, pgs. 15-16.

Dr. Hopkinson explained that based on the condition of Petitioner's right hip he and Petitioner agreed to perform a right total hip replacement first and defer the left total hip replacement so that rehabilitation on the left hip could be accomplished on replaced right hip. PEX 5, pg. 16.

Dr. Hopkinson testified that he performed a right total hip replacement on November 21, 2012 at Loyola. PEX 5, pgs. 17-18. Dr. Hopkinson's surgical report appears at PEX 2, pg. 88. Dr. Hopkinson testified that Petitioner's left hip symptoms got better following the right hip revision. PEX 2, pg. 18. Dr. Hopkinson testified that he returned Petitioner to work without restrictions by February 11, 2013. PEX 2, pg. 21.

Dr. Hopkinson testified that he still recommends that Petitioner undergo a left hip replacement because of the wear it has suffered.

Dr. Hopkinson testified specifically that Petitioner's work activities were accelerated or causing the condition of the hips, including the left-hip. Dr. Hopkinson testified that "it's a mechanical thing." PEX 2, pg. 20. Dr. Hopkinson testified specifically that as to the right hip, it was his opinion that Petitioner's work activities caused or accelerated the deterioration leading to the need for the hip replacement. PEX 2, pg. 20.

Dr. Hopkinson testified that due to Petitioner's previous pelvic injury he was more susceptible to developing osteoarthritis in his left hip. PEX 5, pg. 31. He testified that depending on the activities, arthritis can be accelerated if activity is more than sedentary. PEX5, pg. 31.

Dr. Hopkinson saw Petitioner June 17, 2013 where he noted that he was doing well. He saw him November 25, 2013 where he "advised him he would need left hip revision of some or all component in the next one to three years. PEX 5, pg. 22. Dr. Hopkinson testified that if Petitioner continued to work he would aggravate or accelerate the wear in his hip requiring replacement. PEX 5, pg. 23. Dr. Hopkinson testified that the trajectory of the need for the left hip replacement can lengthen or shorten depending on mainly activities. Dr. Hopkinson agreed that activities like those Petitioner described aggravated the symptoms in his hip hastened the need for replacement. Those activities aggravated or accelerated the deterioration that causes the need for the hip replacement. Dr. Hopkinson testified that if Petitioner does not obtain left hip replacement it is going to catastrophically fail one day when he is doing something and that it

will fracture or collapse leaving him in lots of pain and they will have to do the surgery on an emergent basis as opposed to elective surgery. PEX 5, pg. 25.

Dr. Hopkinson testified that "I think work is the main cause of his activities - - or of his advanced activities." PEX 5, pg. 26. Dr. Hopkinson testified that all of the treatment he has rendered to Petitioner has been reasonable and necessary given Petitioner's symptoms. PEX 5, pg. 26.

Dr. Hopkinson testified that he felt it was the repetitive activities of Petitioner's job that were aggravating his condition. PEX 5, pg. 36. Dr. Hopkinson reiterated that the intensity and duration of activity effects the wear of the prosthesis. More intense and heavier activity increases wear on the prosthesis. PEX 5, pg. 45.

Mitchell B. Sheinkop, M.D.

Dr. Sheinkop testified via evidence deposition on September 3, 2015. Dr. Sheinkop was retained by the Respondent to conduct examinations and provide opinions pursuant to §12 of the Act. Dr. Sheinkop testified that he is an orthopedic surgeon who does not currently perform surgery and does not have admitting privileges at any hospital. REX 1, pg. 5 and 53. Dr. Sheinkop earned his bachelor's degree at the University of Illinois and his M.D. at Chicago Medical School. From 1968-1976, he served as an officer in the United States Air Force Reserve (Medical Corps), and in from 1972-1973, was Assistant Professor in Surgery/Orthopedics at The University of Chicago Hospitals and Pritzker School of Medicine. From 1973-1999, Dr. Sheinkop was Associate Professor/Orthopedics at Rush University, and from 1992-2008, was Director, Rush Joint Replacement Program, Oak Park Hospital. From 2010 to the present, he has been Director of the Orthopedic Program at Weil Foot-Ankle and Orthopedic Institute. His specialty is Interventional Orthopedics in which he advises patients with arthritis to postpone or avoid a joint replacement. Dr. Sheinkop's curriculum vitae is 33-1/2 pages long. REX 1, Dep. Ex. 1.

Dr. Sheinkop testified that he had no knowledge of Dr. Hopkinson's work or opinions as regards Petitioner and was never shown Dr. Hopkinson's deposition or records. REX 1, pg. 36. Dr. Sheinkop did not know what effect the right hip replacement had on Petitioner's left hip symptoms. REX 1, pg. 37.

Dr. Sheinkop testified that he did review records before offering his opinions but could not recall what records he reviewed and did not have such records with him at the time of the deposition. REX 1, pp. 11-12. Petitioner's attorney made an objection to Dr. Sheinkop's failure to produce his file or have the ability to provide detailed information about what he did and did not review in relation to his work in this matter. REX 1, pg. 12. In addition, Dr. Sheinkop testified that he reviewed a videotape of a person operating a machine which may or may not be similar to the machine operated by Petitioner. However, the video was never produced, (REX 1, pg. 20) and Dr. Sheinkop was unable to describe the video in detail including its length, the type of machine and what activities the person depicted in the video performed. REX 1, pg. 18 and 23. Dr. Sheinkop did not recall whether the video he reviewed, which was not produced showed anything other than a person operating a machine.

Dr. Sheinkop never formed any impression as to how many times a day Petitioner had to climb in and out of the machine. He never inquired of Petitioner regarding that because he viewed the video after his interaction with Petitioner. REX 1, pg. 44. Dr. Sheinkop did not take a history of job activities from Mr. Bonadona. REX 1 pg. 21.

Dr. Sheinkop testified that he reviewed a physical demands summary prepared by someone on behalf of Respondent. He testified that it lists various activities including lifting and other activities. Dr. Sheinkop testified that the physical demands summary was "not realistic." REX 1, pg. 26.

Nevertheless, Respondent asked Dr. Sheinkop to opine on the cause of Petitioner's hip symptoms and need for hip surgery. Dr. Sheinkop's report concludes, "On the other hand, this might or could be the demands of the work place have resulted in the need for the revision slightly sooner than otherwise might have been the case." PEX 3, pg. 1. Dr. Sheinkop agreed that Petitioner had a vigorous occupation and that physical wear and tear on Petitioner's prosthesis was accelerated by vigorous work activity including the frequency of the interaction between the components and the entity and the interaction of the components of the hip. Dr. Sheinkop agreed that the faster the prosthesis wears out, the earlier it needs to be replaced. REX 1, pg. 32.

Dr. Sheinkop testified that if Petitioner had severe pain in both sides of the groin at the end of his work day, that would indicate that work place activities was provoking symptoms in his hip. REX 1, pg. 33. Dr. Sheinkop was unaware of any activity outside of work that provoked the symptoms in Petitioner's hip. Dr. Sheinkop testified that more frequent or more intense interaction between the components [of the hip prosthesis] is going to make the prosthesis wear out faster. REX 1, pg. 31.

Dr. Sheinkop testified that where activity provokes symptoms in the hip, that is caused by inflammation which is related to arthritis. REX 1, pg. 33. He agreed that arthritis is generally speaking progressive. Dr. Sheinkop did not make note of the fact that Petitioner experienced intense pain in both groins by the end of his work day, but acknowledged if that was the case, that work activity was provoking the symptoms which would be caused by inflammation.

Dr. Sheinkop acknowledged that at 43 years of age, Petitioner was relatively young to be requiring hip replacements. REX 1, pg. 34-35

Dr. Sheinkop had no opinions and was not asked to look at the issue of whether Petitioner required a total hip replacement on the right side in 2012. REX 1, pg. 44.

Dr. Sheinkop testified that the intensity and duration of physical wear on the hip prosthesis would have an effect on the hip longevity of the prosthesis. REX 1, pg. 44. Dr. Sheinkop described the kinds of activities which generate intense interaction between the components in a hip replacement as those involving impact such as, running. REX 1, pg. 45. Dr. Sheinkop testified that climbing ladders was a "wear impact accelerator." REX 1, pg. 45. He testified that activities which caused a person to bounce, moving their body around would be a wear impact accelerator. REX 1, pg. 45-46. He testified that carrying any object above 25 pounds would be a wear impact accelerator. REX 1, pg. 46. He testified that walking on uneven or loose ground would be a wear impact accelerator. REX 1, pg. 46. He testified that walking on slippery surfaces, such as uneven ground in the winter time would be a wear impact accelerator. REX 1, pg. 46. Dr. Sheinkop testified that his October 1, 2012 report reflects his opinion that the work place demands based on Petitioner might or could have accelerated the need for Petitioner's total hip replacement on the right side. REX 1, pg. 47. He acknowledged that Petitioner's workplace activities might or could have accelerated the need for his hip replacement because it accelerated his symptoms. REX 1, pg. 47. Dr. Sheinkop testified that his symptoms were a result of activities that produce inflammation which aggravate arthritis which results in the surface of the hip being roughed up in areas where they bear against each other. REX 1, pg. 47-48.

Dr. Sheinkop testified that in his practice, he advises his patients to avoid activity that provoked symptoms. REX 1, pg. 51. He tells them to stop running, he tells them to stop rock climbing if they are a rock climber. He tells them to avoid intense activity in order to delay indications for a hip replacement. REX 1, pg. 51. Dr. Sheinkop testified that it is true that if somebody came to him and told him that they were going to continue to engage in activities that produce symptoms because they elected to do that, he would tell his patient that those activities are going to hasten the need for a hip replacement. REX 1, pg. 51-52.

Dr. Sheinkop testified that it was his opinion that whatever trauma Petitioner underwent 20-years ago including an acetabular fracture rendered him more susceptible to developing severe arthritis in the right hip such that it needed to be replaced. REX 1, pg. 56.

In Dr. Sheinkop's October 1, 2012 report, attached to his evidence deposition as exhibit 2 and submitted as PEX 3, he concludes that Petitioner would have required a left hip replacement at some time. He testified that "on the other hand, it might or could be the demands of the work place have resulted in the need for a revision slightly sooner than might have been the case." REX 1, pg. 47. Although Dr. Sheinkop's October 28, 2014 §12 report, attached to his deposition as exhibit 3 concludes that work place activities had no role in Petitioner's need for total hip replacements, it is clear from reading his evidence deposition that Dr. Sheinkop made no effort to determine what activities Petitioner engaged in at work provoked symptoms.

Conclusions of Law

In support of his decisions with regard to issues (C) "Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?", and (F) Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator concludes as follows:

Petitioner testified that, prior to his employment by Respondent, he was involved in an automobile accident in 1972. On cross-examination, Petitioner clarified that this accident was not work related. As a result of this accident, Petitioner pelvis was crushed and he sustained severe pelvic trauma. PEX5, pg. 31. Petitioner testified that, due to the injuries he sustained in this automobile accident, he eventually underwent total left hip replacement surgery in 1991 performed by Dr. Schwartz of Loyola University Medical Center. Petitioner testified that he also suffered a dislocation of his right hip as a result of his non-work-related automobile accident.

Petitioner's date of birth is January 20, 1960. PEX2. Based upon Petitioner's date of birth, he was approximately 12 at the time he was involved in an automobile accident in 1972. Petitioner testified that he was 31 when he underwent his initial left hip replacement surgery in 1991.

Petitioner testified that, as part of his job duties for Respondent, he began operating an excavator machine in 1984. Petitioner testified that his responsibilities included greasing the excavator, fueling the excavator, and checking the machine for damage. Petitioner testified that the cab of the excavator was approximately 5'4" off the ground and that his job duties required him to climb in and out of the excavator several times each day. If the machine was on a trailer, he would have to climb higher. Petitioner testified that he operated an excavator between 1984 and 2010.

Petitioner testified that, in 2010, he began operating a wheel loader machine. Petitioner testified that this machine bounced around due to the fact that it moved using tires rather than a belt. Petitioner testified that he used the machine on various typed of terrain.

In support of his claim of repetitive work-related trauma, Petitioner testified that he suddenly began experiencing right hip and leg pain in 2010, soon after his job duties changed from operating an excavator to operating a wheel loader. However, the records of Dr. Hopkinson contradict Petitioner's testimony and reveal that, on September 20, 2007, Petitioner complained of "more and more right hip pain with activities." On September 20, 2007, Dr. Hopkinson advised Petitioner that he would need to consider a right total hip arthroplasty if his symptoms worsened. On October 20, 2008, Petitioner made additional right hip complaints. No mention of Petitioner's work duties is indicated in any of the notes from these appointments.

Notwithstanding the foregoing, the Arbitrator finds that Petitioner's need for right hip total hip replacement and need for future left total hip replacement was caused or aggravated by Petitioner's work activities. Petitioner's treating physician, Dr. Hopkinson concluded that Petitioner's previous injury rendered him more susceptible to developing osteoarthritis in his left hip. Both physicians who testified in this case concluded that intensive activity such as that which Petitioner engaged in on a daily basis as part of his job activities for Respondent were the type of activities that increased wear on the left hip prosthesis and produced symptoms that indicated that Petitioner's osteoarthritis was caused or aggravated by those activities. Both doctors testified that increased activity produces increased wear which leads to the need for left total hip replacement earlier rather than later. Dr. Sheinkop did not dispute that Petitioner required a right hip replacement.

It is well settled that the type of activities Petitioner engaged in as part of his work duties cause or contribute to exacerbation of osteoarthritis, leading to the need for hip replacement. See *Allen v. Caterpillar Tractor Co.*, 05 IWCC 0856, 2005 WL 3630062 (Ill. WCC) The nature of Petitioner's work including bending, climbing and other activities can be a factor in producing degenerative changes in the hips which accelerate the need for total hip arthroplasty at a young age. Dr. Sheinkop acknowledged that Petitioner was relatively young compared to other patients who might need a total hip replacement as a result of nature and progressing arthritis. The natural conclusion is that reached by both Dr. Hopkinson and Respondent's §12 examiner Dr. Sheinkop: the vigorous activities of Petitioner which provoked symptoms is indication that Petitioner's work aggravated and is the reason causing or aggravating Petitioner's wear and osteoarthritis in his hips and accelerated the need for total hip replacement on the left side and right side.

The evidence shows and the record is devoid of any other explanation for Petitioner's need for bilateral hip replacements. Petitioner testified, Dr. Hopkinson observed and Respondent

offered no evidence to refute the evidence that Petitioner did not engage in other activities outside of work which cause symptoms or aggravated the condition of his left and right hips.

The fact that the employee had a pre-existing condition, even though the same result may not have occurred had the employee been in normal health, does not preclude a finding that the employment was a causative factor. *St. Elizabeth Hosp. v. Illinois Workers' Comp. Comm'n*, 371 Ill.App.3d 882, 888 (5th Dist. 2007). Every natural consequence that flows from an injury which arose out of and in the course of the claimant's employment is compensable under the Workers' Compensation Act. *Cent. Rug & Carpet v. Indus. Comm'n*, 361 Ill.App.3d 684, 690 (1st Dist. 2005). The claimant need not show that the work injury was the sole or even principal cause of an injury but need only show evidence from which the inference can be drawn that the injury was a causative factor. *City of Streator v. Indus. Comm'n*, 92 Ill.2d 353, 363-64 (1982).

It is also well-settled that an employee is fully entitled to benefits if a pre-existing condition has been aggravated, exacerbated or accelerated by an accidental injury.

The Arbitrator finds that the need for Petitioner's right hip total hip replacement in November 21, 2012 was a result of and caused by Petitioner's work activities. The Arbitrator concludes that the need for Petitioner's left hip total hip replacement as recommended by Drs. Hopkinson and Sheinkop is the result of Petitioner's work activities which caused or aggravated Petitioner's symptoms and accelerated the need for left total hip replacement.

In support of his decisions with regard to issues (J) "Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services? ", and (K) "Is Petitioner entitled to any prospective medical care?", the Arbitrator concludes as follows:

Respondent has failed to pay for medical treatment, including the right total hip replacement, that was related to and aggravated by Petitioner's work for Respondent.

The evidence shows that Petitioner requires a left total hip replacement as recommended by Drs. Hopkinson and Sheinkop.

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

Petitioner testified that work activities which caused and aggravated symptoms in his hips is the reason why he retired from Respondent's employ. Petitioner testified that he enjoyed his work, needed to work from an economic standpoint and obtained health insurance through his

employ at Respondent. Petitioner testified and it is unrebutted that he requested Respondent provide him with work which did not provoke symptoms in his hip.

Respondent offered Petitioner work which did not provoke symptoms in his hip, running a compressor, which Petitioner did for approximately two-weeks after returning from his right total hip replacement. At the conclusion of the compressor job, Respondent forced Petitioner to operate a loader, which produced symptoms in his hip. Petitioner testified that he discussed obtaining a job from Respondent which did not cause symptoms with Mssrs. McMahon and Ware however, Petitioner was informed that if he wanted to stay in the employ of Respondent he was required to operate a loader as assigned.

Petitioner testified that he left the employ of Respondent on September 1, 2014. The attachment to Arbitrator's Exhibit 1 reflects that after surgery, Petitioner was entitled to TTD from November 22, 2012 through February 11, 2013, 11-4/7 weeks. Petitioner then worked for Respondent until the end of August. Petitioner is entitled to Temporary Total Disability payments from September 1, 2014 through April 1, 2015, 30-3/7 weeks. Petitioner testified that he worked 3 weeks for P & M Sewer for three months until his symptoms were such that he discontinued work. Thereafter he was entitled to temporary total disability payments from July 1, 2015 through April 1, 2017, 91-4/7 weeks. Petitioner testified that on April 2, 2017 he obtained work at 12 hours per week, $14.00 per hour ($168.00 average weekly wage). As of the date of the hearing, Petitioner is entitled to 33-3/7 weeks of temporary partial disability from April 2, 2017 through November 22, 2017.

In support of his decision with regard to issue (M) "Should penalties or fees be imposed upon Respondent?", the Arbitrator concludes as follows:

The Arbitrator concludes that since there was a bona fide dispute as to the issues of accident and causation, no penalties or fees are warranted in this case. With regard to Petitioner's left hip, Dr. Sheinkop testified that Petitioner got 15-17 years out of the hip replacement, which was wonderful, and the race is on for just failure versus contribution to failure. REX 1, pp. 46-47. With regard to the right hip, Dr. Sheinkop opined "in appearance and the nature of his trauma was ultimate (sic) secondary arthritis or post-traumatic arthritis and the need for a hip replacement." REX 1, pg. 47. Dr. Sheinkop testified that such trauma was the motor vehicle accident long ago that resulted in a complex right acetabular and pelvis fracture.

Brian T. Cronin
Arbitrator

7-24-18
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	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Vanessa Sims,

Petitioner,

vs. NO: 13 WC 16422

PACE,

19IWCC0532

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 all issues, and being advised of the facts and law, modifies the Decision of the Arbitrator to formally clarify the disposition of Respondent's Motion to Strike Petitioner's Statement of Exceptions. The Commission otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

On August 1, 2017, Respondent filed a Motion to Strike Petitioner's Statement of Exceptions and Brief to the Commission and Deny Oral Argument. The Commission hereby denies Respondent's Motion to Strike.

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 January 20, 2017, is modified as stated herein.

The party commencing 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: SEP 2 7 2019
o: 9/10/19
TJT/jds
51

Thomas J. Tyrrell

Maria E. Portela

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SIMS, VANESSA
Employee/Petitioner

Case# **13WC016422**

PACE
Employer/Respondent

19IWCC0532

On 1/20/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.60% 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:

0123 COHN & COHN
ERWIN COHN
77 W WASHINGTON ST SUITE 1422
CHICAGO, IL 60602

0075 POWER & CRONIN LTD
ELENA CINCIONE
900 COMMERCE DR SUITE 300
OAKBROOK, IL 60523

19IWCC0532

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

Venessa Sims
Employee/Petitioner

v.

PACE
Employer/Respondent

Case # **13** WC **16422**

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 **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Waukegan**, on **December 27, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **April 26, 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 alleged accident *was* given to Respondent.~~

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

In the year preceding the injury, Petitioner earned $**50,648.00**; the average weekly wage was $**974.00**.

On the date of accident, Petitioner was **55** years of age, ***single*** with **0** dependent children.

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

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

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

Respondent paid benefits of $**22,096.93** under Section 8(j) of the Act.

ORDER

BECAUSE PETITIONER FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT SHE SUSTAINED ACCIDENTAL INJURIES ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT, AND FURTHER FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT HER CONDITION OF ILL BEING IS CAUSALLY CONNECTED TO HER EMPLOYMENT, PETITIONER'S CLAIM FOR COMPENSATION IS DENIED.

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

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

Signature of Arbitrator

January 20, 2017
Date

JAN 20 2017

Statement of Facts

Petitioner Venessa Sims testified that in April, 2013, she had been employed by Respondent PACE as a bus driver for 13 years. Her job required her to pick up and drop off passengers while on her route. She would drive the bus with both hands on the large steering wheel. She demonstrated that she would hold it at the 9 o'clock and 3 o'clock positions. To turn the wheel she would pull it hand over hand. She needed to grip the wheel tightly and would open and close her hands over the top of the wheel to turn it. She worked 8 hours per day, 5 days per week. She testified she would turn the bus 10 times per hour. She testified she also needed to open and close the doors of the bus 15-20 times per hour. To open the door, she would grip and turn a handle on the left side of her seat. She would use her left hand to open the door. She would turn the handle to the left to open the front door and to the right to also open the back door of the bus. Petitioner identified PX 9A as a photograph of the handle used to open the bus. PX 9B showed the handle in the closed position. PX 9C showed the handle in the right position to open the back door. PX 9D showed the knob in the left position to open the front door. Petitioner testified that Respondent had 60 buses in the garage. She would drive different buses, but all had this same handle to open and close the doors.

Petitioner testified that, prior to April 26, 2013, she had a little numbness and tingling in her hands, but it was not severe. She would shake it out. On April 26, 2013, the numbness would not go away. She could not feel the wheel to turn the bus. She told her supervisor she could not feel the wheel. She pulled the bus over and they sent a relief driver. She testified she met with the safety supervisor Jeff Landmark at the garage and was sent to Advocate for medical care.

Records of Advocate Occupational Health were admitted as Petitioner's Exhibit 5. The records document an initial visit on April 26, 2013 with complaints of left hand numbness. A date of accident is recorded as April 22, 2013. The diagnosis is listed as left hand paresthesia (left fingers 1-3), rule out carpal tunnel. Petitioner was advised to wear a brace and begin occupational therapy. She was restricted to lifting less than 5 pounds with the left hand, no driving company vehicles, no tight gripping and no repetitive motion of the left hand (PX 5). Petitioner testified she was taken out of service. Petitioner was seen in follow up through May 31, 2013. The May 16, 2013 record states, "rule out carpal tunnel-work related injury due to bus driving." On May 31, 2013, Petitioner was restricted to right hand work only and no driving company vehicles. She was referred to Dr. Talerico, a hand surgeon, for left wrist carpal tunnel (PX 5). Dr. Talerico's June 7, 2012 record disables Petitioner until after an EMG is performed (PX 4).

Petitioner testified she also saw her family doctor Dr. Nho. Dr. Nho disabled Petitioner from April 26, 2013 thru May 15, 2013 from operating a motor vehicle due to left carpal tunnel (PX 8). Petitioner testified she was referred to Dr. Du for an EMG. Dr. Du initially saw Petitioner on June 21, 2013, waiting for approval. The July 12, 2013 report includes a history of a 55 year old left handed woman with complaints of paresthesia of hands for months. The EMG found moderate to marked bilateral carpal tunnel syndrome (PX 6).

Petitioner testified she was referred to Dr. De Leon in August or September, 2013. Dr. De Leon's records were admitted as Petitioner's Exhibit 1. The records document an initial visit on referral from Dr. Du on October 9, 2013. Petitioner reported that she is a bus driver with a chief complaint of bilateral carpal tunnel numbness. This has been ongoing for one year with her most recent episode beginning April, 2013. The handwritten notes state per symptoms started in June. She began noticing some slight numbness and tingling in both hands, with the left being worse. Her complaints were numbness and tingling in the radial aspect of her wrist and fingers of the left hand. She states that the left has more numbness and tingling that the right. The

symptoms are alleviated by the brace. They are aggravated with activity and driving. Dr. De Leon diagnosed bilateral carpal tunnel syndrome and recommended a left carpal tunnel release. Petitioner underwent a left endoscopic carpal tunnel release on October 24, 2013 at Hawthorne Surgical Center. On November 1, 2013, Dr. De Leon noted that Petitioner was doing well. He released her to return to work with respect to the left hand as of November 11, 2013. Petitioner was to advise him when she was ready to schedule her right hand surgery (PX 1).

Petitioner testified she was not satisfied with her surgical result. She still had pain in her left hand and thumb. Dr. De Leon saw Petitioner on January 17, 2014 with complaints of pain at the base of the let thumb, but no numbness. The diagnosis was left thumb arthritis. Dr. De Leon prescribed a splint (PX 1). Petitioner testified she then saw Dr. Zhong. Her right hand was getting worse. She testified that she was referred to Dr. Frank in September, 2014. Dr. Frank's records were admitted as Petitioner's Exhibit 2. The initial August 22, 2014 note records complaints of pain in both hands. Dr. Frank injected the left carpal tunnel with Depo-Medrol and lidocaine. He provided a cock up splint for the right hand at sleep time. On September 23, 2014, Petitioner reported no relief. Her right hand was very symptomatic. Dr. Frank recommended right hand surgery. His report states, "The etiology of the pain is more likely not related to the demands of pain at bus driver and using the big turning wheel. Work related" (PX 2).

Dr. Frank performed a right volar ligament release on December 4, 2014 (PX 2). Petitioner testified she had four months of therapy. She returned to driving a bus. Petitioner saw Dr. Frank on October 12, 2015. She had complaints of aching in her hands when it was cold and rainy. There was no issue of numbness or tingling. His assessment was episodic osteoarthritis pain. Petitioner was advised to use Aleve when necessary. No formal follow up was scheduled (RX 2). Petitioner testified that she has not seen Dr. Frank since October, 2015.

Petitioner was seen for a Section 12 examination by Dr. Ramsey Ellis at Respondent's request on September 10, 2013. She diagnosed bilateral carpal tunnel syndrome. She opined that this was not related to Petitioner's work activity as a bus driver since her job does not involve any prolonged exposure to hand-held vibratory tools or the repetitive flexion/extension of the wrists coupled with forceful grasping. She further stated that as of the date of her examination, she could perform her regular duties as a bus driver without restriction (RX 1, Ex 2). Dr. Ellis testified by evidence deposition on February 9, 2016 (RX 1). She testified to her diagnosis and causation opinions as stated in her report. She noted Petitioner's employment history as a bus driver. She stated Petitioner's obesity was comorbidity for carpal tunnel. Dr. Ellis testified that she did not recall asking Petitioner to describe her duties other than that she drove a large bus. She did not recall asking how she opened the doors or the maneuvers she did with her hands. She testified that the consensus statement of the American Academy of Orthopedic Surgeons concluded the only factors causative for carpal tunnel were use of vibratory tools or highly repetitive flexion/extension with forceful grasping, neither of which were present in driving a bus. She is familiar with driving a bus from her observations. Dr. Ellis testified that the majority of carpal tunnel syndrome is idiopathic. It is correlated with middle age, female versus male.

Petitioner testified that she is still driving a bus. She notices some pain in the palm of her hand. It is a shooting pain she notices 1 or 2 times per week. It lasts a couple of minutes. She is not taking any medication for her hands. Petitioner testified that she was in a motor vehicle accident in April, 2012 injuring her neck and back. She filed a workers compensation claim for that accident. She also had a work related motor vehicle accident on March 11, 2016, injuring her left shoulder. She testified she did not injure her hands in either of these accidents.

Conclusions of Law

In support of the Arbitrator's decision with respect to (C) 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 her claim. Petitioner must show, by a preponderance of the evidence, that she 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. Included within the Petitioner's burden is proof that her current condition of ill-being is causally connected to a work-related injury.

Petitioner did not allege a specific accident. Rather, she alleged that as a result of her years driving a bus for Respondent she developed bilateral carpal tunnel syndrome in her wrists and hands. Petitioner described specific activities she performed in driving the bus as the cause of her condition of ill being. She testified that she would drive the bus with both hands on the large steering wheel. She needed to grip the wheel tightly and would open and close her hands over the top of the wheel to turn it. She would turn the bus 10 times per hour. She testified she also needed to open and close the doors of the bus 15-20 times per hours. To open the door, she would grip and turn a handle on the left side of her seat. She would turn the handle to the left to open the front door and to the right to also open the back door of the bus.

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, 64, 862 N.E.2d 918, 924, 308 Ill. Dec. 715 (2006).* An employee who alleges injury based on repetitive trauma must show that the injury is work related and not the result of a normal degenerative aging process. *Peoria County Belwood Nursing Home v. Industrial Comm'n, 115 Ill. 2d 524, 530, 505 N.E.2d 1026, 106 Ill. Dec. 235 (1987); Edward Hines Precision Components v. Industrial Comm'n, 356 Ill. App. 3d 186, 194, 825 N.E.2d 773, 292 Ill. Dec. 185 (2005).* 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 did not present evidence to quantify the amount of force required to perform the tasks which she describe as causing her condition, only her testimony that she had to grip the wheel "tightly." The Arbitrator notes that the original records only note left handed complaints, yet the EMG finds bilateral carpal tunnel syndrome. The Advocate Occupational Medical May 16, 2013 record states, "rule out carpal tunnel-work related injury due to bus driving." No details of any activities included in her job are noted. No causation opinion was presented from either Dr. Du or Dr. De Leon. Dr. De Leon's history only records that Petitioner is a bus driver. Dr. Frank wrote a confusing note on September 23, 2014. Dr. Frank states, "The etiology of the pain is more likely not related to the demands of pain at bus driver and using the big turning wheel. Work related." The Arbitrator is unable to infer his causation opinion from this seemingly contradictory statement which likely contains typographical errors.

Respondent offered the opinion of Dr. Ramsey Ellis. She opined that Petitioner's condition of ill being was not related to her work activity as a bus driver since her job does not involve any prolonged exposure to hand-held vibratory tools or the repetitive flexion/extension of the wrists coupled with forceful grasping. She testified that the consensus statement of the American Academy of Orthopedic Surgeons concluded the only factors causative for carpal tunnel were use of vibratory tools or highly repetitive flexion/extension with forceful grasping, neither of which were present in driving a bus. She stated Petitioner's obesity was comorbidity for carpal tunnel. Dr. Ellis testified that the majority of carpal tunnel syndrome is idiopathic. It is correlated with middle age, female versus male; Petitioner being a 55 year old female. Dr. Ellis testified that she did not recall asking Petitioner to describe her duties other than that she drove a large bus. She did not recall asking how she opened the doors or the maneuvers she did with her hands. Dr. Ellis stated that she is familiar with driving a bus from her observations.

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.

In weighing the medical evidence and opinions presented, the Arbitrator does not find that Petitioner presented a clear opinion of causal connection to refute that of Dr. Ellis. While Dr. Ellis' opinion does not consider the details of Petitioner's job duties, her statement of understanding of Petitioner's job as a bus driver based upon her observation and understanding would encompass turning the steering wheel and opening and closing the door. The Arbitrator notes that, based upon the treating records admitted, Petitioner did not provide any greater detail beyond the general understanding of what is required to drive a bus to any of her treating doctors. Thus the Arbitrator finds Dr. Ellis' opinion based upon consensus statement of the American Academy of Orthopedic Surgeons and her understanding of the job requirements of a bus driver persuasive.

Based upon the record as a whole, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that she sustained accidental injuries arising out of or in the course of her employment and further failed to prove by a preponderance of the evidence that her condition of ill being is causally connected to her employment with Respondent.

In support of the Arbitrator's decision with respect to (E) Notice, (J) Medical, (K) Temporary Compensation, and (L) Nature and Extent, the Arbitrator finds as follows:

Based upon the Arbitrator's findings with respect to Accident and Causal Connection above, the remaining issues of Notice, Medical, Temporary Compensation, and Nature and Extent are moot.

Petitioner's claim for compensation is denied.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Daniel Inendino,

Petitioner,

vs. NO: 13 WC 6171

City of Chicago,

19IWCC0533

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice provided to all parties, the Commission after considering the issues of temporary total disability benefits and the nature and extent of permanent partial 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.

The Commission notes the Arbitrator awarded Respondent a credit of $60,104.03 for payment of temporary total disability benefits but did not award the corresponding benefits. The Commission finds Petitioner was temporarily totally disabled from February 6, 2013 through September 6, 2013 (a period of 30-3/7 weeks) and from October 12, 2016 through May 31, 2017 (a period of 33-1/7 weeks), for a total period of 63-4/7 weeks. ArbEX1, Request for Hearing form. The Commission awards temporary total disability benefits for the above periods and affirms the Arbitrator's granting of credit to Respondent in the amount of $60,104.03 for temporary total disability benefits paid.

Respondent argues in its brief that the Request for Hearing form indicates Petitioner's average weekly wage equals $1,454.05 and not $1,485.00. The Commission notes the Request for Hearing form, ArbEX1, states Petitioner's average weekly wage is $1,485.00, as does the Arbitrator's Decision. Therefore, there is no clerical error to correct. The maximum permanent partial disability rate of $712.55 is correct.

Pursuant to Section 8.1b of the Act, the Commission weighs the following five factors accordingly (*820 ILCS 305/8.1b(b)* (West 2014); *Corn Belt Energy Corp. v. Illinois Workers' Compensation Commission*, 2016 IL App (3d) 150311WC, ¶ 52, 56 N.E.3d 1101):

Section 8.1b(b)(i) – level of impairment

Although the Arbitrator noted Petitioner did not undergo an AMA impairment rating, he did not mention what weight he would give this factor. Since neither party obtained an impairment rating, the Commission assigns no weight to this factor.

Section 8.1b(b)(ii) – occupation of the injured employee

The Arbitrator noted Petitioner's occupation as a supervisor laborer with the Department of Signs. The Arbitrator further noted following his treatment and recovery, Petitioner was able to return to work to his usual and customary position. The Arbitrator gave this great weight. The Commission finds this factor weighs in favor of a decreased permanence.

Section 8.1b(b)(iii) – age of the employee at the time of the injury

Petitioner was 57 years-old at the time of his October 10, 2012 injury. The Arbitrator noted Petitioner's age had no effect on his claim, and this should receive little weight. The Commission observes Petitioner has a lesser work life expectancy which will require him to manage the effects of his injury for shortened period of time. The Commission finds this factor weighs in favor of a decreased permanence.

Section 8.1b(b)(iv) – employee's future earning capacity

Petitioner returned to work in the same position and earning the same or more than prior to the injury. The Arbitrator noted there is no evidence that his future earning capacity was adversely impacted as a result of his injury. The Arbitrator placed great weight on this factor. The Commission assigns no weight to this factor.

Section 8.1b(b)(v) – evidence of disability corroborated by treating medical records

As a result of his left knee injury, Petitioner underwent an MRI which evidenced tears of both medical and lateral menisci as well as some degenerative changes. PX1. On February 6, 2013, Dr. Nelson performed a left knee arthroscopy, partial medial and lateral meniscectomy, chondroplasty and debridement of the patellofemoral joint. PX1. Dr. Cole subsequently performed a series of Orthovisc injections which provided mild improvement. Due to continued knee complaints, Dr. Cole referred Petitioner for consideration of a total knee replacement. PX2. On October 12, 2016, Petitioner underwent a left total knee arthroplasty performed by Dr. Jimenez. On January 10, 2017, Dr. Jimenez performed a left knee manipulation under general

anesthesia. On May 18, 2017, Petitioner reported he was doing very well with only minimal discomfort in his left knee. Petitioner was released to return to work without restrictions. PX3.

Petitioner testified he is limited in all activities, but stairs and kneeling are particularly painful. T. 17. Petitioner experiences pain and discomfort while going up and down stairs, especially while carrying a load of boxes, signs, materials and tools. T. 17-18. Kneeling is particularly painful as is any direct pressure on the left knee. T. 18. On cross-examination, Petitioner testified he returned to work to his usual and customary position with no restrictions related to stairs, carrying, kneeling or walking. T. 22. The Commission notes the Arbitrator did not indicate what weight was placed on this factor. The Commission finds the above factor weighs in favor of an increased permanence.

Based on the above factors and the record in its entirety, the Commission finds Petitioner sustained 50% loss of use of the left leg with Respondent entitled to a credit of 25% loss of use of the left leg for a prior award, resulting in a present award of 25% loss of use of the left leg pursuant to Section 8(e) of the Act.

The Commission affirms all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's April 2, 2019 decision is modified for the reasons stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $990.00 per week for a period of 63-4/7 weeks, representing February 6, 2013 through September 6, 2013 and from October 12, 2016 through May 31, 2017, that being the period of temporary total incapacity for work pursuant to §8(b) of the Act. The Commission notes Respondent paid $60,104.03 for temporary total disability benefits and is entitled to credit for same.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $712.55 per week for a period of 53.75 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the permanent loss of use of the left leg to the extent of 50% loss of use of the left leg with Respondent entitled to a credit of 25% loss of use of the left leg for a prior award, resulting in a present award of 25% loss of use of the left leg.

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

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

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

DATED: SEP 2 7 2019
LEC/maw
o09/04/19
43

L. Elizabeth Coppoletti

Stephen J. Mathis

D. Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

INENDINO, DANIEL Case# **13WC006171**

Employee/Petitioner

CITY OF CHICAGO **19IWCC0533**

Employer/Respondent

On 4/2/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.38% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2675 COVEN LAW GROUP
MARK J SCHECHTER
180 N LASALLE ST SUITE 3650
CHICAGO, IL 60601

0113 CITY OF CHICAGO DEPT OF LAW
STEPHANIE LIPMAN
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)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

Daniel Inendino
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **13** WC **6171**

19IWCC0533

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 **David A. Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **1/24/18, 2/19/19 & 3/20/19**. By stipulation, the parties agree:

On the date of accident, **10/10/12**, 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 $**75,610.84**, and the average weekly wage was $**1,485.00**.

At the time of injury, Petitioner was **57** years of age, ***married*** with **0** dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

Respondent shall be given a credit of $**60,104.03** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**60,104.03**.

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 $**712.55**/week for a further period of **53.75** weeks, as provided in Section **8** of the Act, because the injuries sustained caused **a loss of 25% of use of the left leg after a credit of 25% loss of use of the left leg is taken into consideration.**

Respondent shall pay Petitioner compensation that has accrued from **6/1/17** through **3/20/19**, and shall pay the remainder of the award, if any, in weekly payments.

See attached

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

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

David A. Kane
Signature of Arbitrator

April 2, 2019
Date

APR 2 - 2019

The petitioner works for the respondent as a supervisor laborer. He is with the Department of Signs. On 10/10/12 he injured his left knee when he slipped and fell while unloading a truck of barricades.

Following this incident he reported to MercyWorks. Subsequently he was referred to Dr. Nelson. An MRI was ordered followed by a recommendation for surgery. On 2/6/13 he underwent an arthroscopic partial medical and lateral meniscectomy, chondroplasty and debridement of the patellofemoral joint. Following the surgery he felt discomfort but as petitioner testified, his therapy "straighten it out".

As pain continued after the surgery the petitioner reported to a Dr. Cole. With this physician he underwent a series of injections. He was referred to Dr. Jimenez.

At the doctor's recommendation he ultimately underwent a total knee replacement on 10/26/16. He testified that he felt better after this surgery. Nonetheless he required a manipulation on 1/19/17. With therapy he was able to claim his range of motion back. He is not where he was prior to the surgery but is without discomfort.

The petitioner returned to in the same position he was in prior to the date of injury. He is working 5 day a week, 40 hours a week. He is on his feet

during the day between 4 to 5 hours and after that he is at his desk or driving.

The petitioner has a prior award on this left leg. It is under case number 05 WC 16311. In 2006 he was awarded 25% loss of use of the left knee.

An AMA impairment rating was not done in this matter; however, Section 8.1(b) of the Act requires consideration of five factors in determining permanent partial disability:

1. The reported level of impairment;
2. Petitioner's occupation;
3. Petitioner's age at the time of the injury;
4. Petitioner's future earning capacity; and
5. Petitioner's evidence of disability corroborated by treating medical records.

Section 8.1(b) also states, "No single 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 a physician must be examined." The term "impairment" in relation to the AMA Guides to the Evaluation of Permanent Impairment 6th Edition is not synonymous with the term "disability" as it relates to the ultimate permanent partial disability award.

1. Reported level of impairment

An AMA impairment rating was not done in this case. This does not preclude an award for partial permanent disability.

2. Petitioner's Occupation

On the date of accident, the petitioner was a supervisor laborer with the Department of Signs. Following his treatment and recovery, the petitioner was able to return to work to his usual and customary position. This must be given great weight.

3. Petitioner's age at time of injury

The petitioner was 57 years old at the time of injury. This has no effect on the claim should receive little weight.

4. Petitioner's future earning capacity

The petitioner has no loss of earnings. Nothing in the record, including his testimony, suggests that his future earning capacity has been affected by the injury sustained. Great weight must be placed on this factor.

5. Evidence of disability corroborated by medical records

The petitioner suffered an injury to his left knee during the course and scope of his employment with respondent. As a result he underwent an arthroscopic partial medical and lateral meniscectomy, chondroplasty and debridement of the patellofemoral joint, followed by a total knee replacement and subsequent manipulation.

The record shows that Petitioner's recovery allowed him to return to his usual and customary position as a supervisor laborer. He testified

that his range of motion is not where it was but that he is without discomfort.

The petitioner shall have and receive 107.5 weeks from the respondent at a rate of $712.55 because the petitioner suffered a loss of 50% of use of the left leg. The respondent shall be given a credit for the prior award of 25% loss of use of the left leg, which means that he will collect 25% of the left leg from the respondent or 53.75 weeks at the aforementioned PPD rate.

The respondent shall pay petitioner compensation that has accrued from 6/1/17 through 3/20/19, and shall pay the remainder of the award, if any, in weekly payments.

STATE OF ILLINOIS)	☒ Affirm and adopt (with explanation)	☐ Injured Workers' Benefit Fund (§4(d))
) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF MADISON)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify Down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WILLIAM TAITT,

Petitioner,

19IWCC0534

vs. NO: 18 WC 5103

ARDENT MILLS,

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 all issues, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part thereof. 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).

I. *Findings of Fact*

Petitioner was employed as a relief man for Respondent. On January 25, 2018, Petitioner's left leg fell through a hole in the floor as he was walking backwards and tugging on a caught air hose. He immediately presented to Memorial Hospital on the accident date with complaints of low back pain. Petitioner told Dr. Stephen Platt that when he had stepped into the hole, he did the splits with his right leg and caused a twisting strain to his right low back. Dr. Platt diagnosed Petitioner with a right lumbar paravertebral muscle strain and prescribed a muscle relaxant.

Shortly thereafter, Petitioner followed up with Dr. James Kirkpatrick at the Chester Clinic on January 29, 2018. Dr. Kirkpatrick administered a Toradol injection and placed Petitioner off work. When Petitioner then saw Dr. Matthew Gornet for a spine examination on February 2, 2018, his lumbar MRI revealed a L4-L5 right annular tear, L5-S1 central annular tear, and bilateral L4-L5 large central herniation. The MRI report also showed a L5-S1 central disc herniation with probable annular fissure that created an impression upon the dura as well as mild central spinal stenosis. Dr. Gornet opined that Petitioner's symptoms were causally related to his work accident

and kept Petitioner off work through April 9, 2018. Petitioner thereafter underwent right L4-L5 epidural steroid injections on February 20, 2018.

At Respondent's request, Petitioner presented for a §12 examination with Dr. James Stiehl on February 26, 2018. Dr. Stiehl was not provided and did not review at any time, the MRI, the MRI report or the notes of Dr. Gornet. On examination, he found that Petitioner had significant sciatic radiculopathy and significant mechanical back pain. He opined that Petitioner's traumatic work exposure directly caused this condition. Dr. Stiehl further indicated that Petitioner could work light duty with no lifting greater than five to ten pounds, but he would have difficulty with stooping, bending, and twisting. Dr. Stiehl believed Petitioner could not perform the duties of his occupation at that time and would need four to six weeks of treatment before he could return to his pre-injury status.

Petitioner thereafter underwent L5-S1 epidural steroid injections on March 6, 2018. When he returned to Dr. Gornet on April 9, 2018, Petitioner reported that these injections had not significantly helped. Dr. Gornet's tentative plan was to pursue either a single disc replacement at L4-L5 or disc replacements at both L4-L5 and L5-S1. Dr. Gornet kept Petitioner off work through June 7, 2018, and in a subsequent off-work note, Petitioner's off work restrictions were continued through July 26, 2018.

On April 13, 2018, Respondent wrote a letter to Petitioner stating that it had agreed to pay Petitioner temporary total disability benefits from March 10 to March 25 in exchange for Petitioner's withdrawal of his § 19(b) motion. Respondent further stated that it would continue to offer Petitioner light duty accommodations in accordance with the restrictions provided by Dr. Stiehl in his §12 report. Respondent instructed Petitioner to report to work on April 16, 2018 at his customary start time.

Petitioner returned to light duty work from April 3, 2018 to June 19, 2018; however, he described his light duty effort as complicated. Petitioner testified that Respondent first had him spend one day painting, which required him to bend down with a paint can, use a ladder to paint overhead, and carry one-gallon paint cans. He thereafter spent the rest of his light duty period sitting at a computer desk and updating records. Petitioner testified that the prolonged sitting bothered his low back condition. He explained that he could stand when he needed, but if he did not get enough work done, he would be questioned as to why he spent time walking. Petitioner also testified that although he could get up and move when his back seized up, Respondent had denied his request to walk down the street and back. Petitioner testified that during this entire period of light duty work, Dr. Gornet had not yet released him to return to work of any kind.

When Petitioner returned to Dr. Gornet on July 26, 2018, Dr. Gornet kept him off work and noted that a recent MRI spectroscopy had found significant painful chemicals at L3 to S1. Petitioner then underwent a L5-S1 discogram with X-ray interpretation and a left facet block on August 14, 2018. The discogram was non-provocative at L5-S1, and the X-ray showed normal nucleogram at L5-S1 with a suggestion of an annular tear posteriorly. Another post-discogram lumbar CT followed and revealed a large L4-L5 broad-based central protrusion posteriorly resulting in moderate central canal stenosis and bilateral foraminal stenosis, a L5-S1 broad-based central protrusion, and disc bulges at L2 through L4 resulting in mild bilateral foraminal stenosis.

On September 8, 2018, Dr. Gornet recommended a single disc replacement at L4-L5 and indicated that Petitioner remained temporarily totally disabled.

On September 18, 2018, Petitioner presented for another §12 examination at Respondent's request with Dr. Kevin Rutz. Dr. Rutz opined that Petitioner's work accident had caused his low back condition and the surgery recommended by Dr. Gornet was within the appropriate standard of care. Dr. Rutz believed Petitioner could work with a 20-pound lifting restriction and the ability to sit or stand as needed; however, he acknowledged that Petitioner might not tolerate such work overall due to his neurologic compression and his "best option is to move forward with surgical intervention."

When Petitioner last saw Dr. Gornet on November 15, 2018, Dr. Gornet continued to recommend the L4-L5 disc replacement surgery and kept Petitioner off work through January 17, 2019. At the time of the hearing, Petitioner reported that the recommended surgery was scheduled for December 12, 2018. Petitioner testified that since he stopped working light duty, he spends his time with his daughter and has not been able to cut grass at his home, perform house repairs, or go deer hunting. He is also no longer a member of the Ellis Grove Volunteer Fire Department.

Ron Belcher, a plant manager for Respondent, was also called by Petitioner to testify at the hearing. Mr. Belcher testified that Respondent's offer of light duty work remained in effect at the time of his testimony. He further testified that when Petitioner returned to light duty work from early April to around June 20 of 2018, his tasks included painting for one day and sitting at a computer desk. He testified that Petitioner was able to get up and move around as needed; however, he was not aware that Petitioner had not been allowed to walk outside to the scale house to stretch his back. Nevertheless, Mr. Belcher acknowledged that it was not his job to check on what the light duty workers were doing.

This matter proceeded to a §19(b) hearing on November 27, 2018. Prior to proceeding, Respondent presented a Motion to Continue and asked that the hearing be postponed for approximately one week. The Motion to Continue, which was not file-stamped, stated that Respondent had scheduled a deposition with Dr. Stiehl for December 6, 2018 after being advised that Petitioner would not stipulate to the admission of Dr. Stiehl's §12 report. Respondent further expressed its intention of calling Petitioner's immediate supervisor, Erik Smith, to testify as to the light duty offer made to Petitioner. Respondent represented that Mr. Smith was in Colorado for previously scheduled training, but he would be available to appear the following week at the Arbitrator's Mount Vernon trial call. Respondent did not make an offer of proof concerning Mr. Smith's testimony.

Shortly before the hearing, Petitioner's counsel stipulated to the admissibility of Dr. Stiehl's report. Respondent requested that the §19(b) hearing be continued to the Mount Vernon trial call and contended that proceeding to hearing on November 27, 2018 without Mr. Smith's testimony would prejudice it. In opposition to the continuance request, Petitioner argued that he had not been paid in months and represented that this matter had been previously noticed up on several §19(b) petitions.

The Arbitrator noted that Respondent's continuance request had also been discussed

informally with both parties' counsel pre-trial and, at that time, the Arbitrator was willing to continue the matter if Respondent agreed to make some payment of temporary total disability benefits to Petitioner. However, based on Respondent's inability or unwillingness to agree to his recommendation regarding an advance payment of temporary total disability benefits, the Arbitrator overruled Respondent's objection to proceeding on November 27, 2018.

When the hearing commenced on November 27, 2018, several issues were stipulated by the parties, including accident, notice, causal connection, liability for medical expenses, and prospective medical care that included the recommended surgery. In the Decision issued on December 31, 2018, the Arbitrator found Petitioner was also entitled to temporary total disability benefits from January 26, 2018 to April 12, 2018 and June 20, 2018 to November 27, 2018.

II. *Conclusions of Law*

Following a careful review of the entire record, the Commission finds that the Arbitrator's denial of Respondent's Motion to Continue does not constitute reversible error.

Pursuant to 50 Ill. Admin. Code §9030.20(f), any party who requests a date certain for trial must be prepared, absent good cause shown, to proceed to trial. However, on the trial day, the parties may request a continuance. The granting or denial of a motion for a continuance lies within the sound discretion of the arbitrator or Commission, whose decision will not be reversed absent an abuse of that discretion. *Edward Don Co. v. Industrial Comm'n*, 344 Ill. App. 3d 643, 650 (1st Dist. 2003). Similarly, pursuant to the Illinois Workers' Compensation Act, an arbitrator has the discretion to grant a continuance to place the testimony of a witness into evidence. *Lefebvre v. Industrial Comm'n*, 276 Ill. App. 3d 791, 795 (1st Dist. 1995). Moreover, even if it is found that the arbitrator abused his or her discretion, the case will not be reversed if the error was harmless. *Id.*

In the present matter, the Commission finds that it was error to deny Respondent a one-week continuance to secure the attendance of an individual that it deemed to be a necessary witness. The arbitrator's reason for denying the request was not related to the substance of the single issue in dispute at the hearing, Petitioner's entitlement to temporary total disability benefits; rather, it was because Respondent was either unwilling or unable to follow a pre-trial recommendation. The delay is *de minimus* considering the totality of the circumstances in this case and the Commission finds that to deny Respondent's request in this case was in error. Nevertheless, the Commission further finds that the denial of the continuance request was harmless and that Respondent was not prejudiced.

"It is a well-settled principle that when a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized, i.e., whether the claimant has reached maximum medical improvement." *Interstate Scaffolding, Inc. v. Ill. Workers' Comp. Comm'n*, 236 Ill. 2d 132, 142 (2010). "TTD benefits may be suspended or terminated if the employee (1) refuses to submit to medical, surgical, or hospital treatment essential to his recovery; (2) fails to cooperate in good faith with rehabilitation efforts; or (3) refuses work falling within the physical restrictions prescribed by *his* doctor." *Matuszczak v. Ill. Workers' Comp. Comm'n*, 2014 IL App (2d) 130532WC (citing *Interstate Scaffolding*, 236 Ill. 2d at 146) (emphasis added).

At the hearing, the parties disputed Petitioner's entitlement to temporary total disability benefits from March 26, 2018 to April 2, 2018 and June 20, 2018 to November 27, 2018. Respondent contends that Petitioner is not entitled to the temporary total disability benefits because it continuously offered him light duty work accommodations during the disputed periods. Petitioner returned to light duty work with Respondent from April 3, 2018 to June 19, 2018; however, this attempted return to work against Dr. Gornet's orders failed. Petitioner testified that the prolonged sitting during his temporary return to work bothered his low back condition, and the findings of both Dr. Stiehl and Dr. Rutz substantiate Petitioner's credibility regarding the degree of his discomfort as a result of an accident they both opined directly caused his medical condition. Indeed, while both examiners disagreed with Dr. Gornet that Petitioner could not work, they believed that Dr. Gornet's treatment plan was appropriate for Petitioner's condition—ultimately requiring surgery—and neither indicated that Petitioner was malingering in any way.

The Commission agrees with the Arbitrator's finding that Petitioner's condition had not yet stabilized in reliance on Dr. Gornet's opinions. The anticipated testimony of Mr. Smith that Respondent continued to offer Petitioner light duty accommodations is a red herring. The inquiry is whether the medical evidence establishes that Petitioner had reached maximum medical improvement, which the record reflects that he did not, and then whether work restrictions were appropriate in weighing the opinions of the physicians. Dr. Stiehl's February 26, 2018 opinions were rendered without the benefit of reviewing Petitioner's MRI, the MRI report or the treating orthopedic surgeon's records. He found that Petitioner suffered significant radiculopathy and mechanical back pain and made no findings that Petitioner was malingering. Dr. Stiehl also agreed at the time that Petitioner was in need of further medical treatment but, despite the lack of information available to him, he believed that Petitioner required certain light duty restrictions. On September 18, 2018, Dr. Rutz issued his report also finding that Petitioner required additional medical treatment as recommended by Dr. Gornet. He believed that Petitioner was also capable of light duty work but acknowledged that "[o]verall [Petitioner] might not tolerate this because of his neurologic compression." Given the foregoing, the Arbitrator's denial of Respondent's request for a continuance to present the testimony of Mr. Smith did not prejudice Respondent as there is sufficient medical evidence establishing the persuasiveness of Dr. Gornet's opinions over the opinions of Respondent's Section 12 examiners on the issue of his need to remain off work.

As the Commission is persuaded by Dr. Gornet's opinions, the denial of Respondent's continuance request was harmless because Petitioner did not have to work under any light duty accommodations while Dr. Gornet's restrictions placed him completely off work. Any testimony Mr. Smith might have offered regarding why Petitioner failed to present to Respondent's continued light duty accommodations, which were not imposed by Dr. Gornet, would have no bearing on the Commission's findings regarding Petitioner's entitlement to temporary total disability benefits. Dr. Gornet's treatment records show Petitioner did not work in any capacity during the disputed periods and his failed attempt to return to work in the interim further supports the proposition that he could not work as Drs. Steihl and Rutz proposed.

For these reasons, the Commission finds the denial of Respondent's Motion to Continue to represent harmless error and otherwise affirms and adopts the Decision of the Arbitrator accordingly.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 31, 2018 is hereby affirmed and adopted.

IT IS FURTHER ORDERED that Respondent pay to Petitioner temporary total disability benefits for 32 3/7 weeks from January 26, 2018 through April 12, 2018 and June 20, 2018 through November 27, 2018 as provided by §8(b) of the Act.

IT IS FURTHER ORDERED that Respondent shall receive a 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.

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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $30,000.00. 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: SEP 3 0 2019

Marc Parker

Barbara N. Flores

DLS/met
O- 8/1/19
46

STATE OF ILLINOIS)	☒ Affirm and adopt (with explanation)	☐ Injured Workers' Benefit Fund (§4(d))
) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF MADISON)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify Down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WILLIAM TAITT,

Petitioner,

19IWCC0534

vs.

NO: 18 WC 5103

ARDENT MILLS,

Respondent.

DISSENT

I respectfully dissent from the Decision of the majority. I agree with the majority's finding that the Arbitrator erred by denying Respondent's one-week continuance request. However, I would have found that the denial was an abuse of discretion that prejudiced Respondent by thwarting its ability to secure the one witness it needed to present its defense on the only disputed issue. Such prejudice constitutes reversible error and a denial of due process to Respondent.

In the context of administrative proceedings, due process of law requires that all parties have an opportunity to cross-examine witnesses and to offer evidence in rebuttal. *RG Constr. Servs. v. Comm'n*, 2014 IL App (1st) 132137WC. Any party claiming that a due process violation has occurred must establish that it was prejudiced by the alleged violation. *Id.* An error will result in reversal only where it caused prejudice to the appealing party. *Compass Group v. Comm'n*, 2014 IL App (2d) 121283WC.

Respondent was denied the opportunity to offer its rebuttal evidence on the only issue it disputed, which was whether Petitioner was entitled to temporary total disability benefits during the period in which Respondent had offered light duty accommodations. To present its rebuttal evidence, Respondent represented that it needed the testimony of Petitioner's immediate supervisor, Erik Smith. However, Mr. Smith was unavailable for the November 27, 2018 hearing, because he was in Colorado attending pre-scheduled training. Nevertheless, Respondent indicated that Mr. Smith would be available to testify at the Arbitrator's Mount Vernon trial call the following week.

This was a 2018 case in which Respondent stipulated to all issues except for temporary total disability and in which no detailed procedural history was provided at trial to show when or

how many times Petitioner had previously presented a properly filed §19(b) petition. Although Petitioner alluded to several §19(b) petitions, there was no evidence in the record that any §19(b) petitions, including the one he presented at trial, had been filed with the Commission. Based on the abysmal record, we also do not know the timeframe between Petitioner's §19(b) petition, the pre-trial conference, the notice of Respondent's Motion to Continue, and the Arbitrator's denial. As such, the record does not establish that Respondent had been needlessly delaying or hindering the progression of this case.

In those circumstances, denying Respondent a one-week continuance was unreasonable, given that the only defense it intended to offer rested solely on Mr. Smith's prospective testimony. Without Mr. Smith's testimony, Respondent was unable to present its rebuttal evidence regarding why Petitioner had stopped attending light duty accommodations on June 19, 2018. More specifically, Respondent was unable to present what, if anything, Petitioner might have represented to Mr. Smith regarding why that date would be his last date. Respondent was also unable to present what, if any, further communications Respondent may have had with Petitioner regarding additional accommodations or demands during the disputed light duty period. Mr. Smith's testimony might have been able to shine light on that information and potentially affect the outcome of this case. We cannot know or presume how it would have impacted the case, because Respondent was not given an opportunity to make an offer of proof.

Ron Belcher did offer some testimony regarding Petitioner's light duty period. However, Mr. Belcher was called by Petitioner and not Respondent. Petitioner cannot call a witness to try to present Respondent's case for it. Moreover, Mr. Belcher admitted that in his position as Respondent's plant manager, it was not his job to check on what the light duty employees were doing. Respondent was clear in representing that Mr. Smith, and not Mr. Belcher, was the witness it needed to present its case regarding Respondent's light duty offer and accommodations. Simply because Mr. Belcher was present in the hearing room as a representative for Respondent does not mean that he was a knowledgeable witness to present Respondent's rebuttal evidence.

Additionally, the Arbitrator represented that when Respondent's Motion to Continue was pre-tried, he had been willing to continue the matter to allow Respondent time to get its witness available if Respondent first agreed to make some payment of temporary total disability benefits to Petitioner. The Arbitrator stated that because Respondent was unwilling or unable to agree to this recommendation, its objection to proceeding on November 27, 2018 was overruled. Respondent's ability to secure a continuance to obtain its only witness should not have hinged on whether it would first agree to pay the very benefits in dispute. The Arbitrator cannot deny a continuance because a party refuses to follow his recommendation, especially if the recommendation is to resolve the issue. That denial cannot be considered harmless error. There was also no record of how much temporary total disability was required in order for Respondent to buy the one-week continuance it needed to receive the due process in which it was entitled.

Moreover, the prospective surgery that Petitioner was seeking had already been approved and scheduled, and therefore, Petitioner would have been back to receiving temporary total disability benefits by the time of the Decision regardless. Respondent had agreed to all issues except temporary total disability benefits for a certain period. The denial of the continuance request resulted in the Arbitrator hearing evidence on only one party's side on this issue. Basing

19IWCC0534

a decision on only one side of the evidence is clearly wrong and harmful error.

For the reasons stated above, I respectfully dissent from the Decision of the majority. Respondent was prejudiced by its inability to present rebuttal evidence in the form of Mr. Smith's testimony, and as such, I would have found that the denial of Respondent's continuance request was reversible error. The entirety of Respondent's defense rested on Mr. Smith's testimony, and due process of law requires that both parties are afforded the opportunity to present their cases.

OCT 2 - 2019

DLS/met
46

Deborah L. Simpson

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

19IWCC0534

TAITT, WILLIAM
Employee/Petitioner

Case# **18WC005103**

ARDENT MILLS
Employer/Respondent

On 12/31/2018, 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 2.48% 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:

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

0000 WIEDNER & McAULIFFE LTD
JAMES TELTHORST
8000 MARYLAND AVE SUITE 550
ST LOUIS, MO 63105

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

William Taitt
Employee/Petitioner

Case # 18 WC 05103

v.

Consolidated cases: n/a

Ardent Mills
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 William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on November 27, 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. [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 ______

19IWCC0534

FINDINGS

On the date of accident, January 25, 2018, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $55,724.61; the average weekly wage was $1,071.63.

On the date of accident, Petitioner was 37 years of age, married with 4 dependent child(ren).

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

Respondent shall be given a credit of $5,791.11 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $5,791.11.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $714.42 per week for 32 3/7 weeks, commencing January 26, 2018, through April 12, 2018, and June 20, 2018, through November 27, 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)

December 22, 2018
Date

DEC 3 1 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 by Respondent on January 25, 2018. According to the Application, Petitioner was pulling a hose, stepped backward in a hole and sustained an injury to the low back, right leg and body as a whole (Arbitrator's Exhibit 2). Counsel for Petitioner and Respondent stipulated Petitioner sustained a work related accident, his current condition of ill-being was related to the accident and that all medical had been or would be paid. This case was heard in a 19(b) proceeding and the primary disputed issue was Petitioner's entitlement to temporary total disability benefits. Petitioner claimed he was owed temporary total disability benefits for 32 3/7 weeks, commencing January 26, 2018, through April 12, 2018, and June 20, 2018, through November 27, 2018 (the date of trial). Respondent claimed Petitioner was entitled to temporary total disability benefits for eight and three-sevenths (8 3/7) weeks, commencing January 26, 2018, through March 25, 2018 (Arbitrator's Exhibit 1).

There was also a dispute regarding the computation of Petitioner's average weekly wage. Petitioner alleged the average weekly wage was $1,115.38. Respondent alleged the average weekly wage was $1,030.63 (Arbitrator's Exhibit 1). However, subsequent to the trial, counsel for Petitioner and Respondent resolved this issue and have stipulated the average weekly wage is $1,071.63.

There was previously a dispute regarding Petitioner's entitlement to prospective medical treatment, specifically, disc replacement surgery that was recommended by Dr. Matthew Gornet. However, Respondent subsequently agreed to authorize and pay for the disc replacement surgery, which was scheduled to take place on December 12, 2018.

The basis for Respondent's disputing Petitioner's claim that he was entitled to ongoing temporary total disability benefits was that Respondent offered Petitioner light duty work. Counsel for Respondent presented and argued a Motion to Continue the trial. The primary basis of the Motion was that Respondent had offered light duty work to Petitioner, but that Respondent's primary witness, Erik Smith, Petitioner's immediate supervisor was not available to testify at trial (Respondent's Exhibit 4). The Arbitrator recommended Respondent agree to pay the disputed temporary total disability benefits, but continue to deny its liability for same, and, if necessary, subsequently litigate this issue at a later time. The Arbitrator noted that, if he ruled in Respondent's favor on this issue, Respondent would be entitled to a credit toward permanency. Respondent was unwilling to agree to the preceding. Accordingly, the Arbitrator denied Respondent's Motion to Continue and the case proceeded to trial.

Petitioner worked for Respondent as a relief man at a grain mill in Chester, Illinois. On January 25, 2018, Petitioner was in the process of attempting to unclog a flour pipe with an air hose. As Petitioner was unrolling the hose, it got caught and while Petitioner was pulling on it and walking backwards, his left leg went through a hole in the floor.

Following the accident, Petitioner was seen in the ER of Chester Memorial Hospital. At that time, Petitioner complained of low back and right leg pain. Petitioner was diagnosed with a

lumbar strain, given some medication and directed to see his personal physician (Petitioner's Exhibit 3).

Petitioner was then evaluated at Chester Clinic on January 29, 2018. Medical treatment there was limited to providing Petitioner with some additional medication and administering an injection (Petitioner's Exhibit 4).

Petitioner was subsequently seen by Dr. Matthew Gornet, an orthopedic surgeon, on February 2, 2018. When seen by Dr. Gornet, Petitioner complained of pain referable to the low back, right buttock/hip with pain going down his right leg to the calf. Dr. Gornet ordered an MRI scan which was performed that same day. Dr. Gornet opined the MRI revealed a large central herniation at L4-L5 and annular tears at L4-L5 and L5-S1. He opined Petitioner's low back condition was related to the accident, prescribed medication and referred Petitioner to Dr. Helen Blake for steroid injections (Petitioner's Exhibit 5).

Petitioner was seen by Dr. Blake on February 20, 2018. At that time, Dr. Blake administered a steroid injection at L4-L5 (Petitioner's Exhibit 7).

At the direction of Respondent, Petitioner was examined by Dr. James Stiehl, an orthopedic surgeon, on February 26, 2018. In connection with his evaluation of Petitioner, Dr. Stiehl reviewed medical records provided to him by Respondent. On examination, Dr. Stiehl noted Petitioner had positive objective findings of radiculopathy in the right lower extremity. He opined Petitioner's condition was related to the accident, the course of treatment provided to him to date was reasonable and that Petitioner should undergo another steroid injection. Dr. Stiehl also opined Petitioner could work light duty with no lifting over 10 pounds and that Petitioner would have difficulties stooping, bending and twisting (Respondent's Exhibit 1).

Petitioner was again seen by Dr. Blake on March 6, 2018. At that time, Dr. Blake administered a steroid injection at L5-S1 (Petitioner's Exhibit 7).

When Petitioner was seen by Dr. Gornet on April 9, 2018, Dr. Gornet noted that the steroid injections did not provide permanent relief to the Petitioner. Dr. Gornet opined Petitioner had sustained a disc injury at L4-L5 and possibly at L5-S1 as well. Dr. Gornet ordered a discogram at L5-S1 which was later performed on August 14, 2018. The discogram was negative (Petitioner's Exhibits 5 and 8).

When Dr. Gornet saw Petitioner on September 8, 2018, he reviewed the discogram. At that time, Dr. Gornet recommended Petitioner undergo disc replacement surgery at L4-L5. Further, Dr. Gornet reaffirmed his opinion that Petitioner had been temporarily totally disabled for the time he had been providing him with treatment (Petitioner's Exhibit 5).

At the direction of Respondent, Petitioner was examined by Dr. Kevin Rutz, an orthopedic surgeon, on September 18, 2018. In connection with his examination of Petitioner, Dr. Rutz reviewed medical records provided to him by Respondent. Dr. Rutz specifically noted Dr. Gornet's recommendation Petitioner undergo disc replacement surgery at L4-L5. Dr. Rutz opined the surgery recommended by Dr. Gornet was "...within the standard of care." Dr. Rutz opined

Petitioner was capable of working with a 20 pound lifting restriction so long as he was allowed to sit or stand as needed. Further, Dr. Rutz also noted that "Overall he might not tolerate this because of his neurologic compression." (Respondent's Exhibit 2).

At trial, Petitioner testified he attempted to return to work to light duty and worked in that capacity from April 3, 2018, through June 19, 2018. Petitioner testified he sat at a desk; however, he stated prolonged sitting aggravated his back pain and caused him to have "charley horse" type symptoms. He stated Respondent would not permit him to get up and walk around to relief the pain in his back. Further, Respondent also directed Petitioner to perform some painting tasks one day which required Petitioner to carry paint cans, bend down, climb a ladder, etc. Petitioner stated he attempted to perform the light duty work duties assigned him as best as he could.

Ron Belcher, Respondent's plant manager, was present at the trial and was called by Petitioner's counsel to testify. Belcher confirmed Petitioner's testimony was truthful and that Petitioner worked light duty through June 19, 2018.

Conclusion of Law

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 for 32 3/7 weeks, commencing January 26, 2018, through April 12, 2018, and June 20, 2018, through November 27, 2018.

In support of this conclusion the Arbitrator notes the following:

There was no dispute Petitioner sustained a work-related injury on January 25, 2018, and his current condition of ill-being is causally related to same.

Petitioner's primary treating physician, Dr. Gornet, has opined Petitioner has been temporarily totally disabled for the entire time he has been treating him.

Respondent's position that Petitioner could work light duty was based primarily upon the opinions of its two Section 12 examiner's, Dr. Stiehl and Dr. Rutz, who examined Petitioner on February 26, 2018, and September 18, 2018, respectively.

Although it was contrary to Dr. Gornet's opinion Petitioner was temporarily totally disabled, Petitioner made an attempt to return to light duty work on April 13, 2018, and worked to the extent he was able to do so through June 19, 2018. The Arbitrator finds Petitioner's testimony regarding the duties Respondent required him to perform and the symptoms he experienced while on "light duty" to be credible.

While Dr. Stiehl opined Petitioner could return to work with a 10 pound lifting restriction, his opinion carried a rather cautionary statement that Petitioner would have difficulties stooping, bending and twisting.

Further, while Dr. Rutz opined Petitioner could return to work with a 20 pound lifting restriction, he also made a similar cautionary statement noting that Petitioner needed to be allowed to sit or stand as needed. Further, Dr. Rutz even stated that Petitioner "...might not tolerate this [the light duty work] because of his neurologic compression."

Based upon the preceding, the Arbitrator finds the opinion of Dr. Gornet be more persuasive than those of Dr. Stiehl and Dr. Rutz in regard to Petitioner's inability to work.

William R. Gallagher, Arbitrator

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

George Roney,

Petitioner,

vs. NO: 18 WC 28333

Commercial Electric,

Respondent.

19IWCC0535

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of temporary disability, permanent disability, medical expenses, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. 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 20, 2019, 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.

19IWCC0535

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $30,000.00. 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: SEP 3 0 2019
o080119
BNF/mw
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

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

RONEY, GEORGE
Employee/Petitioner

Case# **18WC028333**

COMMERCIAL ELECTRIC
Employer/Respondent

19IWCC0535

On 2/20/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.45% 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:

0000 WOODRUFF JOHNSON & EVANS
RUSSELL HAUGEN
10 S LASALLE ST SUITE 2170
CHICAGO, IL 60603

5364 PATRICK JENNETTEN LAW OFFICE
316 S W WASHINGTON ST
UNIT 1A
PEORIA, IL 61602

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)

GEORGE RONEY,
Employee/Petitioner

v.

COMMERCIAL ELECTRIC,
Employer/Respondent

Case # **18** WC **28333**

Consolidated cases: ______

19IWCC0535

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **1/2919**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches 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, **1/30/18**, 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 $**44,900.81**; the average weekly wage was $**1,559.12**.

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

Respondent ***has or shall*** pay all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**9,503.27** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**16,785.90** for medical bills, for a total credit of $**26,289.17**.

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 $1,039.41/week for 28-6/7 weeks, commencing 1/31/18 through 2/14/18, and 7/27/18 through 1/29/19, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services related to the left shoulder from 1/30/18 through 1/29/19, as provided in Section 8(a) and Section 8.2 of the Act.

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

Respondent shall pay reasonable and necessary medical services related to the postoperative care of petitioner's left shoulder beginning 1/30/19 as provided by, or recommended by Dr. Norris, as provided in Section 8(a) and Section 8.2 of the Act.

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

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

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

Maureen H Pulia

Signature of Arbitrator
ICArbDec19(b)

2/12/19
Date

FEB 20 2019

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT: 19IWCC0535

Petitioner, a 53 year old electrician, sustained an accidental injury to his left shoulder that arose out of and in the course of his employment by respondent on 1/30/18. Petitioner began his employment with respondent in June of 2017. His duties as an electrician ranged from demolition to installing new piping, pulling wires, and installing fixtures. Petitioner was required to climb ladders and scaffolding. He testified that 80% of his duties are performed at or above shoulder level. Petitioner denied any problems with his left shoulder from the date he was hired by respondent until 1/30/18, the date of injury. Petitioner is right hand dominant.

Prior to working for respondent petitioner had chronic shoulder dislocations in the 1990's and underwent some sort of soft tissue stabilization procedure similar to a Putti-Platt. On 3/12/15 petitioner also underwent a left shoulder arthroscopy with biceps tenotomy and extensive intra-articular debridement; subacromial decompression, and distal clavicle excision. On 7/16/15 petitioner reported a pain level of 0/10. He reported that he was continually improving, but still had some persistent discomfort with specific activities. He felt that his strength was improving as well. On 9/29/15 petitioner completed work hardening. His left grip strength was within average limits, and his strength fell within the medium-heavy physical demand level. On 10/12/15 petitioner was found to be at maximum medical improvement and released to full duty work without restrictions. On 10/26/15 petitioner presented to Dr. Ho, his primary care physician, for a condition unrelated to his left shoulder. However, he did mention his left shoulder problems, and Dr. Ho thought physical therapy may be beneficial, but petitioner did not pursue this recommendation. Petitioner testified that at that time he did not have significant left shoulder pain. Petitioner testified that by the time he returned to work following the surgery in 2015 he had zero pain overall, but some activities could cause him some pain. He testified that he may have told Dr. Ho that his left shoulder was at 75%.

After being released at maximum medical improvement, petitioner worked as an electrician for Overlander Electric and CB&I from 2016 until hired by respondent in June of 2017. Petitioner denied any difficulty with his left shoulder while performing his electrician duties.

On 1/30/18 petitioner was placing conduit in the hollow spaces of a concrete wall while on scaffolding. As petitioner reached to the right to set a piece of conduit he fell forward and off the scaffolding. When this happened petitioner testified that the wall he was working on, and the scaffolding, came down pushing him forward off the scaffolding. Petitioner testified he fell on concrete blocks that were staged in the hallway. Petitioner fell on an outstretched left hand, then rolled onto his left arm and

left side. He reported immediate pain in his left forearm. He also reported that his left shoulder hurt. He reported cuts on his hands and below his right knee.

Petitioner presented to the emergency room at Carle Clinic for treatment that same day. Petitioner reported that he fell approximately seven feet at work onto his left forearm. He complained of left arm, right wrist and right knee pain. Petitioner underwent x-rays of the right wrist, right knee, left shoulder, left forearm, and left wrist, all of which were unremarkable. Following his examination petitioner was assessed with pain of the left forearm and left shoulder strain.

On 2/14/18 petitioner presented to Glenett Barrett, Nurse Practitioner, complaining of left shoulder pain since he fell at work on 1/30/18. He reported that his symptoms were constant with intermittent worsening. He reported that his symptoms were aggravated by lifting, lifting away from the body, pulling, reaching behind, and rotation. Following an examination petitioner was released to light duty. He was given light duty restrictions of no lifting, pushing or pulling more than 20 pounds, and avoiding overhead work. He was told to continue in physical therapy and return in 4 weeks. On 3/14/18 Barrett ordered an MRI of the left shoulder. He modified petitioner's restrictions to no overhead work, or lifting more than 10 pounds.

On 3/19/18 petitioner underwent an MRI of the left shoulder. The impression was degenerative changes with irregularity of the humeral head and development of multiple small subchondral cysts; tendinopathy of the distal supraspinatus tendon; no evidence of full thickness rotator cuff tear; and minor hypertrophic degenerative changes of the AC joint without evidence of impingement.

On 3/21/18 petitioner presented to Dr. Joseph Norris. Dr. Norris felt that there was no sign of full-thickness rotator cuff tendon tear on MRI, but there was obvious articular cartilage degeneration of the glenohumeral joint with inferior osteophyte formation of the humeral head that was very subtle. Dr. Norris was of the opinion that petitioner had an acute exacerbation of pain of an arthritic shoulder with no signs of extensive soft tissue damage at this point. Dr. Norris performed an injection in the glenohumeral joint and along the bicipital groove, where petitioner was painful. He also recommended ongoing physical therapy. He also ordered an MRI of the neck based on his neck pain that radiates down his arm. Restrictions remained the same.

Petitioner underwent an MRI of the cervical spine on 3/26/18 that revealed disc space narrowing with asymmetric left-sided foraminal impingement at C5-C6 due to marginal osteophytes, and no acute osseous abnormality.

Petitioner presented to Dr. Jesse Butler on 4/5/18 following his cervical spine. He reported that his symptoms were moderate to severe. He described the pain as deep, aching, dull, sharp and throbbing, aggravated by driving, lifting and rotation. Dr. Butler assessed cervical strain with ulnar contusion. He saw no indication for any neck surgery. He recommended that petitioner continue management with Dr. Norris for his shoulder and ulnar neuritis.

On 4/18/18 returned to Dr. Norris. Petitioner reported that the injection did not provide any significant relief. Following an examination, Dr. Norris was of the opinion that petitioner has the option of a viscosupplement Synvisc injection, or a total shoulder arthroplasty as a long term solution for his problem. Petitioner decided to start with the Synvisc injection. Dr. Norris continued petitioner's restrictions.

On 5/2/18 Dr. Norris performed a Synvisc injection of petitioner's left shoulder. He noted that petitioner has significant osteoarthritic disease that was aggravated by a work related injury. Petitioner's restrictions were continued.

On 6/6/18 petitioner returned to Dr. Norris. Petitioner reported that the Synvisc injection helped with some of the dull aching pain, but he still had mechanical symptoms and disability associated with discomfort that keeps him from activities of daily living or the ability to do his full job duties. Petitioner's examination was unchanged. Dr. Norris laid out three possible scenarios: 1) have petitioner go through an assessment for a functional capacity evaluation that will provide long term restrictions; 2) have petitioner proceed with a repeat arthroscopy and debridement (which Dr. Norris did not recommend); or have petitioner undergo a total shoulder arthroplasty. Petitioner wanted to think about these options. He was released to care with the same restrictions.

On 8/15/18 petitioner followed-up with Dr. Norris. He indicated that he would like to undergo a total shoulder arthroplasty. An examination revealed pain with range of motion, lack of the terminal 25 degrees of motion in all planes, tenderness to palpation over the bicipital groove, and 5/5 muscle strength throughout.

On 9/5/18 the therapist from Athletico drafted a letter regarding petitioner's treatment and progress. The therapist noted that when petitioner was discharged from therapy on 7/10/18 he continued to have reports of fluctuating shoulder and cervical symptoms that were partly dependent upon the intensity of his work tasks as well as unexpectedly with shoulder movement.

On 9/10/18 petitioner underwent a Section 12 examination with Dr. Michael Rotman, at the request of the respondent. He reported that he injured his shoulder when a scaffolding collapsed on him and he fell 7 feet. He reported that he was doing pretty well with his shoulder prior to the fall. He gave a history of having reconstruction of his left shoulder in 1998 for recurrent dislocations of the shoulder. He then had another injury to the left shoulder in a motor vehicle accident in 2014, which resulted in an arthroscopic cleanout procedure in 2015. Following this surgery, petitioner reported that he was doing pretty well up until the time of the injury on 1/30/18. He reported falling and hitting a mortarboard and falling on his left forearm. Petitioner recalled having left shoulder complaints at the time of the fall, but most of his concern was about the forearm at that time. He stated that his left arm hit sideways on the concrete blocks, and then the scaffolding and block wall fell on him.

Petitioner complained of stiffness, pain with overhead use, night pain, weakness, trouble with sleeping on the left side, and some numbness and tingling mainly in the ring and small fingers. Petitioner reported a click associated with pain in his shoulder mainly over the outer aspect of the deltoid.

Following a history, review of records, x-rays, and examination that revealed smooth motion, no clicking, crepitus or instability, stiffness, and some discomfort with stretching, Dr. Rotman's impression was that petitioner had longstanding chronic shoulder issues from recurrent dislocations of his shoulder back in the 1990's resulting in a tightening procedure in 1998 that limited motion significantly. Dr. Rotman was of the opinion that since the plain x-rays in 2014 and the x-rays he took showed no evidence of any glenohumeral joint degenerative changes, which suggests that the cartilage wear in his shoulder is not significant enough to be able to be appreciated on x-rays. Dr. Rotman was of the opinion that petitioner's arthritic shoulder did not appear to advance in any way since there are no findings on the x-rays that showed arthritis. He noted that he never replaced a shoulder that looked as good on the x-ray he took of petitioner on the date he examined him. He was of the opinion that generally shoulders are replaced for glenohumeral joint arthritis when the x-rays show significant joint space narrowing, as well as inferior spurring. Given that petitioner had a clean x-ray in 2014 and 2018, he was of the opinion that no shoulder replacement was needed at that time. He was of the opinion that the MRI scan of the left shoulder did not show any evidence of an injury that would have resulted from any type of trauma from the scaffolding incident. He believed the MRI findings were simply degenerative in nature without any swelling or any signs of even an exacerbation of a preexisting degenerative condition.

Dr. Rotman was also of the opinion that the main concern at the time of the fall was petitioner's forearm, but there was nothing significant with regards to the forearm found at the time of his emergency

room visit. Dr. Rotman was of the opinion that petitioner is very well aware that his left shoulder is not normal and has not been normal for several years. He believed petitioner's shoulder surgery in 1998 would have created a lot of stiffness in his shoulder and prior to that he had multiple dislocations. He further believed it was no surprise that petitioner has generalized atrophy about his left shoulder, which has probably coming on since the late 1990's. Dr. Rotman saw no evidence of a work related injury to petitioner's left shoulder that occurred from the scaffolding. He was of the opinion that he would not recommend a shoulder replacement considering the normal x-rays. He opined that petitioner would not need any surgical treatment to his left shoulder as a result of the injury on 1/30/18. He was of the opinion petitioner could certainly work full duty with his shoulder in a similar condition for several years. Dr. Rotman placed petitioner at maximum medical improvement for whatever strain occurred on 1/30/18. He did not believe petitioner would require any further treatment as a result of the injury on 1/30/18.

On 10/3/18 petitioner returned to Dr. Norris and reported that he had been examined at the request of respondent's workers' compensation insurer, and that doctor was of the opinion that the surgery was not indicated, and he could return to work without restrictions. Dr. Norris noted that his opinions had not changed. He noted that petitioner had a previous arthroscopy which showed significant articular cartilage loss, and attempted all conservative treatments including intraarticular steroid as well as intraarticular viscosupplement injections. Dr. Norris was of the opinion that he based his indication for the total shoulder arthroplasty on the arthroscopic pictures and not the plain x-rays. He noted that petitioner had obvious limitations objectively and subjectively. He noted that he would need a functional capacity evaluation for delineate petitioner's exact restrictions if the total shoulder arthroscopy is not performed. He continued petitioner's current restrictions and sent him for a functional capacity evaluation.

On 10/5/18 the evidence deposition of Dr. Norris, an orthopedic surgeon, was taken on behalf of the respondent. Dr. Norris noted that petitioner had baseline articular cartilage disease in 2015, and a recent MRI showing degenerative changes, which he believed was a reasonable explanation for his pain. Dr. Norris reported that his significant intraoperative findings were that the rotator cuff was intact; there was significant and severe grade 4 articular cartilage loss of the inferior 1/2 of the glenoid, and a 6 cm by 4 cm full thickness articular cartilage lesion of the humeral head in its central aspect. He was of the opinion that a glenohumeral joint is not a weight bearing joint, and when you taken an x-ray of the joint you don't have compression of the two joint surfaces, like with a knee or hip. For this reason, Dr. Norris was of the opinion that in a shoulder, there can be significant articular cartilage loss without significant joint space narrowing or the development of osteophytes in a very dramatic sense until the duration and severity of

the disease has progressed extensively. Dr. Norris opined the treatment he provided petitioner for his left shoulder condition of ill-being since he re-examined him on 3/21/18 has been reasonable and necessary. Dr. Norris further opined that the fall on 1/30/18 definitely exacerbated a chronic condition to create his pain symptoms. He based this predominantly on the chronology of petitioner's symptoms, namely being asymptomatic, completely recovered, and working for the greater part of 2 years following his initial surgery with absolutely no discomfort on a consistent or significant basis until the fall on 1/30/18, after which all of his pain symptoms began and persisted.

On cross-examination Dr. Norris stated that he saw arthritis in petitioner's left shoulder when he scoped it in 2015. He further testified that in 2015 petitioner was supposed to follow-up one last time after work conditioning, but did not. Dr. Norris testified that although he had petitioner on restrictions when he last saw him in 2015, he wrote in that note that he anticipated released without restrictions at his next follow-up visit. Dr. Norris was of the opinion that is not unusual for patients who had surgeries similar to what petitioner had in 2015 to go through work hardening. Dr. Norris testified that the procedure petitioner underwent in the 1990's had a higher risk factor for arthritic change. Dr. Norris was of the opinion that petitioner's chronological age is younger than the average patient that would be getting a shoulder arthroplasty. Dr. Norrie believed that the procedure petitioner underwent in the 1990's contributed to risk factors that led to his arthritic change. He was also of the opinion that it is entirely plausible and true that absent any trauma, petitioner would have required a shoulder replacement at some point in time in his life, but could not predict whether or not petitioner would require a shoulder replacement if he did not have the trauma on 1/30/18 because a lot of patients have severe arthritis and they never require shoulder replacement. Dr. Norris was of the opinion that although petitioner had severe arthritis before the injury it was asymptomatic, and he did not find this unusual.

On 11/7/18 petitioner underwent a left total shoulder arthroplasty. This procedure was performed by Dr. Norris. His post-operative diagnosis was left glenohumeral degenerative joint disease. Petitioner followed-up postoperatively with Dr. Norris. This treatment included physical therapy. Dr. Norris was of the opinion that petitioner's post-operative course in 2015 followed a fairly normal post-operative course aside from any arthritic condition he identified at the time of the surgery. He testified that the last time he saw the petitioner following the surgery in 2015 petitioner still had periodic pain that was waxing and waning, and that could be consistent with symptomatic arthritis. Dr. Norris noted that his account of injury was that petitioner fell directly on his shoulder. He did not know the position of petitioner's hand, but was not sure that it would have really mattered. Dr. Norris did not review any records after the

accident prior to the time he saw him. Dr. Norris was of the opinion that petitioner's pain prevented him from working before his surgery.

On redirect examination Dr. Norris was of the opinion that an acute exacerbation of osteoarthritis could come from a direct fall onto a forearm in that it affects the shoulder joint. After Dr. Norris reviewed the emergency records from 1/30/18 he stated that the records did not change his opinions regarding causation of the condition as it relates to the injury on 1/30/18.

On 12/3/18 Dr. Rotman drafted an addendum report after reviewing additional records. He noted that his prior impression had not changed. He was of the opinion that it took an extraordinary amount of time to get petitioner back to full duty following the minimal debridement procedure in 2015 for what appeared to be solely degenerative changes after previous instability procedures. Dr. Rotman suspected that petitioner's current persistent complaints of pain were no different from his persistent complaints of pain back in 2015 and that until he receives his total shoulder, he is not going to stop complaining. Dr. Rotman opined that petitioner's degenerative shoulder condition was not caused or aggravated or made worse from the scaffolding accident. Dr. Rotman agreed that x-rays do lag, and if an arthroscope was placed in petitioner's shoulder, you would find degenerative changes worse than are seen on the x-ray, but was of the opinion that Dr. Norris found them at the time of the arthroscopy. Dr. Rotman agreed that arthritis of the shoulder does progress with time. He agreed that even if petitioner's shoulder x-rays are still pretty good, petitioner is still going to have degenerative changes in his shoulder, and they would most likely have progressed somewhat based on the natural history of arthritis since 2015. He agreed that Dr. Norris would find more arthritis in 2018 than in 2015 because he debrided the shoulder in 2015. Dr. Rotman was of the opinion that shoulder debridement does not cure a shoulder arthritic condition, but only removes more tissue, and would expect that to lead to more cartilage wear later. Dr. Rotman agreed with Dr. Norris that there will be more arthritis seen on the inside of petitioner's joint than apparent on the x-rays, but this does not change his opinions.

On 12/11/18 the evidence deposition of Dr. Rotman, an orthopedic surgeon, was taken on behalf of the respondent. Dr. Rotman was of the opinion that the procedure petitioner in the late 1980's or early 1990's tightened up the shoulder too much, and the shoulder becomes arthritic. Dr. Rotman testified that when he routinely performs shoulder replacements he performs them on persons who had the type of procedure petitioner had in the late 1980's or early 1990's, a few times a year. Dr. Rotman noted that even though he could not see a lot of arthritis on the x-rays in 2014, Dr. Norris found a lot of arthritis when he performed the arthroscopy in 2015. He believed the x-rays on 2014 were similar to the x-rays

taken in 2018. Dr. Rotman noted that the MRI taken after the 1/30/18 injury showed no inflammation to the arthritis, and would have expected to see that if petitioner had aggravated the underlying arthritis in his shoulder. Dr. Rotman was of the opinion that only some of the arthritis that he saw during the 2015 surgery was consistent with the prior 1998 dislocation surgery. Dr. Rotman expected petitioner's left shoulder pain to wax and wane after the 2015 surgery depending on activity level, weather changes and humidity changes because of the arthritis. He believed the pain petitioner in July of 2015 in his left shoulder was related to symptomatic arthritis. Dr. Rotman opined that the need for petitioner's total shoulder replacement in 2018 is not causally related to the injury he had on 1/30/18. He further opined that petitioner's preexisting arthritis was not aggravated as a result of the injury on 1/30/18, causing it to become symptomatic. He was of the opinion that the need for shoulder replacement was already preexisting from his 2015 findings at the time of the arthroscopy which had been progressive changes for several years following petitioner's dislocations and reconstructive procedures.

On cross examination Dr. Rotman opined that regardless of causation, petitioner's left shoulder replacement was reasonable and necessary. Dr. Rotman agreed that when petitioner last saw Dr. Norris in 2015 Dr. Norris had never made any mention of a total shoulder replacement. Dr. Rotman testified that he figured petitioner performed electrician work in 2016 and 2017, but does not know if petitioner missed any work during that period due to his left shoulder pain. Dr. Rotman saw no medical records in 2016 or 2017 where petitioner sought any treatment for his left shoulder. Dr. Rotman opined, based on the arthroscopic photographs in 2015, that petitioner had a bad shoulder that he was going to have problems with and that were not going to improve with time because there is nothing about his arthritic shoulder that was going to get better. Dr. Rotman testified that he did not look at the final emergency room diagnosis of a left shoulder strain, and when asked it this would be significant with to respect to his opinion that petitioner did not complain of or have immediate onset of pain in his left shoulder after the fall, he discounted the diagnosis and stated that the records did not document any specific shoulder complaints. Despite petitioner's history on 1/14/18 to Gibson Health that there was a traumatic onset of symptoms in his left shoulder that began on 1/30/18, Dr. Rotman still did not believe petitioner had an immediate onset of pain in his left shoulder following the injury on 1/30/18. He testified that any pain petitioner had in his left shoulder at that time would have been from his arthritis, and not from anything that happened on 1/30/18. Dr. Rotman agreed that not everyone that has arthritis or who has had a Putti-Platt procedure require a total shoulder replacement. Dr. Rotman also agreed that a large component of an individual's need for a total shoulder replacement is based on their subjective level of pain or complaints of pain.

On redirect examination Dr. Rotman did not find petitioner's claim that he did not have any pain from his release after the arthroscopy in 2015 until the time of his accident in January 2018 credible.

On 12/19/18 Dr. Norris noted that petitioner had less and less pain at rest, but still was struggling to regain his motion. Petitioner reported pain after therapy and was really stiff with respect to active and passive forward flexion and abduction. Petitioner had 85 degrees of forward flexion, 75 degrees of abduction, internal rotation to the belt and external rotation of 10 degrees, with 4+/5 muscle strength throughout. Dr. Norris was of the opinion that petitioner needed to get aggressive with regard to motion, and he did not have any significant restrictions with respect to forward flexion and abduction. He gave petitioner Toradol to try and increase his ability to move without pain. Dr. Norris instructed petitioner to return in 6 weeks.

An MRI of the left shoulder dated 12/4/14 showed left acromioclavicular joint arthritis and lateral downsloping of the acromion with encroachment on the supraspinatus tendon; moderate tendinosis and peritendinitis in the supraspinatus and infraspinatus tendons with a probable small low grade articular surface partial tear in the supraspinatus tendon near its humeral head insertion; and degenerative fraying of the superior glenoid labrum.

On 6/20/16 a Settlement Contract was approved for petitioner's case 14 WC 43357. This case involved an injury on 11/17/14 to petitioner's left shoulder following a motor vehicle accident while working for Lone Pine Electric. The settlement was for 15% man as a whole pursuant to Section 8(d)2 of the Act.

Petitioner testified that as a result of the surgery in the late 1980's or early 1990's he was aware that he would have arthritis and decreased motion of the left shoulder, but was never told prior to 1/30/18 he would ever need a total shoulder replacement. Petitioner testified that he is right hand dominant and uses his dominant arm more often than the left when working, especially with respect to using tools. Petitioner further testified that he equally uses both arms when lifting things. Petitioner testified that after being released by Dr. Norris after the 2015 surgery he still had some left shoulder complaints but was able to perform the full duties of an electrician without restriction.

Petitioner testified that when he was released to light duty work following the injury on 1/30/18 he had complaints that he did not have prior to 1/30/18. These complaints included instability, which felt like his shoulder was going to dislocate and halfway out. He testified that the longer he worked light duty, the more frequently it happened. He denied these problems prior to 1/30/18.

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

Petitioner claims his current condition of ill-being as it relates to his left shoulder is causally related to the injury he sustained on 1/30/18. Respondent claims petitioner's current condition of ill-being as it relates to his left shoulder is causally related to his preexisting left shoulder condition that included a Putti-Platt procedure in the 1990's and a prior left shoulder surgery he had in 2015.

Opinions regarding petitioner's current condition of ill-being were offered by Dr. Rotman, respondent's examining physician, and Dr. Norris, petitioner's orthopedic surgeon. It is unrebutted that prior to the injury on 1/30/18 petitioner had undergone a Putti-Platt stabilization procedure in the 1990's for recurrent dislocations. This procedure resulted in a permanent decrease in petitioner's range of motion of his left shoulder. Petitioner then underwent a left arthroscopy with biceps tenotomy and extensive intra-articular debridement; subacromial decompression; and distal clavicle excision in 2015. Following the surgery in 2015 petitioner underwent physical therapy and work hardening and was released to full duty work without restrictions on 10/12/15. When he completed work hardening on 9/29/15 his left grip strength was within average limits, and his strength fell within the medium-heavy physical demand level. Petitioner provided differing testimony regarding the condition of his left shoulder from 10/26/15 until 1/30/18, but admitted that during this time he did have some pain in his left shoulder depending on what he was doing. The arbitrator finds that during this period, although petitioner was not pain free, he was able to perform his full duty job without restrictions, and did not receive any treatment for his left shoulder until 1/30/18.

Following the injury on 1/30/18 petitioner was diagnosed with a left shoulder strain at the emergency room. At his next medical visit on 2/14/18 petitioner continued to have left shoulder complaints that were worsened by lifting, lifting away from the body, pulling, reaching behind, and rotation. Petitioner did not improve with conservative treatment that included cortisone and Synvisc injections. Petitioner was also given light duty restrictions that remained until the date of his left shoulder arthroplasty on 11/7/18. Petitioner is still treating post-operatively with Dr. Norris and remains off work.

Dr. Norris noted that petitioner had a previous arthroscopy that showed significant articular cartilage loss, and following the injury on 1/30/18 all conservative treatment options were tried including intraarticular steroid injection, as well as intraarticular viscosupplement injections without any lasting improvement. He further noted that petitioner had obvious limitations both objectively and subjectively. Dr. Norris testified that he based his recommendation for a total shoulder arthroplasty on the arthroscopic pictures and not the plain x-rays. He was of the opinion that the glenohumeral joint is not a weight

bearing joint, and therefore when you take an x-ray of the joint you don't have compression of the two joint surfaces like you would with a knee or hip. Because of this, Dr. Norris was of the opinion that in a shoulder, there can be significant articular cartilage loss without significant joint space narrowing or the development of osteophytes in a very dramatic sense until the duration and severity of the disease has progressed extensively. Dr. Norris opined that the fall on 1/30/18 definitely exacerbated a chronic condition in petitioner's left shoulder that created his current pain symptoms. He based this opinion on the chronology of petitioner's symptoms after the 2015 surgery being namely asymptomatic, and the fact that he worked full duty without restrictions for the greater part of 2 years without any treatment until after the injury on 1/30/18. Dr. Norris agreed that petitioner's chronological age is younger than the average patient that would be getting a shoulder arthroplasty, and that it is entirely plausible that absent any trauma, petitioner would have required a shoulder replacement at some point in his life, but could not predict whether or not petitioner would require a shoulder replacement if he did not have the trauma on 1/30/18, since a lot of patients with severe arthritis never require shoulder replacements. Dr. Norris found it significant that petitioner was able to work his full duty before the injury on 1/30/18, but not after. Dr. Norris opined that an acute exacerbation of osteoarthritis could come from a direct fall onto a forearm in that it affects the shoulder joint.

Dr. Rotman was initially of the opinion that since the plain x-rays in 2014 and the x-rays he took showed no evidence of any glenohumeral joint degenerative changes, which suggested to him that the cartilage wear in petitioner's shoulder was not significant enough to be able to be appreciated on x-rays, that petitioner's arthritic shoulder did not appear to advance in any way, and he never replaced a shoulder that looked as good as on the x-ray he took of petitioner's shoulder on the date he examined him. He opined that he replaces shoulders for glenohumeral arthritis when the x-rays show significant joint space narrowing, as well as inferior spurring, and petitioner had neither. However, he agreed that even though he could not see a lot of arthritis on the x-rays performed in 2014, Dr. Norris found a lot of arthritis when he performed the arthroscopy in 2015. Based on this admission, the arbitrator gives little weight to Dr. Rotman's opinion that a decision for surgery can be based solely on the x-ray findings. Dr. Rotman opined that petitioner's preexisting arthritis was not aggravated as a result of the injury on 1/30/18, causing it to become symptomatic. He further believed that the need for a shoulder replacement was already preexisting from his 2015 findings at the time of the arthroscopy which had been progressive for several years following petitioner's dislocations and reconstructive procedures. The arbitrator finds this opinion less than persuasive especially given the fact that there was no recommendation for a total shoulder arthrosplasty in 2015, or at any time prior to the injury on 1/30/18, and the fact that from

October of 2015 until 1/30/18 petitioner had no treatment for his left shoulder. Dr. Rotman was of the opinion that any pain petitioner had in his left shoulder on 1/30/18 or at his first follow-up would have been from his arthritis, and not from anything that happened on 1/30/18. Again, the arbitrator finds this opinion less than persuasive given the fact that petitioner clearly had left shoulder complaints and impressions on these dates, and Dr. Norris' opinion that even if the fall was not directly on the left shoulder, but rather to the left forearm, such an impact from a distance of 7 feet would affect the left shoulder. The arbitrator also finds it significant that Dr. Rotman initially attributes petitioner's need for a shoulder replacement to the arthritis from the Putti-Platt procedure, and then on cross examination during his deposition agrees that not everyone that has arthritis or who has had a Putti-Platt procedure require a total shoulder replacement.

Based on the above, as well as the credible evidence, the arbitrator adopts the opinions of Dr. Norris and finds the petitioner's current condition of ill-being as it relates to his left shoulder causally related to the injury he sustained on 1/30/18, finding them more persuasive then those of Dr. Rotman. Additionally, the arbitrator finds it significant that following petitioner's release from care after his surgery in 2015, petitioner returned to full duty work without restrictions; sought no treatment for his left shoulder from October of 2015 through 1/29/18; and, that after the injury on 1/30/18 petitioner has been unable to return to full duty work without restrictions.

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

Having found petitioner's current condition of ill-being as it relates to his left shoulder is causally related to the injury on 1/30/18, the arbitrator finds the medical services that were provided to petitioner for his left shoulder condition from 1/30/18 through 1/29/19 were reasonable and necessary to cure or relieve petitioner from the effects of his injury on 1/30/18. The arbitrator bases this finding on the opinions of both Dr. Norris and Dr. Rotman who opined that notwithstanding the issue of causation petitioner's left shoulder replacement was reasonable and necessary.

Respondent shall pay all reasonable and necessary medical expenses related to the petitioner's left shoulder from 1/30/18 through 1/29/19 pursuant to Sections 8(a) and 8.2 of the Act.

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

K. IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE?

Having found petitioner's current condition of ill-being as it relates to his left shoulder is causally related to the injury on 1/30/18, the arbitrator finds the medical services petitioner is currently undergoing postoperatively with Dr. Norris following his left total shoulder replacement are reasonable and necessary to cure or relieve petitioner from the effects of his injury on 1/30/18.

The arbitrator finds the respondent shall pay all reasonable and necessary medical expenses related to the post-operative care being provided by or recommended by Dr. Norris beginning 1/30/19, pursuant to Sections 8(a) and 8.2 of the Act.

L. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

Having found petitioner's current condition of ill-being as it relates to his left shoulder is causally related to the injury on 1/30/18, the arbitrator finds the petitioner was temporarily totally disabled from 1/31/18 through 2/14/18, and 7/28/18 through 1/29/19, a total of 28-6/7 weeks.

The arbitrator finds the respondent shall receive credit in the amount of $9,503.27 for temporary total disability benefits paid.

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~~	)	[X] ~~Reverse Causal connection~~	[ ] ~~Second Injury Fund (§8(e)18)~~
			[ ] PTD/Fatal denied
		[ ] Modify	[X] None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Miguel Alcantar,

Petitioner,

vs. NO: 13 WC 39750

Paramount Staffing of Chicago (loaning employer), and
Specialty Print Communications (borrowing employer)

Respondent.

19IWCC0536

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical care, temporary total disability and penalties and fees, and being advised of the facts and law, reverses the Decision of the Arbitrator, which is attached hereto and made a part hereof, as stated below. The 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).

I. FINDINGS OF FACT

Petitioner was employed full-time by Respondent Specialty Print Communications ("SPC"), a paper-printing company, where he was assigned by Respondent Paramount Staffing ("Paramount"). Petitioner worked in shipping and was tasked with unloading boxes weighing at least 50 pounds, which he did 4-5 times per day.

Petitioner was in good health when he began working for SPC. There is no evidence in the record of prior low back pain, radiculopathy, or related medical treatment. There is also no evidence that Petitioner missed work for SPC due to injury or illness prior to his accident.

On October 5, 2013, Petitioner sustained an undisputed accident at work when he bent over to lift a plastic tub weighing between 50 and 60 pounds. As he was engaged in this task, Petitioner felt pain in his back and legs as well as stinging in his waist. A co-worker, Juvenal Reyes, witnessed the occurrence. Petitioner reported the incident and a written report was drafted. In the report, he states "my waist hurts and the pain will not go away and my left side hurts and my legs began to feel tired." Petitioner testified that he meant that his legs were weak.

The decision of the Arbitrator delineates the facts relating to Petitioner's medical treatment in detail. As relevant to the issues on review, the Commission notes that on the date of accident Petitioner presented at Alexian Brothers as referred by Respondent after complaining of low back and radicular pain at a level of 9/10 as well as tenderness in his back. After a physical examination, he was diagnosed with a lumbar strain, prescribed pain medication and placed on light duty. Petitioner returned to work later in the day and was given a job doing paperwork where he would switch from sitting to standing depending on his pain.

Petitioner underwent treatment at Alexian Brothers throughout the following weeks reporting similar symptoms. On November 12, 2013, Petitioner saw Dr. Lorena Ramirez at Marque Medicos complaining of radicular pain to his thighs, as well as numbness and tingling. Dr. Ramirez took Petitioner off work and prescribed physical therapy.

On December 1, 2013 Petitioner underwent a lumbar MRI as ordered by Dr. Fernando Perez at Marque Medicos. The interpreting radiologist found the following:

1) Diffuse lumbar spondylosis with multi-level annular disc bulging and hypertrophy of posterior elements, most prominent at L4-5;
2) A 3mm diffuse disc bulge/protrusion at L4-5 with hypertrophy of posterior elements causing mild spinal and bilateral neural foraminal stenosis, more on the left;
3) A 2.5mm diffuse disc bulge at L3-4 with tiny central herniation flattening the thecal sac and hypertrophy of facet joints. There was mild bilateral neural foraminal stenosis;
4) A 1.5mm disc bulge flattening the thecal sac at L2-3; and
5) A 2.5mmm diffuse disc bulge and hypertrophy of facet joints at L5-S1 with mild bilateral neural foraminal stenosis, more on left.

On December 11, 2013, Petitioner submitted to a Section 12 Examination with Dr. Wellington Hsu at Respondent's request. Dr. Hsu took a history from Petitioner through an interpreter, performed a physical examination, and reviewed physical therapy records, MRI and diagnostic test results, records from Marque Medicos, and a Workers' Compensation First Report

of Injury or Illness. Dr. Hsu then rendered opinions regarding the relatedness, if any, of Petitioner's lumbar spine condition to the accident at work.

Dr. Hsu noted Petitioner's report that he was lifting boxes when he strained his back. He noted that Petitioner's December 1, 2013 MRI revealed mild spondylitic changes at L3-4 and L4-5 without evidence of instability, disc bulging, or stenosis. Dr. Hsu opined that Petitioner suffered a lumbar strain caused by the work injury on October 5, 2013 noting that Petitioner's "symptoms that he described soon thereafter are also confirmed in the medical records. Although there does appear to be a gap in the reporting of the incident, I see no other evidence in the medical record that would lead me to conclude otherwise that he sustained a lumbar strain on October 5, 2013. He also has a condition of lumbar spondylosis seen on the MRI films that is in no way related to the work incident of October 5, 2013."

Dr. Hsu also noted that Petitioner did have decreased range of motion on physical examination, but he noted suspicion that Petitioner did not give forth full effort because he was observed moving much quicker and without difficulty outside of the examining room and Dr. Hsu noted Waddell signs. Dr. Hsu opined that Petitioner had reached maximum medical improvement as a result of his lumbar strain, he needed no further medical treatment, and he could return to full duty work.

On January 13, 2014, Petitioner underwent an EMG as ordered by Dr. Perez, which revealed no evidence of lumbosacral radiculopathy in either lower extremity and no evidence of a diffuse peripheral polyneuropathy. Petitioner remained off work at the direction of physicians at Marque Medicos through January 14, 2014.

The following day, on January 15, 2014, Petitioner returned to light duty work at his request. Petitioner worked standing on a forklift moving and stacking pallets. While working, Petitioner was approached by representatives of both SPC and Paramount. They questioned Petitioner regarding his work-release status. Upon learning that he only had a light duty release, both Respondents' representatives informed Petitioner that he would not be allowed to continue working, and he was sent home. Petitioner testified that he did not feel physically capable of working, but did so anyway due to financial necessity. On January 16, 2014, Petitioner presented to Dr. Perez, who maintained his light duty status. Petitioner has not been offered such work since.

Petitioner then sought treatment with Dr. Sue Harsoor as referred by Dr. Ramirez on January 24, 2014 for pain management. Petitioner complained of back pain and radicular pain down to his ankles, as well as numbness and tingling. Dr. Harsoor reviewed the December 1, 2013 MRI and noted disc protrusions at L3-4 (2.5mm) and L4-5 (3mm). She diagnosed Petitioner with discogenic pain and discussed medications, epidural injections and physical therapy.

Dr. Harsoor then recommended and administered a series of injections. The first injection was performed on February 14, 2014. On March 7, 2014, Petitioner reported 50% relief from the injection, but still complained of thigh numbness with cramps. On April 22, 2014, Petitioner

underwent another injection. Ten days later he indicated a temporary 70% improvement in pain, but noted that he was still unable to sit for long periods.

In the interim, Respondent obtained a utilization review from Dr. Fossier, a board-certified orthopedic surgeon, on April 29, 2014. After reviewing Petitioner's medical records, Dr. Fossier noted multi-level degenerative changes in Petitioner's lumbar spine. He was also provided with Dr. Hsu's Section 12 report referring to it as "12/18/13 Wellington K. Hsu, MD: Office Visit[.]"

Dr. Fossier opined that the initial post-accident treatment was medically necessary. However, he also opined that the frequency and duration of conservative treatment rendered by Dr. Perez and Marque Medicos was excessive. Dr. Fossier noted that Official Disability Guidelines (ODG) recommends 10 physical therapy treatments and 12 chiropractic treatments for a lumbar sprain/strain. If there is objective evidence of improvement, both treatment totals would then increase to 18. In Petitioner's case, Dr. Fossier did not find any improvement indicating the need for more than 10 therapy treatments for what he opined to be a lumbar strain.

Dr. Fossier also opined that the February 14, 2014 epidural injection was unnecessary because there was no evidence of radiculopathy, which is the most important criteria for such an injection. Dr. Fossier also found that Petitioner's MRI showed no nerve root compromise and Petitioner's EMG was normal. However, he acknowledged that a normal EMG does not definitively rule out radiculopathy. Dr. Fossier opined that Petitioner's lumbar strain should have resolved by December 11, 2013 when he saw Dr. Hsu.

On May 7, 2014, Dr. Hsu was called as a witness by Respondent and gave testimony at an evidence deposition. Dr. Hsu is a board-certified orthopedic surgeon. He testified about his December 11, 2013 examination of Petitioner, his report including review of various records, and the opinions that he rendered related to Petitioner's condition and its relatedness, if any, to his accident at work.

Consistent with the opinions contained in his first Section 12 report, Dr. Hsu maintained that Petitioner sustained a lumbar strain as a result of the reported mechanism of injury. He also diagnosed Petitioner with a preexisting condition of lumbar spondylosis, which he opined was not causally related to the accident because spondylosis is caused by genetic predisposition and age-related wear to the disks or facet joints. Dr. Hsu also maintained that Petitioner had reached maximum medical improvement as of his December 11, 2013 examination. He opined that Petitioner's mechanism of injury was low impact causing a soft tissue injury which he expected to heal with appropriate conservative care. Dr. Hsu further maintained that Petitioner did not require any further medical treatment and could return to work without restrictions.

On cross-examination, Dr. Hsu acknowledged that he did not review any medical records prior to the date of accident and was unaware of any low back treatment prior to the date of accident or Petitioner's inability to perform his job duties before the date of accident. He also acknowledged that he did not review any clinical notes for any date of service other than

Petitioner's physical therapy scripts and work status reports. Dr. Hsu further acknowledged that Petitioner's low back examination range of motion results were abnormal. He admitted that he did not note whether Petitioner's spondylosis was related to the disk or facet. Dr. Hsu also admitted that lumbar spondylosis could be rendered symptomatic from a lifting movement in an extreme situation, but not from normal lifting.

Petitioner then underwent a Functional Capacity Evaluation ("FCE") on May 16, 2014 as ordered by Dr. Harsoor. The evaluator determined that Petitioner was only capable of light duty work. The results of the evaluation were valid.

On June 25, 2014, Petitioner presented to Dr. Erickson on referral from Dr. Harsoor. Dr. Erickson recommended an electronic DSSEP test, which was performed on the same date by Dr. Chhabria and revealed moderate delay of 0.9 bilaterally at the L3 level as well as on the left side at L4. Dr. Erickson diagnosed Petitioner with mechanical back pain associated with disc protrusions from L3-L5 and ordered continued physical therapy and agreed with the light duty restrictions.

Respondent obtained another utilization review from Dr. Zarro, a board-certified orthopedic surgeon, on December 23, 2014. Dr. Zarro was also called as a witness by Respondent and gave testimony at an evidence deposition on March 14, 2015. He reviewed the necessity of Petitioner's lumbar discography from L2-S1. Dr. Zarro reviewed 15 pages of medical records from Dr. Erickson, the June of 2014 DSSEP test, and a lumbar MRI report. Dr. Zarro used ODG guidelines in his analysis. He noted that he did not have Petitioner's physical therapy records for review. Dr. Zarro opined that the lumbar discogram with post-discogram CT scanning was not medically necessary. In so concluding, he stated that pre-operative discography was not recommended by ODG and "the conclusions of recent, high quality studies on discography have significantly questioned the use of discography results as a preoperative indication for either IDET or spinal fusion." Dr. Zarro does not indicate the specific studies in his utilization review report.

Additionally, Dr. Zarro testified that it would be unreasonable to recommend such a procedure on a patient with no radicular pain, numbness or weakness and no instability on imaging studies. Dr. Zarro acknowledged that a discogram is a medically-accepted diagnostic tool. However, he testified that he did not "see the point in subjecting the patient to a test that is invasive and has risks of infection, disk herniation and radicular pain when the diagnosis is already known." Petitioner had already been diagnosed with lumbar disc desiccation and degeneration at L3-4.

Petitioner continued with treatment and underwent the recommended discogram on February 27, 2015. Tests showed severe concordant pain at L4-5 and radiculopathy bilaterally. A lumbar CT scan on the same date revealed a small broad-based L4-5 central disc protrusion without significant lumbar spinal canal/neural foraminal stenosis. Dr. Harsoor reviewed the results and found that the discogram was positive at L4-5.

On March 25, 2015, Petitioner presented to Dr. Kranzler, a neurosurgeon, on referral from Dr. Erickson. Petitioner complained of back pain radiating down both legs with numbness and tingling, left worse than right. He also reported electric shock-like sensations into his left big toe. Dr. Kranzler noted Petitioner's December of 2013 lumbar MRI, June of 2014 DSSEP test at Lake County Neuromonitoring, LLC, the February of 2015 discogram at Ambulatory Surgical Care Facility, LLC and the February 2015 CT scan from Naperville Imaging Center. Dr. Kranzler diagnosed radiculopathy and opined that Petitioner's left big toe symptoms could be attributable to L5 irritation.

On June 12, 2015, Dr. Hsu authored an addendum report at Respondent's request. He noted his review of additional medical records from Marque Medicos, Dr. Harsoor, Dr. Erickson, as well as additional diagnostic tests. Dr. Hsu stated that none of the additional medical records provided to him changed his opinions. In addition, Dr. Hsu opined that Petitioner's discogram was not reasonable or necessary and that Petitioner was not a good surgical candidate. He continued to opine that Petitioner was at maximum medical improvement as of December 11, 2013 with no need for work restrictions or further medical treatment. Dr. Hsu further concluded that no permanent partial disability resulted from the accident and summarily rendered an impairment rating of 0%.

On August 19, 2015, Petitioner returned to Dr. Kranzler to discuss surgery. Petitioner reported ongoing lumbar and radicular pain down both legs, with numbness and tingling to his left big toe. Dr. Kranzler recommended an updated MRI, which was performed September 22, 2015, as well as an updated DSSEP test of the lumbar area. Regarding the updated MRI, the interpreting radiologist found the following:

1) A 2-3mm subligamentous posterior disc herniation at L3-4 with a small posterior annular tear noted to indent the ventral surface of the thecal sac;
2) A 2-3mm posterior disc protrusion/herniation at L4-5, also noted to indent the ventral surface of the thecal sac; and
3) A 3-4mm subligamentous posterior disc protrusion/herniation at L5-S1 noted to indent the ventral surface of the thecal sac with mild bilateral neuroforaminal narrowing and exacerbated ligamentum flavum hypertrophy.

Respondent obtained two additional utilization reviews from Dr. Goodrich, a board-certified orthopedic surgeon, on September 9, 2015. Dr. Goodrich was also called as a witness by Respondent and gave testimony at an evidence deposition on March 11, 2016. Dr. Goodrich reviewed records and determined that the recommended updated MRI was not medically necessary. In so concluding, Dr. Goodrich noted that the medical records did not clearly indicate progression of symptoms or objective neurologic deficits or "red flags" to warrant a repeat MRI. He also found no therapeutic plan that will benefit from evaluation with an MRI. Dr. Goodrich also reviewed records and determined that the recommended updated DSSEP test, which was eventually performed on June 21, 2016, was not medically necessary. He noted that the medical

records reviewed did not clearly indicate a significant change in symptoms or objective findings, nor was it clear how the requested test would affect the patient's treatment.

On January 27, 2016, Dr. Kranzler was called as a witness by Petitioner and gave testimony at an evidence deposition. Dr. Kranzler is a board-certified neurosurgeon. He testified about his treatment of Petitioner and rendered opinions related to Petitioner's condition and its relatedness, if any, to his accident at work.

Dr. Kranzler testified that he diagnosed Petitioner with lumbar radiculopathy stemming from L4 and L5. He recommended that Petitioner return to Dr. Erickson to proceed with surgery. Dr. Kranzler opined that the cause of Petitioner's radiculopathy was lateral recess stenosis at L3-4 and L4-5. Dr. Kranzler also testified that while stenosis is generally a degenerative condition, bulging of the discs can add to narrowing and the subligamentous herniation of disc material, as in Petitioner's case, can render stenosis symptomatic as a result of trauma.

Dr. Kranzler opined that Petitioner's clinical and diagnostic findings were correlated. He explained that Petitioner's pain was in the proper leg and his symptoms did not change from exam to exam. He also noted objective evidence from Petitioner's MRI and electrical studies that support correlation of pathology at L3-4 and L4-5. Dr. Kranzler maintained Petitioner's diagnoses after his DSSEP test results that also confirmed Petitioner's subjectively reported complaints. He also maintained Petitioner's diagnosis of radiculopathy at L4-5 and recommended a hemilaminectomy from L3-L5, and possibly at S1 as well, to be guided by DSSEP responses during surgery. Dr. Kranzler opined that Petitioner's radiculopathy was caused by lateral recess stenosis from L3-5.

Dr. Kranzler opined that Petitioner's stenosis from L3-5 is accompanied with back pain, numbness, weakness, radiculopathy, and specified pain in his left big toe. He also testified that Petitioner's 2013 and 2015 MRI's were essentially identical. Dr. Kranzler stated that most MRI findings are degenerative, but reiterated that degeneration just makes it easier for trauma to cause nerve-related symptoms. Dr. Kranzler also noted that symptoms related to lumbar radiculopathy can fluctuate depending on how much rest versus physical exertion a patient undertakes.

With regard to the DSSEP test, Dr. Kranzler testified that it is used to help verify that radiculopathy is genuine. He stated that a delay of 0.8 is considered abnormal, but most people are still able to live with this amount of irritation. However, a delay of 0.9 such as Petitioner's is too much pressure on the nerve and justifies surgery. Dr. Kranzler opined that the DSSEP test is a more reliable determinant of nerve irritability than is an EMG. He stated that EMG's are more determinant of muscle atrophy and weakness, rather than nerve irritation.

Ultimately, Dr. Kranzler testified that, absent pre-accident evidence of low back or radicular complaints, Petitioner's need for surgery was causally related to his work accident. Petitioner's subjective and objective findings correlated, his pain was in the proper leg, his symptoms did not fluctuate from exam to exam, and there was no evidence of exaggeration.

On January 20, 2016, Dr. Milos was called as a witness by Petitioner and he gave testimony at an evidence deposition. Dr. Milos is board-certified in sports medicine and general orthopedics. He performed a utilization review on Respondent's behalf. Dr. Milos reviewed Dr. Kranzler's request for surgery and went through a peer-to-peer with Dr. Kranzler on November 25, 2015. After their discussion, Dr. Milos agreed with Dr. Kranzler that the hemilaminectomy surgery was medically reasonable. Dr. Milos noted that Petitioner had a long history of symptoms and objective studies, had exhausted and failed conservative care, and was having difficulties with activities of daily living. Dr. Milos also noted that left toe weakness is associated with the L5 nerve root (Petitioner had difficulty raising his left toe). Dr. Milos testified that his opinion that Petitioner's surgery was necessary was based on the objective evidence that corroborated Petitioner's subjective complaints, along with his conversation with Dr. Kranzler.

On February 3, 2016, Petitioner returned to see Dr. Erickson, reporting that his leg pain was just as severe as his low back pain, rating it at a level of 8/10. Dr. Erickson opined that conservative treatment was unlikely to reverse Petitioner's situation and he noted that Petitioner would likely soon proceed to a proposed surgery of a decompression hemilaminectomy with foraminotomies from L3-S1 as directed by intraoperative nerve testing.

On April 18, 2016, Petitioner submitted to a second Section 12 Examination with Dr. Hsu at Respondent's request. Dr. Hsu took additional history from Petitioner through an interpreter, performed a physical examination, and reviewed additional records from Dr. Kranzler as well as additional diagnostic tests. Dr. Hsu maintained the opinions in his original report, and stated that none of the additional medical records reviewed after his first exam and addendum report changed his opinions. In addition, Dr. Hsu opined that Petitioner's DSSEP test was not reasonable or necessary and that the recommended lumbar hemilaminectomy at L3-L4, L4-L5, and L5-S1 was not reasonable or necessary based on pathology that did not show significant stenosis.

On July 18, 2016, Dr. Erickson reviewed the June 21, 2016 DSSEP test, which was performed in order to determine how many spinal levels required surgical intervention. Dr. Erickson found abnormality on the left at L3 and S1 and recommended a decompression hemilaminectomy with foraminotomies from L3-5 with a possible addition of L5-S1 by a hemilaminectomy as directed by intraoperative nerve monitoring.

The decision of the Arbitrator also delineates the facts relating to the surveillance footage submitted by Respondent in detail. As relevant to the issues on review, the Commission notes that Respondent submitted surveillance evidence of Petitioner from late May 2016 through early June of 2016. There is an instance of significant surveillance reflecting Petitioner's physical condition taken on May 28, 2016 showing Petitioner watching a soccer game at a park. Petitioner is somewhat active in this video. However, it is apparent that he is guarded in the majority of his movements. Petitioner is occasionally seen bending slightly at the knees and waist to retrieve balls kicked out of play and what appears to be a lightweight backpack.

At the time of hearing, Petitioner had been off work nearly three years. He was taking ibuprofen for pain. Petitioner testified that he had pain with every movement, but still went out for walks when he was bored. He attended his girlfriend's children's soccer matches and was able to walk around and cheer them on. He explained that he would feel ok at the time, but afterwards his pain would return. Petitioner also testified that he had difficulty bending forward at the waist or squatting without pain. He was only able to rotate his shoulders from left to right while keeping his waist straight a little bit. Petitioner testified that he could lift five pounds, but was unsure if he could lift ten. He also testified that he could drive a car, but could only stand for 15-20 minutes before the pain forced him to sit. Petitioner also testified that it was painful for him to jog.

II. CONCLUSIONS OF LAW

A. Causal Connection

The Commission finds that Petitioner has established an ongoing causal connection between his work-related accident on October 5, 2013 and lumbar condition including radiculopathy as opined by Dr. Kranzler. In so concluding, the Commission finds the Petitioner's testimony to be credible overall, as it is corroborated by contemporaneous records beginning immediately after the accident. The Commission further finds the opinions of Dr. Kranzler to be more persuasive than those of Dr. Hsu in this case as they are supported by objective medical evidence.

Petitioner offered unrebutted testimony that he was asymptomatic in the low back and had no radicular symptoms prior to his accident. Petitioner also testified that he worked for Respondent without restrictions prior to his accident. No evidence was submitted to the contrary.

Dr. Kranzler opined that Petitioner's condition in the lumbar spine caused radiculopathy, citing to diagnostic tests corroborating Petitioner's subjective complaints. He also noted that Petitioner's MRI films as interpreted by radiology found disc bulging at various levels, which supported Petitioner's subjective complaints of radicular symptoms. Dr. Kranzler further noted that Petitioner's subjective complaints were made immediately after the accident and made consistently and contemporaneously with treatment thereafter.

Respondent relies on the opinions of Dr. Hsu in support of its position that Petitioner's low back condition and radicular complaints are unrelated to the accident beyond a lumbar strain. Dr. Hsu characterized Petitioner's injury as low-impact resulting only in a soft tissue injury that resolved by the time he first examined Petitioner. Dr. Hsu continually maintained that Petitioner only suffered a strain, that he required no medical treatment beyond conservative care through December 11, 2013, and that he could return to work full duty. Given the record, the Commission finds the opinions of Dr. Hsu unpersuasive.

Dr. Hsu was under the misimpression that Petitioner waited twenty-six days to report the accident. He also did not have the opportunity to review Petitioner's contemporaneous medical records beginning immediately after the accident which reveal that Petitioner complained of low back and radicular pain, as well as tenderness in his back. Moreover, Dr. Hsu's opinions discount that Petitioner, 35-year-old laborer, was wholly asymptomatic prior to this accident which prompted immediate medical treatment.

In contrast, Petitioner's treating physician, Dr. Kranzler, relied on Petitioner's complaints, which remained consistent throughout treatment and were corroborated by pathology noted in MRIs. Petitioner also underwent a functional capacity evaluation, the results of which were valid. Moreover, the opinions of Dr. Milos, one of Respondent's utilization review physicians, buttress the opinions of Dr. Kranzler and undermine those of Dr. Hsu relating to the necessity of surgery. After reviewing medical records and proceeding through the peer-to-peer process with Dr. Kranzler, Dr. Milos opined that the surgery recommended by Dr. Kranzler was necessary based on the objective evidence that corroborated Petitioner's subjective complaints. Thus, the opinions of Dr. Kranzler that Petitioner's condition is causally related to his accident and that surgery is necessary are supported by the opinions of Dr. Milos as well as the lack of pre-accident symptomatology, medical treatment, and inability to perform his work.

The Commission also notes the Arbitrator's assessment of Petitioner's testimony in light of the surveillance videos submitted by Respondent. After reviewing the surveillance videos, the Commission finds that, while one date shows Petitioner engaged in some physical activities on a soccer field, it is apparent that he is also guarded in the majority of his movements. During the May 28, 2016 surveillance video, which is the most substantial of the videos, Petitioner is occasionally seen slightly bending at the knees and waist to retrieve balls kicked out of play and what appears to be a lightweight backpack. The Commission finds little within the videos that belie Petitioner's current complaints.

Based on the totality of the record as noted above, the Commission reverses the arbitration decision and finds that Petitioner's current condition of ill-being is causally connected to the work accident of October 5, 2013.

B. Medical Expenses

The parties also dispute Respondent's liability for certain unpaid medical bills. The Commission gives little weight to the opinions of Dr. Fossier, Respondent's utilization review physician, given the particular facts of this case.

Dr. Fossier opined that Petitioner's physical therapy and chiropractic care was excessive based on ODG guidelines for a lumbar sprain/strain. He concluded that there was no indication of improvement and that epidural injections were unwarranted as there was no objective evidence of radicular pain. However, the medical records reflect Petitioner's treating physicians' findings as well as Petitioner's reports of temporary improvement in his pain after epidural injections and that

therapy was a little helpful. Moreover, Respondent's other utilization review physician, Dr. Milos, opined that left toe weakness is associated with the L5 nerve root further corroborating the correct nerve distribution and necessity of the treatment as ordered by Petitioner's treating physicians.

The medical treatment rendered by treating physicians, and referenced above, was reasonable and necessary given the objective evidence. The diagnoses, continued findings on physical examination, and opinions of Petitioner's treating physicians are more persuasive than the opinions of Dr. Fossier, who never had the opportunity to examine Petitioner. Thus, the Commission finds that Respondent shall be liable for all unpaid portions of any medical bills related to Petitioner's chiropractic treatment, physical therapy, and epidural steroid injections denied by Dr. Fossier's utilization review.

The remaining utilization review reports, however, establish that not all of Petitioner's medical treatment was reasonable or necessary. Petitioner underwent a series of diagnostic tests that were found to be unreasonable and unnecessary through utilization reviews performed. In so concluding, the reviewing physicians noted a lack of symptom progression, "red flags" to warrant repeat diagnostics, or a lack of significant change in symptoms to establish how the tests modality would affect the patient's condition.

The Commission agrees, finding no persuasive evidence indicating the medical necessity of these repeat diagnostic tests and notes that no peer-to-peer process was completed. Thus, the Commission finds that Respondent shall not be liable for medical expenses denied by the remaining utilization reviews including the second MRI, second DSSEP, and discogram based on the opinions of Dr. Goodrich and Dr. Zarro.

C. Prospective Medical Treatment

The Commission finds the prospective surgery recommended by Dr. Kranzler to be reasonable and necessary to alleviate Petitioner from the effects of his injury at work. In addition to finding the opinions of Dr. Kranzler to be persuasive as explained in the analysis *infra*, it is significant that Respondent's utilization review physician, Dr. Milos, also opined that the recommended surgery was necessary. Thus, the Commission finds the opinions of Drs. Kranzler and Milos to be persuasive and awards the recommended surgery.

In addition, the Commission notes a troublesome attempt to conceal Dr. Milos' unfavorable opinion from Petitioner concerning the reasonableness of the prospective surgery. A November 2, 2015 e-mail to the adjuster advised leaving Petitioner's counsel off a distribution list "so we can bury the report if it is unfavorable." While there is no discovery in workers' compensation, and parties make their own strategic decisions related to litigation, Respondent placed great value on the opinion of Dr. Milos having retained him to perform a utilization review. To then ignore an unfavorable opinion in such a way and given the contentious nature of the parties' disputes is telling; the foregoing comportment is inadvisable, at best.

19IWCC0536

D. Temporary Total Disability

Regarding temporary total disability, the Commission finds that Petitioner has satisfied his burden of proof concerning causal connection and that Petitioner was unable to work per his physicians beyond November 12, 2013. Medical records show that Petitioner was placed off work from November 12, 2013 through January 14, 2014. Petitioner attempted work on January 15, 2014 with light duty restrictions, which Respondent characterized as an unauthorized attempt to return to work. However, Petitioner was immediately sent home and his physician reiterated his light duty work restrictions the following day. Thus, from January 16, 2014 through the August 3, 2016 arbitration hearing date, Petitioner was either unable to work or was not offered work within his restrictions by Respondent. The Commission hereby modifies the Arbitrator's award for temporary total disability from November 12, 2013 through January 14, 2014 and from January 16, 2014 through August 3, 2016.

E. Penalties and Fees

The Commission affirms the Arbitrator's ruling denying penalties and attorney's fees. Although the Commission found them to be unpersuasive, Respondent's reliance on the opinions of Dr. Hsu and various utilization reviewers throughout the claim is not deemed to be unreasonable or vexatious.

III. PETITIONER'S REQUEST FOR SPECIAL FINDINGS PURSUANT TO 50 ILLINOIS ADMINISTRATIVE CODE 9040.40(b)

Along with his Statement of Exceptions, Petitioner propounded four questions to the Commission pursuant to 50 Illinois Administrative Code 9040.40(b). The four questions are as follows, with the Commission's response to each in succession:

1) Was Petitioner's preexisting lumbar spondylosis symptomatic at any time prior to the work accident on October 5, 2013?

   There is no evidence in the record of any symptomatology related to Petitioner's preexisting lumbar spondylosis prior to the accident date.

2) Did Petitioner aggravate his preexisting spondylosis on October 5, 2013?

   Yes, to the extent opined by Dr. Kranzler whose opinions are incorporated herein.

3) Did Petitioner sustain an intervening accident after the accident on October 5, 2013 and prior to the IME exam on December 5, 2013[sic]?

19IWCC0536

There is no evidence in the record indicating that Petitioner sustained an intervening accident between October 5, 2013 and Dr. Hsu's December 11, 2013 examination.

4) What evidence within the record supports Dr. Hsu's denial of causal connection?

The Commission finds the opinions of Dr. Kranzler to be more persuasive than those of Dr. Hsu in this case. Dr. Kranzler's opinions and the findings of the Commission relating to causal connection are incorporated herein.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner has met his burden of proof in relation to his current condition of ill-being being causally connected to his work accident suffered on October 5, 2013.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $228.57 per week for a period of 142 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 be liable for all reasonable and necessary medical expenses under §8(a) of the Act, excluding any and all expenses related to the treatment or diagnostic tests non-certified through the utilization reviews of Dr. Goodrich and Dr. Zarro.

IT IS FURTHER ORDERED BY THE COMMISSION that the prospective surgery recommended by Dr. Kranzler is hereby awarded to Petitioner, and Respondent shall be liable for all related expenses.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: SEP 30 2019
O: 7/17/19
BNF/wde
45

Barbara N. Flores

Marc Parker

Dissent

I respectfully dissent from the decision of the majority. I would have affirmed the Decision of the Arbitrator in which he found that Petitioner's work-related accident caused only a lumbar strain, which has resolved, and that he did not did not sustain his burden of proving that the accident caused a current and ongoing condition of ill-being of his lumbar spine.

The Arbitrator found Petitioner to be an incredible witness. Not only is the Arbitrator in a better position to assess the credibility and veracity of a claimant than is the Commission, his determination of Petitioner's lack of credibility is amply supported by the record. First, on the day of the accident, Petitioner reported 9/10 pain, but his treating emergency department doctor found him in no acute distress. Second, the objective findings do not corroborate his subjective complaints. The MRI findings were relatively benign, a CT found no disc herniations, an EMG found no radiculopathy, and the only truly positive test was a discogram, which Petitioner's treating doctor, Dr. Kranzler, acknowledged is a notoriously inaccurate test and he does not prescribe them as a diagnostic tool. Third, Respondent's Section 12 medical examiner, Dr. Hsu, examined Petitioner twice and on both examinations found symptom magnification, lack of effort in range of motion testing, and various positive Waddell signs. Fourth, Respondent submitted into evidence video and photographic surveillance evidence which clearly show Petitioner engaged in various activities that clearly cast serious doubt on the veracity of his ongoing and serious subjective complaints. Those activities include turning, bending over to pick objects off the ground, slinging a knapsack over his shoulder, kicking soccer balls, and jogging on various occasions. These are all activities that Petitioner testified he could not perform.

In addition, I agree with the assessment of the Arbitrator and disagree with the assessment of the majority, on the relative persuasiveness of Petitioner's treating doctor, Dr. Kranzler versus Respondent's Section 12 medical examiner, Dr. Hsu. Dr. Kranzler did not see Petitioner until

almost two years after the accident and apparently did not review various prior medical records including the emergency department records and the negative EMG. He also agreed that Dr. Erickson performed a neurological examination which was completely normal and that Dr. Erickson found nothing other than Petitioner's unsubstantiated subjective complaints. On the other hand, Dr. Hsu reviewed all of Petitioner's prior medical records and therefore was in a better position to assess the credibility of Petitioner's subjective complaints than Dr. Kranzler.

For the reasons stated above, I would have affirmed the Decision of the Arbitrator in which he found that Petitioner did not sustain his burden of proving that the work-related accident caused a current and ongoing condition of ill-being of his lumbar spine. Therefore, I respectfully dissent from the decision of the majority.

DLS/dw
O-7/17/19

Deborah L. Simpson

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

ALCANTAR, MIGUEL
Employee/Petitioner

Case# **13WC039750**

PARAMOUNT STAFFING OF CHICAGO LOANING EMPLOYER AND SPECIALTY PRINT COMMUNICATIONS BORROWING EMPLOYER
Employer/Respondent

19IWCC0536

On 12/1/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.43% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

1922 SALK, STEVEN B & ASSOC LTD
DAMIAN R FLORES
150 N WACKER DR SUITE 2570
CHICAGO, IL 60606

4866 KNELL O'CONNOR DANIELEWICZ
STEVE REISING
901 W JACKSON BLVD SUITE 301
CHICAGO, IL 60607

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)

MIGUEL ALCANTAR
Employee/Petitioner

Case # **13** WC **39750**

v.

Consolidated cases: **n/a**

PARAMOUNT STAFFING OF CHICAGO, loaning employer and SPECIALTY PRINT COMMUNICATIONS, borrowing employer
Employer/Respondent

19IWCC0536

An *Application for Adjustment 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 **AUGUST 3, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Petitioner's earnings?

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

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

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

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

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

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

N. ☒ Is Respondent due any credit?

O. ☐ Other ______

FINDINGS 19IWCC0536

On the date of accident, **OCTOBER 5, 2013**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**18,577.91**; the average weekly wage was $**342.68**.

On the date of accident, Petitioner was **35** 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 $**1,268.54** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**1,268.54**.

Respondent is entitled to a credit of $**3,269.73** 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 Petitioner's request for prospective medical care in the form of surgery as recommended by Dr. Kranzler and Dr. Erickson is denied;

2) The Respondent shall pay those medical services incurred through December 18, 2013. The Respondent shall not be responsible for medical services incurred by the Petitioner after December 18, 2013;

3) The Respondent shall pay those TTD benefits incurred from November 12, 2013 through December 19, 2013. The Respondent shall have a credit for those TTD benefits previously paid to the Petitioner;

4) The Petitioner's Petition for Penalties and Attorney's Fees is denied.

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

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

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

Signature of Arbitrator

NOVEMBER 30, 2016
Date

ICArbDec19(b)

DEC 1 - 2017

MIGUEL ALCANTAR v. PARAMOUNT STAFFING OF CHICAGO, loaning employer and SPECIALTY PRINT COMMUNICATIONS, borrowing employer

13 WC 39750

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter was tried on the Petitioner's Section 19(b) Petition before Arbitrator Steffenson on August 3, 2016. The issues in dispute were causal connection, medical care and bills, TTD, prospective medical, and penalties and attorney's fees. (Arbitrator's Exhibit 1). The parties agreed to receipt of this Arbitration Decision via e-mail and requested a written decision, including findings of fact and conclusions of law, pursuant to Section 19(b) of the Act. (Arbitrator's Exhibit (*hereinafter*, Ax.) 1).

FINDINGS OF FACT

On October 5, 2013, Petitioner presented to Dr. Lindahl at Alexian Brother Medical Group and complained of back pain that shot down into both legs; predominantly left. Petitioner stated he was lifting a 60-pound box prior to presenting at Alexian Brothers Medical Group, when he felt pain in his back; Petitioner rated his pain as 9/10. Dr. Lindahl examined Petitioner and opined he did not appear in any acute distress, but did have some tenderness to the left side of his back. Dr. Lindahl ultimately diagnosed a lumbosacral stain. Petitioner was released to work modified duty with restrictions of no lifting/carrying, no pushing/pulling, no twisting, bending, squatting, kneeling, no climbing ladders/stairs, limit repetitive motion, and alternate standing and sitting as tolerated. (Petitioner's Exhibit 1).

Follow-up visits occurred at Alexian Brother Medical Group on October 10, 2013, October 15, 2013, October 22, 2013 and October 28, 2013. Recommendations continued to include ice and/or moist heat, ibuprofen, and Flexeril. Physical therapy was recommended on October 28, 2013. Work restrictions remained in effect ranging from a 5-pound weight limit on October 10th to a 30-pound weight limit on October 22, 2013. On October 22nd, petitioner was noted to be working full duty and was only reporting intermittent pain. However, at the October 28th visit, Petitioner reported no improvement in his pain and his restrictions were downgraded to a 20-pound lifting limit. (Petitioner's Exhibit (*hereinafter*, Px.) 1).

On November 12, 2013, Petitioner presented to Specialized Radiology Consultants for an x-ray of the lumbar spine. The results indicated there was no evidence of fracture, and the soft tissue structures were unremarkable. (Px. 2).

On November 12, 2013, Petitioner returned to Marque Medicos and provided a form indicating that he was opting out of the employer's preferred provider program. Petitioner stated that on October 5, 2013, he bent forward to pick up a 60 pound bin of mail and became stuck in a flexed position and could not straighten up; Petitioner noted back pain of 10/10. Petitioner reported being sent to a company doctor and given medications without improvement. Petitioner was ultimately diagnosed with a lumbar sprain, and treatment recommendations included cold packs, physical therapy and an off-work status. Physical therapy then was initiated on November 13, 2013, and Petitioner attended 20 physical therapy visits between November 13 and December 27, 2013. November 26, 2013, Petitioner was provided a work status slip and maintained on an off-work status through December 9, 2013 by Marque Medicos. (Px. 3).

On December 1, 2013, Petitioner presented to Archer Open MRI and underwent an MRI of the lumbar spine without contrast. The results indicated (1) diffuse lumbar spondylosis with multilevel annular disc bulging and hypertrophy of posterior elements, most prominent at L4-5; and (2) at L4-5 there was a 3-mm diffuse disc bulge/protrusion and hypertrophy of posterior elements causing mild spinal and bilateral neural foraminal stenosis, more on the left. (Px. 4).

Additional off work slips were provided by Marque Medicos for 12/6/13 -12/13/13 and from 12/13/13 – 12/26/13. (Px. 3).

Subsequently, on December 24, 2013, Petitioner was evaluated by Fernando Perez, D.C. at Marque Medicos. Petitioner reported persistent pain in his low back area, right greater than left, with radiation to the bilateral thighs. Dr. Perez examined Petitioner and assessed lumbar intervertebral disc derangement without myelopathy. Dr. Perez ordered an EMG/NCV. Petitioner was to continue physical therapy and remain off work. On January 10, 2014, an off work slip from Marque Medicos removed Petitioner from work for the period 1/10/14 – 1/14/14. Petitioner was to be reevaluated on January 14, 2014, at which time his return to work status will be determined. (Px. 3).

On January 13, 2014, Petitioner presented to Dr. Fernandez Perez (DC) at Midwest Neurodiagnostics for neurological testing. The nerve conduction studies and the EMG needle study indicated no electrodiagnostic evidence of a lumbosacral radiculopathy in both lower extremities and no evidence of a diffuse peripheral polyneuropathy. (Px. 3).

On January 24, 2014, Petitioner presented to Dr. Sue Harsoor for initial evaluation and treatment. Petitioner reported a DOI of 10/5/12 and described pain that radiated to both the right and left leg, and bilateral ankles; Petitioner additionally complained of tingling and numbness. Petitioner rated his pain at worst an 8/10, and current complaint was at 3/10. Pain was made worse with standing and sitting for long periods of time. Petitioner reported muscle tenderness and muscle weakness. Dr. Harsoor reviewed Petitioner's MRI, which showed L3-L4 and L4-L5 disc protrusion. Petitioner noted interest in getting ESI injection. Thereafter, on February 14, 2014, Petitioner returned to Dr. Harsoor for a follow up visit. Petitioner reported pain to be at 7/10. An ESI was performed uneventfully, and Petitioner was unable to work as no restricted duty available. A second ESI injection was performed on this date to L4-L5. Petitioner was diagnosed with lumbar radiculopathy. The Petitioner returned to Dr. Harsoor for a follow up visit on March 7, 2014. He reported back pain that radiated to both hips and left extremity (more than right). Petitioner reported 50% relief with second ESI injection. However, Petitioner still reported numbness in thighs with cramps. Petitioner was prescribed Flexeril to help with pain. (Px. 4).

A March 13, 2014 work slip from Marque Medicos indicated Petitioner could RTW on modified duty with restrictions of no lift/carry over 25lbs and sit/stand as needed. (Px. 3).

On April 11, 2014, Petitioner returned to Dr. Harsoor for a follow up visit. Petitioner's complaints remained unchanged. Petitioner was scheduled for a left transforaminal ESI due to pain in legs with numbness. Petitioner was released to light duty work continuing the same restrictions. He again saw Dr. Harsoor for a follow up visit on April 22, 2014 and rated his pain at 7/10. A left transforaminal ESI was given at L4-5 and L3-4. Petitioner was released to light duty with restrictions unchanged. Then, on May 2, 2014, Petitioner returned to Dr. Harsoor for a follow up visit and reported 70% relief of pain after the nerve block, but was still unable to sit for long periods of time. Petitioner was referred for an FCE. On May 30, 2014, Petitioner returned to Dr. Harsoor for a follow up visit. An FCE was performed by Elite indicative of light duty capabilities and recommendation for a work conditioning program. (Px. 4).

On June 25, 2014, Petitioner presented to Dr. Erickson at the American Center for Spine & Neurosurgery. Dr. Erickson examined Petitioner and opined he had mechanical back pain associated with disc protrusions from L3 through L5. The importance of the protrusions was confirmed by the results of neurophysiological testing. Petitioner was to continue PT and light duty restrictions. (Px. 6).

Subsequently, on July 18, 2014, Petitioner returned to Dr. Harsoor for a follow up visit. Petitioner reported being unable to sit for long periods of time, and requested another ESI. Dr. Harsoor gave Petitioner a home exercise program and prescribed pain medication. (Px. 4).

On July 23, 2014, Petitioner returned to Dr. Erickson for a follow up visit. Petitioner complained of low back pain radiating to both legs and tingling of both soles. Petitioner was recommended to undergo a diagnostic discography from L2-S1 with post discogram CT scanning. A work slip indicated he could RTW light duty. (Px. 6).

The next month, on August 15, 2014, Petitioner returned to Dr. Harsoor for a follow up visit. Petitioner was examined and his symptoms remained unchanged. It was noted that a third ESI was not yet approved. He returned to Dr. Harsoor for a follow up visit on September 19, 2014. Petitioner was examined and his symptoms remained unchanged. Petitioner was to continue light duty work while waiting for approval of a third ESI. That third ESI took place during his return to Dr. Harsoor on September 26, 2014. On October 3, 2014, Petitioner returned to Dr. Harsoor for a follow up visit and reported his pain had subsided for a week after the third ESI, but continued to have numbness in his left leg. (Px. 4).

On October 8, 2014, Petitioner returned to Dr. Erickson for a follow up visit. Petitioner was waiting for diagnostic discography and had an ESI on September 26, 2014 with little to no relief. The ESI was administered by Dr. Harsoor at the L3-4 and L4-5 level. (Px. 6).

Then, on January 28, 2015, Petitioner returned to Dr. Erickson for a follow up visit. Petitioner had not been seen since October 2014. The last ESI was beneficial, however relief did not last. Petitioner would undergo diagnostic discography and post discogram CT scanning as soon as possible. (Px. 3).

During a February 13, 2015, follow-up with Dr. Harsoor, Petitioner would be scheduled to undergo a discogram and would be off work for the next 3 months, per Dr. Erickson. Petitioner refused medication. (Px. 4).

On February 27, 2015, Petitioner returned to Dr. Harsoor and underwent a lumbar discography. Petitioner had severe concordant pain at L4-5 shooting down both legs. Pain at L2-3 and L3-4 was 7-8/10. (Px. 3).

On February 27, 2015, Petitioner presented to Naperville Imaging Center and underwent a CT of the lumbar spine w/o contrast. The post discogram CT lumbar spine showed a small broad-based L4-5 central disc protrusion w/o significant lumbar spinal canal/neural foraminal stenosis. (Px. 7).

The Petitioner, on March 19, 2015, met with Dr. Kranzler at Northside Neurosurgery and complained of low back pain radiating down both of his legs, with numbness and tingling. Petitioner had previously undergone a discogram on February 27, 2015 at L4-5 centrally. An MRI of the lumbosacral spine was done on December 1, 2013, which showed lateral recess stenosis with diffuse L3-4 and L4-5 disc bulging. Petitioner had attended PT and underwent two

ESIs without significant improvement. Petitioner complained pain was severe and he was recommended for surgery. A work slip indicated petitioner was totally disabled until his next visit on June 24, 2015. (Px. 6).

On March 20, 2015, Petitioner returned to Dr. Harsoor for a follow up visit. Petitioner was to be re-evaluated after surgery. (Px. 4).

On March 25, 2015, Petitioner returned to Dr. Kranzler for a follow up visit. Petitioner's complaints remained unchanged. Surgery would be planned after coordinating with Dr. Erickson. (Px. 3).

The Petitioner returned to Dr. Kranzler on August 19, 2015, for a follow up visit. Petitioner complained of low back pain radiating down both of his legs, with numbness and tingling down to his left great toe. Dr. Kranzler recommended an updated MRI of the lumbar area without contrast. (Px. 7).

On September 22, 2015, Petitioner underwent an MRI of the lumbar spine. The results indicated (1) L3-4 level there was a 2-3 mm subligamentous posterior disk herniation with a small posterior annular tear noted to indent the ventral surface of the thecal sac; (2) L4-5 level there was a 2-3 mm posterior disk protrusion/herniation also noted to indent the ventral surface of the thecal sac; (3) L5-S1 there was a 3-4 mm subligamentous posterior disk protrusion/herniation noted to indent the ventral surface of the thecal sac with mild bilateral neuroforaminal narrowing and exacerbated ligamentum flavum hypertrophy; and (4) the rest of the lumbar spine appeared unremarkable. (Px. 6).

Then, on October 21, 2015, Petitioner returned to Dr. Kranzler for a follow up visit. Petitioner's complaints remained unchanged. Dr. Kranzler was waiting for authorization for DSSEP; surgery plan based on DSSEP and perform the test intraoperatively. Dr. Kranzler recommended hemilaminectomy at L3-4, L4-5, and possible L5-S1. On January 13, 2016, Petitioner returned to Dr. Erickson for a follow up visit. Dr. Erickson noted surgery was approved. Surgical benefits and risks were discussed with Petitioner. Subsequently, on January 29, 2016, Petitioner returned to Dr. Erickson to discuss surgical options. Dr. Erickson reviewed MRIs, clinical symptomatology and neurophysiological testing, which he opined suggested Petitioner would need decompression beginning on the left side at L3-4 and L4-5 via a hemilaminectomy. Dr. Erickson opined, depending on the results of the intraoperative nerve testing, decompression at L5-S1 segments might be necessary. (Px. 6). During a follow-up visit on February 3, 2016, Dr. Erickson discussed in some detail the proposed procedure of decompression hemilaminectomy with foraminotomies from L3 through S1 as directed by intraoperative nerve testing. Petitioner opined his leg pain was as severe as his low back pain,

pain level rated 8/10. Dr. Erickson opined conservative treatment was not likely to reverse his situation. (Px. 6).

The Petitioner testified that, on October 5, 2013, he worked at Respondent Specialty Print Communications (hereinafter "SPC"). (Transcript 19-20). Petitioner testified that he was sent to work for SPC by Respondent Paramount Staffing (hereinafter "Paramount"). (Transcript (*hereinafter*, Tr.) 20). Petitioner worked in shipping at SPC. (Tr. 20). Part of his job duties included lifting boxes of mail. (Tr. 21). Petitioner typically started work at SPC between 7:00-7:30 am and worked until 3:00-3:30 pm. (Tr. 56-57).

Petitioner testified that, on October 5, 2013 between 10:00 am and 11:00 am, he bent over to grab a plastic tub full of paper. (Tr. 24-25, 57). Petitioner estimated that the tub weighed between 50-60 pounds. (Tr. 24, 57). Petitioner had difficulty describing the dimensions of the tub, but stated that it was the same size that the mailmen work with. (Tr. 25-26). Petitioner lifted the tub approximately one foot off the ground when he felt pain and dropped the tub. (Tr. 26). Petitioner testified that he felt pain and stinging on his waist as well as pain traveling down into both legs. (Tr. 27).

Petitioner testified that he provided both verbal and written notice of the incident to Eric Ramirez. (Tr. 28, 59). Mr. Ramirez provided Petitioner with the accident report form that he completed on October 5, 2013. (Tr. 60). However, Petitioner testified that Eric Ramirez did not work either for SPC or Paramount. (Tr. 28, 59). Petitioner also testified that he did not discuss this report with Boris Sanchez, who worked in the office for Paramount. (Tr. 31).

Petitioner testified that Truman Pope sent him to Alexian Brothers after the accident and he was driven there by a co-worker by the name of Juvenal Reyes. (Tr. 32). Petitioner testified that the doctors at Alexian Brothers provided light duty work restrictions and Petitioner returned to work the same day. (Tr. 34). Upon returning to work, Petitioner performed job duties which included sitting down and changing bad jobs from one envelope to another. (Tr. 35). Petitioner would alternate between sitting and standing while working light duty. (Tr. 35).

Petitioner testified that he sought medical treatment with Dr. Lorena Ramirez Marque Medicos on November 12, 2013. (Tr. 36-37). Dr. Lorena Ramirez restricted Petitioner completely from work at that time. (Tr. 37). The following day, Petitioner gave the off work note to Eric Ramirez. (Tr. 37-38).

Petitioner testified that he was examined by Dr. Hsu at Northwestern after an MRI of his back in December 2013. (Tr. 38-39). Benefits were stopped after that examination. (Tr. 39).

Petitioner then was examined by Dr. Lorena Ramirez who released him to work with restrictions on January 14, 2014. (Tr. 39). Petitioner returned to work on January 15, 2014 at approximately 7:00 am. (Tr. 39-40, 61). Petitioner testified that he returned to work with restrictions because he wanted to keep working. (Tr. 39). However, Petitioner did not feel physically capable of working at that time. (Tr. 62). Petitioner testified that he spoke with Eric Ramirez that morning about working with the restrictions. (Tr. 40, 61-62). However, Petitioner testified that no one from Paramount told him that he could return to work on that date. (Tr. 61). Petitioner worked the entire day on January 15th. (Tr. 40-41). Petitioner performed work using a forklift which included stacking or unloading pallets. (Tr. 41). Petitioner denied manually lifting any boxes that day. (Tr. 62). Petitioner stood for his entire 8 hour shift that day. (Tr. 41). Petitioner testified that Truman Pope and Boris Sanchez approached him around noon on January 15th to tell him that he could not work with those restrictions. (Tr. 42, 63). Petitioner testified that Mr. Pope and Mr. Sanchez allowed him to work the rest of the day to finish his shift, which was approximately 3 more hours of work. (Tr. 42-43, 63). Petitioner testified that he was not offered any light duty work after that date. (Tr. 43). Petitioner was paid his full wages for the work performed that day. (Tr. 62-63). On January 16, 2014, Petitioner testified that he went back to Dr. Lorena Ramirez who increased the amount of weight that he could lift. (Tr. 43).

Petitioner testified that he then treated with Dr. Harsoor starting on January 24, 2014 who prescribed physical therapy and injections. (Tr. 44). Petitioner had the first injection in February 2014 which provided some relief, but then the pain returned. (Tr. 44-45). Petitioner had the second injection on April 11, 2014 which provided similar results. (Tr. 45). Petitioner testified that Dr. Harsoor noted 70% improvement in symptoms. (Tr. 45). Petitioner had the third injection on September 22, 2014 which, again, provided similar results. (Tr. 47).

Petitioner testified that he eventually saw Dr. Erickson who performed "some kind of electric" examination and prescribed additional physical therapy. (Tr. 46). Dr. Erickson also prescribed a discogram. (Tr. 47). Petitioner testified that the discogram caused more pain. (Tr. 48, 69-70). Petitioner then saw Dr. Kranzler who recommended another MRI as well as surgery. (Tr. 48).

Petitioner testified that he attempts to stay active. (Tr. 51). He goes for walks and attends the soccer matches of his girlfriend's children. (Tr. 52). He testified that he is okay when he engages in more physical activity such as walking for long periods of time, but the pain comes back. (Tr. 53). Petitioner testified that he does not run or jog. (Tr. 64). However, Petitioner also testified that he tries to job, but it hurts so he cannot do it anymore. (Tr. 66). Petitioner testified that he is not able to touch the heel of one foot to the toe of another foot. (Tr. 64). Petitioner is not able to bend forward at the waist. (Tr. 64). Petitioner testified that he

feels a lot of pain when he attempts to bend forward at the waist. (Tr. 72-73). Petitioner is not able to squat down. (Tr. 64). Petitioner later testified that he is able to bend his knees and bend his back a little bit, but feels pain. (Tr. 73). While keeping his waist straight, Petitioner is able to rotate his shoulders left or right a little bit. (Tr. 64). Petitioner does not know whether he is able to lift objects which weigh more than 10 pounds because he has not tried to do so. (Tr. 65). He is sometimes able to stand for long periods of time (Tr. 65). On average, he is only able to sit down for 15-20 minutes. (Tr. 65). Petitioner testified that, if there was a soccer ball in front of him, he would be able to touch it but could not kick it. (Tr. 67). Petitioner also testified that the only pain medication he takes is 1-2 Ibuprofen. (Tr. 53, 70).

Jose Flores testified that he a surveillance investigator for Frasco Investigative Services.[1] (Tr. 79). He was assigned by his employer to conduct a surveillance investigation on Petitioner. (Tr. 80). Mr. Flores conducted surveillance on May 22nd, 23rd, 27th, 28th, 29th, 30th, and June 2nd of 2016. (Tr. 81). Mr. Flores positively identified Petitioner in open court on the date of trial. (Tr. 81). On May 22, 2016, Mr. Flores performed surveillance, but discontinued efforts as there was no activity. (Tr. 82). Then, on May 23, 2016, Mr. Flores initiated surveillance around 7:00 am. (Tr. 82-83). At approximately 7:40 am, Mr. Flores testified that he observed Petitioner leaving his residence on foot and walking three small children to a local elementary school. (Tr. 83). After walking the children to school, Petitioner returned to his residence. (Tr. 83). It took Petitioner approximately 20 minutes to walk the children to school and then return home. (Tr. 84). Mr. Flores testified that Petitioner was not seen using any aids or having any visible restrictions. (Tr. 83). Later that day at approximately 2:50 pm, Mr. Flores testified that he observed Petitioner leaving his residence and picking the children up from the school. (Tr. 84). This trip took about 30 minutes. (Tr. 84). Surveillance was discontinued at 4:00 pm.

On May 27, 2016, Mr. Flores testified that surveillance was initiated at approximately 2:30 pm, but was discontinued at 6:30 pm because he did not observe anything. (Tr. 84-85).

Subsequently, on May 28, 2016, Mr. Flores testified that he observed Petitioner driving children to a local park. (Tr. 85). Two of the children played a soccer game. (Tr. 85). Mr. Flores testified that he observed Petitioner watching the soccer game, from time to time jogging for balls that were kicked out of play, bending at the waist to pick up balls and throw them back into play, and kicking balls back into play. (Tr. 85-86). The soccer game lasted about an hour.

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[1] Surveillance reports dated May 30, 2016 and June 8, 2016 were offered by Respondent and admitted into evidence. (Respondent's Exhibit 7-8). The Arbitrator notes that the information contained within the surveillance reports are consistent with Mr. Flores's testimony. (Respondent's Exhibit (*hereinafter*, Rx.) 7-8).

(Tr. 86). Petitioner stayed for about another half hour to watch part of another game that was going on and talk to various individuals at the park before leaving to go home. (Tr. 86).

Mr. Flores then testified that he began surveillance on May 29, 2016, at 7:30 am, and observed individuals arriving at the residence for what appeared to be a family gathering in the backyard. (Tr. 86-87). Petitioner was not observed outside on this date. (Tr. 87). Surveillance was terminated at approximately 3:30 pm. (Tr. 87). On May 30, 2016, Mr. Flores testified that he initiated surveillance at 8:00 am, but terminated surveillance around 11:00 am because he did not observe any activity. (Tr. 87). On June 2, 2016, Mr. Flores testified that the observed Petitioner leaving his residence on foot to drop off the children at a local elementary school once again. (Tr. 87-88). After Petitioner dropped off the children, he picked up a newspaper from a newspaper dispenser and returned to his residence. (Tr. 88).

Video surveillance footage from May 28, 2016 was presented and played for the Arbitrator during the trial. In watching the video surveillance footage, the Arbitrator notes the following observations:

- At 2 minutes and 49 seconds into the video, Petitioner was observed standing and watching as the soccer game went on. (Tr. 94-95, Rx. 9A). It appeared as though the heel of one of Petitioner's feet touched the toe of his other foot. (Tr. 95, Rx. 9A).
- At 11 minutes and 50 seconds into the video, Petitioner was observed standing by the team huddle during halftime without any visible restrictions and without the use of ambulatory devices. (Tr. 96, Rx. 9A). It appeared as though he rotated his shoulders to the left. (Tr. 96, Rx. 9A).
- At 12 minutes and 43 seconds, Petitioner was observed interacting with the team, pacing up and down the field, and bending at the waist to pick up a book back and sling it over his left shoulder. (Tr. 97, Rx. 9A).
- At 15 minutes and 42 seconds, Petitioner slightly bent at his waist and knees to retrieve a ball off the ground using his hands. (Tr. 97-98, Rx. 9A).
- At 16 minutes and 32 seconds, Petitioner was observed turning and using his right foot to kick a soccer ball back into play. (Tr. 98, Rx. 9A).
- At 16 minutes and 51 seconds, Petitioner was observed jogging towards a soccer ball kicked out of play and then once again used his foot to kick the ball back into play. (Tr. 98, Rx. 9A).
- At 18 minutes and 51 seconds, Petitioner again used his foot to kick a soccer ball back into play. (Tr. 98-99, Rx. 9A).
- At 19 minutes and 54 seconds, Petitioner gave instructions to one of the kids playing soccer, made motions, and twisted his back and his foot in order to coach one of the

kids. (Tr. 99, Rx. 9A). Petitioner then retrieved a ball and dribbled it back to the playing field using both of his feet. (Tr. 99, Rx. 9A).

- At 25 minutes and 30 seconds, Petitioner was observed walking quickly and briefly jogging towards a ball that was kicked out of play, then used both feet to dribble the ball back towards the playing field. (Tr. 99-100, Rx. 9A). Petitioner also bent at the knees to place the ball behind the net of the goal. (Tr. 100, Rx. 9A).
- At 30 minutes and 50 seconds, Petitioner walked towards a ball that was knocked out of play. (Tr. 100, Rx. 9A). He then bent at the waist and used his hand to retrieve the ball. (Tr. 100, Rx. 9A). He then dribbled the ball back towards the playing field. (Tr. 100, Rx. 9A). Petitioner was observed scraping his foot on the ground as if something was on his shoe when he got back toward the playing field. (Tr. 100-101, Rx. 9A).
- At 46 minutes and 50 seconds, Petitioner was observed jogging to a ball that was out of play and used his foot to kick the ball back into play. (Tr. 101, Rx. 9A).

Video surveillance footage from May 23, 2016 and June 2, 2016 was also submitted into evidence, but was not played during trial.[2] (Rx. 9A-B). This video surveillance footage from May 23rd and June 2nd showed Petitioner casually walking children down the street and then back to his residence. Petitioner did not appear to be in any outward physical distress. (Rx. 9A-B). Petitioner was also seen bending at the waist to retrieve a newspaper on the footage from June 2nd. (Rx. 9B).

Still photographs were offered by the Respondent and admitted into evidence over the Petitioner's objection. (Tr. 184).[3] These consisted of:

- Petitioner is slight bent at the waist leaning towards his right side, picking up a backpack with his right arm, with his head turned slightly to the left. (Rx. 10A).
- Petitioner is leaning to the right side, using his right arm to hold a backpack slightly off the ground. (Rx. 10B).
- Petitioner is walking straight toward a fence with his head turned fully to the left side. Petitioner is seen rotating his shoulders to the left. (Rx. 10C).

[2] The Arbitrator notes that the surveillance footage from May 23, 2016, May 28, 2016, and June 2, 2016 is consistent with Mr. Flores's testimony and the surveillance reports entered into evidence. (Rx. 9A-B).

[3] The Arbitrator notes that the video stills from May 23, 2016 and May 28, 2016 are consistent with Mr. Flores's testimony, the surveillance reports, and the surveillance video entered into evidence. (Rx. 10A-L).

- Petitioner is walking straight toward a fence with his head turned fully to the left side, and looking slightly over his left shoulder. Petitioner is rotating/twisting his shoulders to the left. (Rx. 10D).
- Petitioner has his knees bent and is bending at the waist to reach down to pick up a soccer ball. (Rx. 10E).
- Petitioner is holding a soccer ball with his right hand, and has his right leg extended backwards to kick a soccer ball on the ground in front of him. (Rx. 10F).
- Petitioner appears to be moving at a light jog with a soccer ball in his right hand. (Rx. 10G).
- Petitioner has just kicked a soccer ball on the ground, and his right leg is extended forward. (Rx. 10H).
- Petitioner is demonstrating a kicking motion for a child. He is standing on his left leg, with his right leg elevated to approximately knee height, his arms are out at his sides, and his head is turned slightly to the right. (Rx. 10I).
- Petitioner is bent down in a crouched position behind a soccer goal as he places a ball under the corner of the goal. (Rx. 10J).
- Petitioner is bent down at the waist leaning down to the right side with his right leg in front of him and left leg on an angle behind him. He is picking up a ball with his right arm. (Rx. 10K).
- Petitioner has his right leg extended in the air in front of his body at approximately knee height, his arms are out to his sides, and his head is angled slightly downward as he kicks a soccer ball. (Rx. 10L).

Mr. Boris Sanchez testified that he has been employed by Paramount Staffing for the last 16 years. (Tr. 116-117). Currently, his job title is district manager. (Tr. 116-117). On October 5, 2013, Petitioner was working for Paramount as a branch manager. (Tr. 117). Mr. Sanchez testified that Eric Ramirez is not an employee of Paramount Staffing. (Tr. 118). Mr. Sanchez testified that he is not sure whether Eric Ramirez worked for SPC. (Tr. 118). There were other staffing firms that supplied employees to SPC on the alleged date of injury. (Tr. 119).

Mr. Sanchez testified that he was working in the office on January 15, 2014. (Tr. 119-120). He was off-site from SPC when Mr. Sanchez noticed that Petitioner had clocked in around 6:30 am. (Tr. 120, 125). He noticed this at around 2:00 pm. (Tr. 120). Mr. Sanchez arrived at SPC around 2:30 pm. (Tr. 125). Mr. Sanchez spoke to Truman Pope. (Tr. 120-121). Truman Pope worked for SPC. (Tr. 121). Mr. Sanchez testified that he did not authorize Petitioner to return to work on January 15, 2014. (Tr. 121). Mr. Sanchez testified that he and Mr. Pope approached Petitioner to ask him for the document which released him to light duty employment. (Tr. 121-122). Petitioner did not state that he provided the light duty release to anyone else earlier that

day. (Tr. 122). Mr. Sanchez testified that Petitioner stated he simply forgot to turn in the light duty note at the beginning of his shift. (Tr. 123). Mr. Sanchez told Petitioner that his light duty restrictions could not be accommodated and that Petitioner had to leave for the day. (Tr. 123). Petitioner was sent home immediately around 3:00 pm. (Tr. 123). However, it was roughly the end of his shift. (Tr. 123). Mr. Sanchez testified that Petitioner was near a forklift and pallet with boxes when he approached him. (Tr. 124). Mr. Sanchez also testified that Petitioner's job duties would have required him to manually lift boxes on that date. (Tr. 124, 129-130). Petitioner did not report any complaints of pain to Mr. Sanchez on that date. (Tr. 123).

On December 11, 2013, Petitioner presented to Dr. Wellington Hsu for an IME. (Rx. 1, Dep. Ex. 2). Dr. Hsu testified that he was a board certified orthopedic surgeon who was licensed to practice medicine in Illinois. (Rx. 1, Dep. Tr. 5 & Dep. Ex. 1). Petitioner provided a history of moving a number of boxes weighing 60 pounds on October 5, 2013 and, while bent over lifting a box, noted immediate onset of low back pain as well as left greater than right lower extremity pain. He reported receiving physical therapy with significant improvement. (Rx. 1, Dep. Ex. 2).

Upon physical examination, Dr. Hsu performed a straight leg test which was negative. (Rx. 1, Dep. Tr. 11). A negative straight leg raise test suggests that that there is no nerve root compression. (Rx. 1, Dep. Tr. 11). Petitioner had a normal gait and could heel and toe walk. (Rx. 1, Dep. Tr. 11). The neurological examination was normal with full strength and a normal sensation exam. (Rx. 1, Dep. Tr. 11). Dr. Hsu also noted positive Waddell's signs which indicate nonorganic or a psychosocial component to low back pain. (Rx. 1, Dep. Tr. 10). Dr. Hsu was suspicious that Petitioner did not give full effort during range of motion testing. (Rx. 1, Dep. Ex. 2). Dr. Hsu reviewed the MRI which he opined showed evidence of L3-4 and L4-5 mild spondylotic changes without evidence of disc bulging or spinal stenosis. (Rx. 1, Dep. Tr. 12).

Dr. Hsu testified that Petitioner had sustained a lumbar strain on October 5, 2013 and also had a pre-existing condition of lumbar spondylosis. (Rx. 1, Dep. Tr. 13-14). Dr. Hsu concluded that the basis for his conclusion that Petitioner sustained a lumbar strain was the mechanism of action, which is low impact, and the expectation of that soft tissue injury to heal with appropriate conservative care. (Rx. 1, Dep. Tr. 15-16). Dr. Hsu stated that the spondylosis in the discs and facet joints are not caused by any occupational movement or traumatic event. (Rx. 1, Dep. Tr. 15). Instead, they are caused by genetic related predisposition and age related and wear related phenomenon. (Rx. 1, Dep. Tr. 15). Dr. Hsu testified that the pre-existing lumbar spondylosis was a structural injury which is inconsistent with the mechanism of injury. (Rx. 1, Dep. Tr. 35).

Dr. Hsu also concluded that Petitioner had reached MMI. (Rx. 1, Dep. Tr. 15-16). Petitioner did not require any additional medical treatment. (Rx. 1, Dep. Tr. 16). The basis for this opinion was that Dr. Hsu's diagnosis of lumbar strain resolved with appropriate care. (Rx. 1,

Dep. Tr. 16). Petitioner could return to his pre-injury job without restrictions. All of Dr. Hsu's opinions were based upon reasonable degree of medical and surgical certainty. (Rx. 1, Dep. Ex. 2).

Subsequently, on June 12, 2015, Dr. Hsu performed a medical records review and drafted an addendum to his initial IME report. (Rx. 2). After review of the updated medical records, Dr. Hsu diagnosed a resolved lumbar strain and lumbar spondylosis. Dr. Hsu concluded that Petitioner's current level of back pain was not related to the alleged October 5, 2013 work incident. The incident was low impact and would not be expected to cause a structural injury to the lumbar spine. Dr. Hsu concluded that all the treatment leading up to his last IME was reasonable and necessary in relation to the October 5, 2013 work incident which caused a lumbar strain. However, Dr. Hsu concluded that all the treatment thereafter was secondary to a lumbar spondylotic condition that is pre-existing and age related and was in no way related to the work incident. Additionally, Dr. Hsu stated that the discogram was not medically necessary as evidence-based literature suggests poor prognosticating utility and can lead to increased disc degeneration and herniations in the future. Dr. Hsu concluded that Petitioner was a poor surgical candidate because evidence-based literature is replete with studies that demonstrate a poor outcome with surgical treatment rather than conservative care with patients of this demographic. Dr. Hsu again stated work restrictions would not be appropriate as a result of the work incident and Petitioner had reached MMI without suffering any permanent partial disability. Dr. Hsu provided a 0% impairment rating. All of Dr. Hsu's opinions were based upon reasonable degree of medical and surgical certainty. (Rx. 2).

Thereafter, on April 18, 2016, Dr. Hsu performed another clinical evaluation of Petitioner, a medical records review, and drafted an addendum to his two prior IME reports. (Rx. 3). Dr. Hsu performed a physical examination and noted the range of motion of Petitioner's lumbar spine was 30 degrees of flexion, 10 degrees of extension and 40 degrees of left and right lateral rotation. I am suspicious that he did not give forth full effort for this range of motion examination. Dr. Hsu also noted Petitioner had positive Waddell signs with axial compression, supersensitivity and hip rotation 3/4. Dr. Hsu noted a normal gait and that Petitioner could heel and toe walk and tandem walk without difficulty. Dr. Hsu's neurological examination demonstrates 5/5 strength throughout Petitioner's bilateral lower and upper extremities in all muscle groups. Petitioner's sensation is intact to light touch throughout all distributions. Petitioner's reflexes are normal. (Rx. 3).

Dr. Hsu reviewed the MRI of the lumbar spine from 09/22/2015 which demonstrated L3-L4 and L4-L5 mild spondylotic changes. Dr. Hsu noted there was no evidence of instability. Dr. Hsu noted there was no evidence of disk bulging or spinal stenosis. Dr. Hsu concluded that there was very little change with this MRI compared to the 2013 MRI. (Rx. 3).

19IWCC0536

Dr. Hsu diagnosed a resolved lumbar strain and lumbar spondylosis. Dr. Hsu noted symptom magnification on physical examination where the claimant was suspected not to give forth full effort during the range of motion examination of the lumbar spine. The reason was that he was observed to have greater range of motion in the examining room of his lumbar spine when he was not being actively tested for it. Furthermore, he did have positive Waddell signs as he did during his previous independent medical evaluation. Dr. Hsu stated that there was no evidence of any acute injury on my clinical evaluation or diagnostic tests. It does not appear that he has any acute pathology supporting his subjective complaints of low back pain at this time. Dr. Hsu concluded that Petitioner's current condition was not causally related to the alleged October 5, 2013 work injury. Dr. Hsu also stated that Petitioner did not require any work restrictions. Based on Dr. Hsu's physical examination, Petitioner has no functional disability and can return to full duty employment. Dr. Hsu stated Petitioner had reached MMI. Dr. Hsu also believed that all of Petitioner's treatment to date had been reasonable for the treatment of lumbar spondylosis. However, Dr. Hsu stated the MRI of September 22, 2015 and a DSSEP test were not necessary as a result of Petitioner's spondylotic condition. Dr. Hsu also stated that that a lumbar hemilaminectomy at L3-L4, L4-L5 and L5-S1 is not medically necessary or reasonable at this time based on Petitioner's pathology which does not show significant stenosis. All of Dr. Hsu's opinions were based upon reasonable degree of medical and surgical certainty. (Rx. 3).

On January 27, 2016, Dr. Leonard Kranzler testified that he was board certified in neurological surgery. (Px. 30, Dep. Tr. 4 & Dep. Ex. 1). Dr. Kranzler is licensed to practice medicine in Illinois. (Px. 30, Dep. Tr. 6-7 & Dep. Ex. 1). Dr. Kranzler testified that he reviewed Petitioner's file was on March 25, 2015 which was approximately a year and a half after the alleged date of injury. (Px. 30, Dep. Tr. 61-63). However, Dr. Kranzler did not perform a clinical exam until August 19, 2015. (Px. 30, Dep. Tr. 63). Petitioner presented to Dr. Kranzler with complaints of low back pain radiating down both legs with numbness and tingling, left worse than right. (Px. 30, Dep. Tr. 11). Petitioner also complained of electric shock like sensations into his left grate toe with a sense of weakness and rated his pain 7/10. (Px. 30, Dep. Tr. 11). Petitioner could sit for 20-25 minutes and then would need to stand to alleviate the pain. (Px. 30, Dep. Tr. 11). Dr. Kranzler testified that pain radiating into the legs suggested that Petitioner had an irritated nerve. (Px. 30, Dep. Tr. 11). Dr. Kranzler testified that numbness of the great toe suggested issues at L5. (Px. 30, Dep. Tr. 12). However, Dr. Kranzler testified that it is not standard practice to rely fully on the neurological examination because there is considerable crossover between one nerve and another. (Px. 30, Dep. Tr. 12).

Dr. Kranzler testified that he reviewed the results of the CT scan dated February 27, 2015. (Px. 30, Dep. Tr. 13). However, Dr. Kranzler could not recall whether he reviewed only the CT scan report or the images as well. (Px. 30, Dep. Tr. 51). The CT scan suggested an

abnormality at the L4-5 level. (Px. 30, Dep. Tr. 13). Dr. Kranzler also reviewed the discogram which was positive at L4-5. (Px. 30, Dep. Tr. 14). Dr. Kranzler reviewed the MRI dated December 1, 2013, but could not tell whether he reviewed the images or just the report. (Px. 30, Dep. Tr. 15). The MRI showed lateral recess stenosis which is indicative of nerve compression. (Px. 30, Dep. Tr. 14-15). Dr. Kranzler reviewed dermatomal somatosensory evoked potentials (hereinafter "DSSEP") test which indicated nerve irritability at L3 bilaterally and L4 on the left. (Px. 30, Dep. Tr. 18-20). A normal rate would be a standard deviation of 0.7. (Px. 30, Dep. Tr. 22). Dr. Kranzler stated the majority of people have a 0.9 to 1.2 standard deviation. (Px. 30, Dep. Tr. 91). Dr. Kranzler stated that the highest standard deviation he has ever seen was 3.0. (Px. 30, Dep. Tr. 90). However, Dr. Kranzler considers a 0.8 standard deviation to be clinically significant. (Px. 30, Dep. Tr. 90). Petitioner's DSSEP test noted a standard deviation of 0.9. (Px. 30, Dep. Tr. 22). Dr. Kranzler also reviewed the MRI dated September 22, 2013 which revealed anterior disc protrusions at L3-4, L4-5, and L5-S1 with a torn annulus at L3-4. (Px. 30, Dep. Tr. 38). Dr. Kranzler testified that the first and second MRIs were essentially the same. (Px. 30, Dep. Tr. 39).

On cross examination, Dr. Kranzler testified that he could not recall if he reviewed any emergency room records. (Px. 30, Dep. Tr. 48). Dr. Kranzler testified that he did not review Dr. Harsoor's records either. (Px. 30, Dep. Tr. 48-49). Dr. Kranzler testified that he did not review the EMG performed on Petitioner. (Px. 30, Dep. Tr. 60). Dr. Kranzler also reviewed Dr. Erickson's medical record dated June 25, 2014 in which Dr. Erickson noted the neurologic exam was quite good with no areas of discrete weakness, numbness, and no long track signs. (Px. 18 & Px. 30, Dep. Tr. 49-50). Dr. Erickson also noted the reflexes were symmetrical and did not see any abnormality, namely, straight leg raising. (Px. 18. & Px. 30, Dep. Tr. 49-50). Dr. Kranzler also did not find a specific comment regarding numbness. (Px. 18 & Px. 30, Dep. Tr. 50). Dr. Kranzler noted that hip maneuvers and the Faber test were both negative. (Px. 18 & Px. 30, Dep. Tr. 50). Dr. Kranzler agreed that Petitioner presented to Dr. Erickson without any issues aside from subjective complaints. (Px. 30, Dep. Tr. 50). Dr. Kranzler also testified that discograms can cause degeneration in the disc more frequently on the side of the procedure and are an unreliable test which does not have a high-grade value. (Px. 30, Dep. Tr. 52). Dr. Kranzler further conceded that he would not order a discogram as a diagnostic tool. (Px. 30, Dep. Tr. 55).

Dr. Kranzler diagnosed Petitioner with lumbar radiculopathy originating from the L4 and L5 levels. (Px. 30, Dep. Tr. 23). Dr. Kranzler testified that the cause of the radiculopathy was lateral recess stenosis at L3-4 and L4-5. (Px. 30, Dep. Tr. 23-24). Dr. Kranzler also testified that stenosis is a degenerative condition. (Px. 30, Dep. Tr. 24). The bulging of the discs could add to the narrowing, but the bony changes are more longstanding. (Px. 30, Dep. Tr. 24). Dr. Kranzler concluded that Petitioner's diagnostic and clinical findings correlated. (Px. 30, Dep. Tr. 25).

Petitioner reported to Dr. Kranzler that he was well until October 5, 2013 when he lifted and twisting in the process of lifting a bin weighing 50-60 lbs. (Px. 30, Dep. Tr. 32). Petitioner told Dr. Kranzler that he felt a sudden severe back pain radiating into his legs over the anteriolateral aspects of the thighs. (Px. 30, Dep. Tr. 32). Dr. Kranzler concluded that Petitioner's complaints and condition was causally related to the alleged work incident. (Px. 30, Dep. Tr. 35-36). Dr. Kranzler stated that Petitioner's injury is acute in the fact that the symptoms began at that moment, but it is superimposed on a background of arthritic stenosis. (Px. 30, Dep. Tr. 34-35). However, Dr. Kranzler testified that bony changes are not likely to occur at the moment that a 60-lb tub is picked up. (Px. 30, Dep. Tr. 33). Dr. Kranzler also testified that the period of time between 2013 and the first MRI was not sufficient to create the bony changes that are seen. (Px. 30, Dep. Tr. 35). Dr. Kranzler testified that ordering a second MRI was uncommon, but wanted to see if there was any updated information since the first MRI. (Px. 30, Dep. Tr. 38). Dr. Kranzler recommended surgery in the form of a hemilaminectomy at L3-4, L4-5, and possibly L5-S1. (Px. 30, Dep. Tr. 39-40). Dr. Kranzler also testified that the need for surgery was causally related to the alleged work incident. (Px. 30, Dep. Tr. 42-43).

Dr. Kranzler testified that he did not have any information regarding an unauthorized return to work. (Px. 30, Dep. Tr. 76-77). Dr. Kranzler testified that, if Petitioner went back to work, then he had to be physically capable of going back to work. (Px. 30, Dep. Tr. 77). Dr. Kranzler also testified that it was also possible that an outside incident unrelated to the alleged work incident or Petitioner's job caused, aggravated or accelerated his degenerative condition after the January 15, 2014 unauthorized return to work. (Px. 30, Dep. Tr. 85). All of Dr. Kranzler's medical opinions were based on a reasonable degree of medical and surgical certainty. (Px. 30, Dep. Tr. 8).

On July 29, 2014, Dr. Clarence Fossier testified that he was a board certified orthopedic surgery who is licensed to practice in Illinois, Georgia, Tennessee, and Washington. (Rx. 4, Dep. Tr. 9). Dr. Fossier performed utilization review (*hereinafter* "UR") on April 29, 2014. (Rx. 4, Dep. Tr. 14). The UR parameters for chiropractic and physical therapy are found in ODG. (Rx. 4, Dep. Tr. 18). Dr. Fossier testified that the initial treatment rendered to Petitioner, including the initial x-rays and the MRI, was reasonable and necessary. (Rx. 4, Dep. Tr. 19). However, Dr. Fossier testified that the frequency and duration of the nonoperative treatment by Dr. Perez and the physical therapy was excessive or prolonged. (Rx. 4, Dep. Tr. 19). Dr. Fossier testified that up to 10 physical therapy treatments, but anything beyond that was more than what was required. (Rx. 4, Dep. Tr. 19-20, 21). Dr. Fossier also testified that any chiropractic treatment over 12 visits would have been unnecessary. (Rx. 4, Dep. Tr. 21). Dr. Fossier did not believe there was anything exceptional in Petitioner's situation. (Rx. 4, Dep. Tr. 20). Dr. Fossier also testified that that the ESI performed on February 14, 2014 was not medically reasonable and necessary. (Rx. 4, Dep. Tr. 22). Dr. Fossier recommended a self-correct home exercise program. (Rx. 4, Dep. Tr.

22). All of Dr. Fossier's medical opinions were based on a reasonable degree of medical and surgical certainty. (Rx. 4, Dep. Tr. 22).

On March 11, 2016, Dr. Jacob Goodrich testified that he was a board certified orthopedic surgeon. (Rx. 5, Dep. Ex. 1). Dr. Goodrich was licensed to practice medicine in Georgia and South Carolina. (Rx. 5, Dep. Tr. 7). Dr. Goodrich performed two URs in relation to Petitioner's claim on September 9, 2015. (Rx. 5, Dep. Ex. 2-3). Dr. Goodrich testified that he performed UR of the second lumbar MRI. (Rx. 5, Dep. Tr. 8 & Dep. Ex. 2-3). In relation to the UR of the second MRI, Dr. Goodrich testified that he reviewed the medical records and Petitioner had a prior MRI study performed in December 2013. (Rx. 5, Dep. Tr. 8). Dr. Goodrich testified that he concluded that he did not certify the medical necessity of the second lumbar MRI. (Rx. 5, Dep. Tr. 12). Dr. Goodrich testified that he used ODG as the parameters for arriving at his conclusions. (Rx. 5, Dep. Tr. 9-10). Dr. Goodrich reviewed a significant number of medical records in arriving at this conclusion, all of which were summarized in his report. (Rx. 5, Dep. Tr. 8-9 & Dep. Ex. 2-3). Dr. Goodrich also testified that he based his conclusion on the fact that Petitioner had the same complaints, predominantly back pain, more so than the leg pain and numbness; all of the findings seemed to be consistent or unchanged over that two-year period of time. (Rx. 5, Dep. Tr. 10). Dr. Goodrich also based his conclusions on the fact that Petitioner had a stable exam. (Rx. 5, Dep. Tr. 11).

Dr. Goodrich testified that he performed UR of the second DSSEP test as well. (Rx. 5, Dep. Tr. 13-14). Dr. Goodrich testified that he concluded the second DSSEP test was not medically necessary per the guidelines and his personal experience. (Rx. 5, Dep. Tr. 14-15). Dr. Goodrich testified that he used ODG as the parameters for arriving at his conclusions. (Rx. 5, Dep. Tr. 15). Dr. Goodrich reviewed the same medical records for the DSSEP test as he did for the MRI in arriving at this conclusion, all of which were summarized in his report. (Rx. 5, Dep. Tr. 15 & Dep. Ex. 4-5). Dr. Goodrich testified that he based this conclusion on the fact that there had been no real change over a two-year period with serial examinations by two different spinal surgeons, the history document, the physical exam documented, and the response to therapy documented. (Rx. 5, Dep. Tr. 15-16). Dr. Goodrich also testified that the reliability of the DSSEP test played a role in reaching his conclusion. (Rx. 5, Dep. Tr. 16). All of the opinions Dr. Goodrich expressed were based on a reasonable degree of medical certainty. (Rx. 5, Dep. Ex. 2-5).

On March 14, 2016, Dr. Christopher Zarro testified that he was a board certified orthopedic surgeon. (Rx. 6, Dep. Ex. 1). Dr. Zarro has a private practice and is also a professor of orthopaedics at UMDNJ/New Jersey Medical School. (Rx. 6, Dep. Tr. 6-7, Dep. Ex. 1). Dr. Zarro performed UR on December 23, 2014. (Rx. 6, Dep. Ex. 2-3). The focus of the UR was whether a lumbar discography L2 through S1 was medically necessary and appropriate. (Rx. 6, Dep. Tr. 8-

9). Dr. Zarro used ODG as the parameters for arriving at his conclusions. (Rx. 6, Dep. Tr. 9). Dr. Zarro concluded that the lumbar discogram was not medically necessary. (Rx. 6, Dep. Tr. 9). Dr. Zarro testified that the basis for his opinion stemmed from the patient diagnosis, the clinical exam findings, the MRI findings, Petitioner's response to the epidural injection, the lack of sensitivity and specificity of discograms, the incidence of discitis, which can be over 2 percent from a discogram, and the incidence of discograms causing a disc herniation with increased symptoms. (Rx. 6, Dep. Tr. 26-27). All of the opinions Dr. Zarro expressed were based on a reasonable degree of medical certainty. (Rx. 6, Dep. Tr. 11).

On January 20, 2016, Dr. Steven Milos testified that he is board certified in orthopedics and sport medicine. (Px. 27, Dep. Tr. 7). Dr. Milos also testified that he is licensed to practice medicine only in Illinois. (Px. 27, Dep. Tr. 6). Dr. Milos testified that he performed UR of a surgical laminectomy and discectomy for L3-5 and possible L5-S1. (Px. 27, Dep. Tr. 16). Dr. Milos testified that he noted a diagnosis of lumbar radiculopathy. (Px. 27, Dep. Tr. 17). Dr. Milos reviewed an MRI report dated February 1, 2013, but not the films. (Px. 27, Dep. Tr. 17). The MRI report indicated there was stenosis laterally at L3-4/L4-5 level with some mild bulging at L5-S1. (Px. 27, Dep. Tr. 17). Dr. Milos also reviewed a discogram report which document abnormality of the L4-5 disk. (Px. 27, Dep. Tr. 17-18). Dr. Milos also reviewed another MRI report dated September 22, 2015 which was consistent with the prior study. (Px. 27, Dep. Tr. 18). Dr. Milos testified that the findings on the diagnostic tests would typically be chronic in nature. (Px. 27, Dep. Tr. 43). Dr. Milos also reviewed a DSSEP test which was significant for abnormal changes in the nerve at the L3 and L4 levels. (Px. 27, Dep. Tr. 18-19). Dr. Milos also testified that there was a note in his file materials dated November 10, 2015 from Kristen Johnson, RN, which indicated there was a lack of information. (Px. 27, Dep. Tr. 24). Dr. Milos testified that he did not review a job description prior to rendering his opinions. (Px. 27, Dep. Tr. 40-41). Dr. Milos also did not review Dr. Erickson's report dated June 25, 2014. (Px. 27, Dep. Tr. 41). Dr. Milos did not review the emergency room records dated October 5, 2013. (Px. 27, Dep. Tr. 41). Dr. Milos did not review lumbar x-rays dated November 12, 2013, the EMG dated January 13, 2014, or the lumbar CT scan dated February 27, 2015. (Px. 27, Dep. Tr. 41). Dr. Milos did not review any medical records prior to March 25, 2015. (Px. 27, Dep. Tr. 41). Of the reports that Dr. Milos did review, he did not review the corresponding films or images. (Px. 27, Dep. Tr. 42). Dr. Milos testified that he did not review any of Dr. Hsu's IME reports and was unaware that Dr. Hsu concluded that Petitioner was not a surgical candidate. (Px. 27, Dep. Tr. 42). Dr. Milos also testified that he never performed a clinical evaluation of Petitioner. (Px. 27, Dep. Tr. 44).

Dr. Milos testified that he spoke with Dr. Kranzler to determine why surgery was recommended. (Px. 27, Dep. Tr. 30). However, Dr. Milos never attempted to contact Dr. Hsu. (Px. 27, Dep. Tr. 42). Dr. Milos concluded that surgery was medically reasonable. (Px. 27, Dep. Tr. 31, 44). Dr. Milos used the ODG in arriving at his conclusions. (Px. 27, Dep. Tr. 34). Dr. Milos

19IWCC0536

testified that the basis for this opinion was that Petitioner had a long-standing history of symptoms consistent with the levels that were being discussed, Petitioner had objective studies with an MRI, discograms, and SSEP, Petitioner had failed conservative treatment, was having difficulty with his day-to-day activity, and Petitioner had exhausted all conservative treatment options. (Px. 27, Dep. Tr. 31-32). Dr. Milos testified that his opinion regarding the medical reasonableness of surgery would change if he knew that another doctor concluded that Petitioner was not a surgical candidate. (Px. 27, Dep. Tr. 45). Dr. Milos also testified that his opinion would change if he knew that there was other diagnostic evidence that he did not previously have which suggested that Petitioner did not have the symptomatology he complained of in the medical records. (Px. 27, Dep. Tr. 45).

Dr. Milos also testified that there was an email from Respondent's attorney dated November 2, 2015 which was contained in the file materials sent to him. (Px. 27, Dep. Tr. 26-28). Dr. Milos testified that he saw the email, but it did not mean anything to him. (Px. 27, Dep. Tr. 29). Dr. Milos testified that this email did not have any bearing or any effect on the opinions contained in his UR report. (Px. 27, Dep. Tr. 46).

CONCLUSIONS OF LAW

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

Issue F: *Causal connection*

A claimant has the burden of proving, by a preponderance of the evidence, all of the elements of his claim. It is the function of the Commission to judge the credibility of the witnesses to resolve conflicts in the medical evidence. *O'Dette v. Industrial Com'n*, 79 Ill. 2d 249 (1980). In deciding questions of fact, it is the function of the Commission to resolve conflicting medical evidence, judge the credibility of the witnesses, and assign the weight to the witnesses' testimony. *R & D Thiel v. Illinois Workers' Compensation Com'n*, 398 Ill. App. 3d 858, 868 (1st Dist. 2010); See also *Hosteny v. Illinois Workers' Compensation Com'n*, 397 Ill. App. 3d 665, 674 (1st Dist. 2009).

For an employee's workplace injury to be compensable under the Workers' Compensation Act, the employee must establish the fact that the injury is due to a cause connected with the employment such that it arose out of said employment. *Hansel & Gretel Day Care Center v. Industrial Com'n*, 215 Ill. App. 3d 284 (3rd Dist. 1991). It is not enough that Petitioner is working when accidental injuries are realized; Petitioner must show that the injury

was due to some cause connected with employment. *Board of Trustees of the University of Ill. v. Industrial Commission*, 44 Ill. 2d 207, 214 (1969).

The Arbitrator concludes that Petitioner sustained a lumbar strain as a result of the alleged work incident on October 5, 2013. The Arbitrator concludes that Petitioner's current condition of ill-being as it relates to the lumbar spine / low back is not causally related to the alleged work incident on October 5, 2013.

The Arbitrator notes Petitioner's testimony that, on October 5, 2013 between 10:00 am and 11:00 am, he bent over to grab a plastic tub full of paper and felt pain. Petitioner present to Alexian Brothers Medical Group rating his pain as 9/10. However, the treating physician noted that Petitioner did not appear in any acute distress, but did have some tenderness to the left side of his back. X-rays dated November 12, 2013 were unremarkable for evidence of fracture and the soft tissue structures were unremarkable. A subsequent MRI dated December 1, 2013 was interpreted by the radiologist as showing diffuse lumbar spondylosis with multilevel annular disc bulging and hypertrophy of posterior elements most prominent at L4-5 and a diffuse 3 mm disc bulge at L4-5.

Petitioner presented to Dr. Wellington Hsu for an IME on December 11, 2013. Upon physical examination, Dr. Hsu performed a straight leg test which was negative which suggests that that there is no nerve root compression. Petitioner had a normal gait and could heel and toe walk. The Arbitrator notes that Petitioner testified that he was not able to perform this action. Dr. Hsu's neurological examination was normal with full strength and a normal sensation exam. Dr. Hsu also noted positive Waddell's signs which indicate nonorganic or a psychosocial component to low back pain. Dr. Hsu was suspicious that Petitioner did not give full effort during range of motion testing. Dr. Hsu reviewed the MRI films and disagreed with the radiologist's interpretation. Dr. Hsu noted the MRI showed evidence of L3-4 and L4-5 mild spondylotic changes without evidence of disc bulging or spinal stenosis. Dr. Hsu diagnosed a lumbar strain based on the low impact mechanism of action. Dr. Hsu testified that the pre-existing lumbar spondylosis was a structural injury which is inconsistent with the mechanism of injury. Dr. Hsu placed Petitioner at MMI and concluded he did not require any further treatment. Petitioner could return to his pre-injury job without restrictions.

An EMG performed on January 13, 2014 did not reveal electrodiagnostic evidence of a lumbosacral radiculopathy in both lower extremities and no evidence of a diffuse peripheral polyneuropathy. The Arbitrator notes this evidence is consistent with the prior lumbar x-rays as well as Dr. Hsu's opinions and interpretation of the MRI. The study does not support Petitioner's subjective complaints.

The Arbitrator notes that Petitioner then attempted an unauthorized return to work on January 15, 2014. Petitioner testified that he spoke with Eric Ramirez about returning to work, but conceded that Eric Ramirez did not work for either Respondent SPC or Respondent Paramount. Petitioner worked an entire shift at full duty. His manager, Boris Sanchez, testified that he would have been moving boxes using a forklift, and also would have been required to manually lift boxes as well. When confronted about returning to work by his supervisors, Petitioner stated that he forgot to provide the light duty work status note. Petitioner was advised that his restrictions could not be accommodated and was sent home. Petitioner did not complain to Mr. Sanchez about any pain. The Arbitrator also notes that Petitioner testified that his restrictions were improved the day after the attempted return to work.

Petitioner continued treating conservatively and received injections. Dr. Harsoor noted 70% improvement in overall symptoms from conservative modalities by May 2, 2014, but Petitioner's subjective complaints remained unchanged.

Dr. Erickson evaluated Petitioner on June 25, 2014 and noted the neurologic exam was quite good with no areas of discrete weakness, numbness, and no long track signs. Dr. Erickson also noted the reflexes were symmetrical and did not see any abnormality, namely, straight leg raising. Petitioner's hip maneuvers and the Faber test were both negative. Dr. Erickson did not make a specific comment regarding numbness. In reviewing the medical record, Dr. Kranzler agreed that Petitioner presented to Dr. Erickson without any issues aside from subjective complaints. Dr. Erickson then evaluated Petitioner on October 8, 2014 and noted that there were "no new worrisome findings" on his neurological examination. He also noted Petitioner's subjective pain rating had diminished from 8-9/10 to a 4-5/10.

A discogram and lumbar CT scan dated February 27, 2015 revealed no disc herniations at L1 through S1 levels, but a small disc protrusion was seen at L4-5. The Arbitrator notes that this interpretation of these diagnostics is consistent with Dr. Hsu's interpretation of the MRI from December 2013; the discogram and CT scan findings do not correlate to Petitioner's subjective complaints or the treating physicians' objective findings in any consistent, meaningful, or significant way.

Dr. Hsu again performed a records review on June 12, 2015. Dr. Hsu diagnosed a resolved lumbar strain and lumbar spondylosis and, again, concluded that Petitioner's current level of back pain was not related to the alleged October 5, 2013 work incident. The incident was low impact and would not be expected to cause a structural injury to the lumbar spine. Dr. Hsu concluded that all the treatment leading up to his last IME was reasonable and necessary in relation to the October 5, 2013 work incident which caused a lumbar strain. All the treatment thereafter was secondary to a lumbar spondylotic condition that is pre-existing and age related and was in no way related to the work incident.

Dr. Hsu performed an updated IME on April 18, 2016. Dr. Hsu was suspicious that Petitioner did not give forth full effort for this range of motion examination. Dr. Hsu also noted Petitioner had positive Waddell signs with axial compression, supersensitivity and hip rotation 3/4. Dr. Hsu noted a normal gait and that Petitioner could heel and toe walk and tandem walk without difficulty. Dr. Hsu's neurological examination demonstrates 5/5 strength throughout Petitioner's bilateral lower and upper extremities in all muscle groups. Petitioner's sensation is intact to light touch throughout all distributions. Petitioner's reflexes were normal. After review of the MRI of the lumbar spine dated September 22, 2015, Dr. Hsu concluded that there was very little change with this MRI compared to the 2013 MRI.

Petitioner's argument rests on the opinions of Dr. Kranzler in providing a causal connection between the alleged work incident and Petitioner's current condition of ill-being. Dr. Kranzler recommended surgery in the form of a hemilaminectomy at L3-4, L4-5, and possibly L5-S1. However, Dr. Kranzler did not perform a clinical evaluation of Petitioner until August 19, 2015, which is more than 22 months after the alleged date of injury. Dr. Kranzler could not recall if he reviewed any emergency room records. Dr. Kranzler could not recall whether he reviewed the films/images from the December 2013 MRI. Dr. Kranzler also did not review Dr. Harsoor's records. Dr. Kranzler further testified that he did not review the EMG performed on Petitioner in January 2014. Dr. Kranzler did review the medical records of his colleague, Dr. Erickson, but ignored Dr. Erickson's neurological evaluations. The Arbitrator does not find the opinions of Dr. Kranzler to be credible as his examinations are too far removed from the alleged date of injury. The Arbitrator notes that, except for the unauthorized return to work on January 15, 2014, Petitioner has not worked whatsoever and a significant amount of time has passed which breaks the casual chain between the alleged work incident and Petitioner's current condition of ill-being. The lack of a causal connection is further highlighted by the lack of objective clinical findings and disputed diagnostic findings which do not support Petitioner's subjective complaints.

The Arbitrator notes that Petitioner's subjective complaints were largely unsubstantiated by any objective findings until the discogram was performed, which Petitioner's treating physician admits is an unreliable test that is known to cause, accelerate, or aggravate pre-existing conditions.

Furthermore, the Arbitrator notes the surveillance evidence presented by Respondent is inconsistent with Petitioner's testimony as well as the subjective complaints and objective findings contained within the medical records. The surveillance evidence that the Arbitrator relies on includes testimony of Jose Flores, surveillance reports, video footage, and video stills. The Arbitrator notes that the surveillance evidence indicates that Petitioner was not completely candid with the treating physicians regarding his physical capabilities and limitations

throughout his medical treatment, nor was he candid with the testimony provided to the Arbitrator at trial.

As such, the Arbitrator relies on the above evidence and Dr. Hsu's opinions that the alleged mechanism of injury regarding Petitioner's lumbar spine / low back are not casually related to the injury in question and finds that Petitioner's current condition of ill-being as it relates to his lumbar spine / low back is not casually related to the October 5, 2013 work accident.

Issue J: *Medical bills*

In light of the Arbitrator's determination that Petitioner failed to establish that his current condition of ill being regarding his lumbar spine / low back was causally related to an injury arising out of and in the course of his employment with Respondent, Petitioner's claims for Section 8 medical benefits are denied beyond the treatment rendered for a lumbar strain. The Arbitrator awards received treatment for the lumbar strain only from the alleged date of injury up until December 18, 2013 from Alexian Brothers Medical Group, Stroger Hospital, and Archer Open MRI.

The Arbitrator denies Petitioner's claim for medical benefits from the following medical providers: Marque Medicos, Dr. Suneela Harsoor, Elite Physical Therapy, American Center for Spine and Neurosurgery (Dr. Erickson & Dr. Kranzler), North Side Neurosurgery, AMP Medical Transportation, Midwest Neurodiagnostic, Ambulatory Surgical Care Facility, Metro Anesthesia, Midwest Rehab, Prescription Partners, Lake County Neuromonitoring, EQMD, Naperville Imaging, and Lakeshore Open MRI.

In partially denying the request medical treatment, the Arbitrator relies on the testimony of Dr. Fossier in which he concluded that the frequency and duration of the nonoperative treatment by Dr. Perez and the physical therapy was excessive or prolonged. Dr. Fossier testified that up to 10 physical therapy treatments, but anything beyond that was more than what was required. Dr. Fossier also testified that any chiropractic treatment over 12 visits would have been unnecessary. Dr. Fossier also testified that that the ESI performed on February 14, 2014 was not medically reasonable and necessary. Instead, a self-directed home exercise program should have been utilized.

The Arbitrator also relies on the testimony of Dr. Goodrich in denying the medical necessity of the second lumbar MRI and the second DSSEP test performed. Dr. Goodrich based this conclusion on the fact that there had been no real change over a two-year period with serial examinations by two different spinal surgeons, the history document, the physical exam documented, and the response to therapy documented. Dr. Goodrich also based his conclusions on the fact that Petitioner had a stable exam. Furthermore, Dr. Goodrich testified

that the unreliability of the DSSEP test played a role in reaching his conclusion. The Arbitrator relies on the testimony of Dr. Hsu who stated the MRI of September 22, 2015 and a DSSEP test were not necessary as a result of Petitioner's spondylotic condition. The Arbitrator also relies on the testimony of Dr. Kranzler only to the extent in which he admitted that the period between 2013 and the first MRI was not sufficient to create the bony changes that are seen and that ordering a second MRI was an uncommon practice.

The Arbitrator also relies on the testimony of Dr. Zarro in denying the medical necessity of the lumbar discography L2 through S1. The Arbitrator notes that Dr. Zarro's opinion was based on the patient diagnosis, the clinical exam findings, the MRI findings, Petitioner's response to the epidural injection, the lack of sensitivity and specificity of discograms, the incidence of discitis, which can be over 2 percent from a discogram, and the incidence of discograms causing a disc herniation with increased symptoms. The Arbitrator also relies on Dr. Hsu's testimony that the discogram was not medically necessary as evidence-based literature suggests poor prognosticating utility and can lead to increased disc degeneration and herniations in the future. Most importantly, the Arbitrator relies on the testimony of Dr. Kranzler only to the extent in which he stated that discograms can cause degeneration in the disc more frequently on the side of the procedure and are an unreliable test which does not have a high-grade value. Dr. Kranzler further conceded that he would not order a discogram as a diagnostic tool. All the evidence is consistent with Petitioner's testimony that the discogram caused more pain.

<u>Issue K</u>: *Prospective Medical care*

In light of the Arbitrator's determination that Petitioner failed to establish that his current condition of ill being regarding his lumbar spine / low back was causally related to an injury arising out of and in the course of his employment with Respondent, the Arbitrator finds that Respondent is not liable for any prospective medical care, including, but not limited to, the surgical recommendation of Dr. Kranzler or Dr. Erickson under Section 8(a) of the Act. All prospective medical benefits are denied.

In denying prospective medical care, the Arbitrator relies on the medical records, the diagnostic evidence, and the opinions of Dr. Hsu. The Arbitrator notes that the x-rays dated November 12, 2013 were unremarkable, Dr. Hsu's interpretation of the MRI dated December 1, 2013 is more credible as he was the only witness who testified that he reviewed the actual images, and that the January 13, 2014 EMG was unremarkable. The Arbitrator notes Dr. Hsu concluded that Petitioner was a poor surgical candidate because evidence-based literature is replete with studies that demonstrate a poor outcome with surgical treatment rather than conservative care with patients of this demographic. Dr. Hsu also stated that a lumbar

hemilaminectomy at L3-L4, L4-L5 and L5-S1 is not medically necessary or reasonable now based on Petitioner's pathology which does not show significant stenosis.

The Arbitrator does not rely on the medical opinions of Dr. Kranzler for the reasons discussed above. The Arbitrator also does not rely on the medical opinion of Dr. Milos for the reasons discussed under **Issue M**, below.

Issue L: *TTD*

In light of the Arbitrator's determination that Petitioner failed to establish that his current condition of ill being regarding his lumbar spine / low back was causally related to an injury arising out of and in the course of his employment with Respondent, Respondent is not liable for any unpaid temporary total disability (TTD) benefits.

The Arbitrator specifically notes that Petitioner has been paid $1,268.54 in TTD payments for lost time between November 12, 2013 through December 19, 2013 and Respondent is due a credit for this amount paid. (Rx. 13A-B).

Issue M: *Penalties and attorney's fees*

In light of the Arbitrator's determination that Petitioner failed to establish that his current condition of ill being regarding his lumbar spine / low back was causally related to an injury arising out of and in the course of his employment with Respondent, the Arbitrator finds that neither penalties nor fees should be imposed upon Respondent. Respondent's conduct in relying on the credible medical opinions of Dr. Hsu, Dr. Fossier, Dr. Goodrich, and Dr. Zarro was a reasonable basis to contest payment of medical expenses and temporary total disability benefits.

An employer's reasonable and good faith challenge to liability ordinarily will not subject it to penalties under the Act. *Board of Education of City of Chicago v. Industrial Comm'n*, 93 Ill.2d 20, 25 (1982); *Complete Vending Services, Inc. v. Industrial Comm'n*, 305 Ill.App.3d 1047, 1050 (1999). Further, according to the Act, "When an employer denies payment of or refuses to authorize payment of first aid, medical, surgical, or hospital services under Section 8(a) of this Act, if that denial or refusal to authorize complies with a utilization review program registered under this Section and complies with all other requirements of this Section, then there shall be a rebuttable presumption that the employer shall not be responsible for payment of additional compensation pursuant to Section 19(k)of this Act." 820 ILCS 305/8.7(a).

In this case, Respondent submitted into evidence the utilization peer review reports of Dr. Fossier, Dr. Goodrich, and Dr. Zarro, which further supported the opinions of Dr. Hsu as discussed above. Furthermore, the Arbitrator *does not* rely on the medical opinion of Dr. Milos

as his own file materials explicitly indicated there was a lack of information. Dr. Milos testified that he did not review a job description prior to rendering his opinions. Dr. Milos also did not review Dr. Erickson's report dated June 25, 2014. Dr. Milos did not review the emergency room records dated October 5, 2013. Dr. Milos did not review lumbar x-rays dated November 12, 2013, the EMG dated January 13, 2014, or the lumbar CT scan dated February 27, 2015. Dr. Milos did not review any medical records prior to March 25, 2015. Of the diagnostic reports that Dr. Milos did review, he did not review the corresponding films or images. Dr. Milos testified that he did not review any of Dr. Hsu's IME reports and was unaware that Dr. Hsu concluded that Petitioner was not a surgical candidate. Dr. Milos never performed his own clinical evaluation of Petitioner. Based on the foregoing, the Arbitrator does not find the opinions of Dr. Milos credible. Dr. Milos also testified that his opinion would change if he knew that there was other diagnostic evidence that he did not previously have which suggested that Petitioner did not have the symptomatology he complained of in the medical records. The Arbitrator notes that such evidence existed at the time as discussed above in this Decision.

Respondent offered medical and temporary disability payment logs into evidence, reflecting that TTD and medical benefits were issued in good faith temporarily while the opinions of Dr. Hsu were being sought. Additionally, the utilization review report creates a presumption that denial of medical benefits in reliance on the same was reasonable. This presumption was not rebutted by Petitioner or the medical testimony provided by Dr. Kranzler.

Further, Petitioner alleges that Respondent withheld utilization review reports. (Px. 29). The Arbitrator notes that the utilization review reports discussed in Px. 29 were disclosed to Petitioner within six days of the report being drafted. (Rx. 16). The Arbitrator does not find any evidence that any utilization review reports were ever withheld in bad faith by Respondent.

Based on the above, the Arbitrator finds that the actions of Respondent in disputing entitlement to medical and temporary total disability and medical benefits were not unreasonable and vexatious, and that Respondent reasonably relied on the medical opinions of Dr. Wellington Hsu, Dr. Clarence Fossier, Dr. Jacob Goodrich, and Dr. Christopher Zarro. The Arbitrator finds that Petitioner failed to submit any evidence substantiating the allegations medical reports were withheld by Respondent. Therefore, Petitioner's request for an award of Section 19(k)/(l) penalties and Section 16 attorney's fees is denied.

Issue N: *Respondent's credit*

Respondent is due credits for amounts paid. This includes a credit of $1,268.54 for TTD benefits paid and $3,269.73 for medical benefits paid under Section 8(j) of the Act, for a total credit of $4,538.27. (Rx. 13A-B, 14A-B).

Finally, 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.

Signature of Arbitrator

NOVEMBER 30, 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 Choose reason	☐ Second Injury Fund (§8(e)18)
		ON 2nd REMAND FROM CIRCUIT COURT	☐ PTD/Fatal denied
		☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kristine Melody,

Petitioner,

vs. NO: 05 WC 12983

Employco n/k/a Work Place Solutions,

Respondent.

19IWCC0537

DECISION AND ORDER ON SECOND REMAND FROM THE CIRCUIT COURT

This matter has been remanded by the Circuit Court for further proceedings in accordance with its order dated February 14, 2019. The case was originally heard at arbitration pursuant to Sections 19(b) and 8(a) after which one or more ultimately named respondents filed for bankruptcy. Subsequently, a motion to dismiss was granted at the arbitration level giving rise to two rounds of appeals to the Circuit Court relating to a correction of the named respondents. A procedural history and further instructions from the Court are provided herein.

I. PROCEDURAL HISTORY

A. Arbitration Hearing

This matter originally came before Arbitrator Cronin pursuant to Petitioner's §19(b) and §8(a) petition against the only named Respondent, Convention All. Essential to the matter before the Commission at this juncture is the fact that Employco n/k/a Work Place Solutions was not a named party at the time of the initial hearing.

In his May 18, 2007 decision, the Arbitrator found that Petitioner had proved a compensable accident occurring on May 20, 2004 and causal connection, as well as entitlement to certain temporary total disability and medical benefits. The Arbitrator awarded such benefits

against the Respondent, Convention All. No allegation was raised regarding a borrowing/lending employment relationship between Convention All and Employco. The matter was presented to the Commission on review and it affirmed the arbitration decision in early 2008.

B. Post-Hearing Benefits, First Amended Application for Adjustment of Claim, and Bankruptcies

Petitioner received temporary total disability payments subsequent to the arbitration decision for approximately five years. The third-party administrator (TPA), Cambridge Integrated Services, satisfied certain payments due under the arbitration award with checks identifying "Convention All Services" as the insured and "Employco Group" as its client. Eventually, Employco—not the Respondent, Convention All—filed for bankruptcy and benefits payments ceased. Convention All had no workers' compensation insurance at the time of the accident and hearing and had since ceased doing business.

Prior to a final disposition on the merits of the case, Petitioner filed an Amended Application for Adjustment of Claim ("amended application") on February 24, 2011 now naming Employco n/k/a Work Place Solutions as the sole respondent. Approximately one year later, in early January of 2012 Petitioner received correspondence indicating that Employco entered bankruptcy and, because it was self-insured, the Self Insurance Advisory Board (SIAB) would take over defense of the claim. No appearance is reflected in the record. In September of 2012, Employco's attorney of record—who had previously represented Convention All, the original respondent—filed a motion to withdraw.

C. Self-Insurance Advisory Board Motion to Dismiss and Second Amended Application for Adjustment of Claim

In due course, the case was remanded to arbitration and came before Arbitrator Huebsch on a motion to dismiss filed on December 7, 2015 by the SIAB on behalf of Employco n/k/a Work Place Solutions seeking its dismissal as a respondent. The SIAB argued that it was not liable for Convention All, the original respondent's, payments to Petitioner because Employco, the later substituted respondent, was not originally named. The Arbitrator granted the motion to dismiss.

Petitioner filed a petition for review with the Commission relating to the Arbitrator's order entered on February 19, 2016 granting the SIAB's motion to dismiss the case against Employco n/k/a Work Place Solutions. Shortly thereafter, on February 29, 2016, Petitioner reportedly, filed a second Amended Application for Adjustment of Claim ("second amended application") naming Thomas Cassell, registered agent and president of Convention All, Thomas Cassell, and Injured Workers' Benefit Fund (IWBF); not found in file. The Commission affirmed the Arbitrator's decision on October 3, 2016, which Petitioner further appealed to the Circuit Court.

On December 8, 2017, the Circuit Court confirmed the "Commission's decision regarding the liability of Respondent Employco n/k/a Work Place Solutions ("Employco") but

remand[ed] the case for further proceedings to address Petitioner's eligibility to recover from the Injured Workers' Benefit Fund." The Court confirmed the Commission's decision "... in so far as it relates directly to Respondent's Motion to Dismiss[]" barring further proceedings against Employco n/k/a Work Place Solutions, noting that Convention All was the only named respondent at the time of the original arbitration hearing and that the law of the case doctrine had been correctly applied by the Arbitrator. However, the Court further ordered "[a]s it relates to Petitioner's ability to recover from the Injured Workers' Benefit Fund, the Commission's decision is set aside and remanded for further proceedings against Convention All to address whether Petitioner is eligible to recover from the Injured Workers' Benefit Fund."

On remand, the Commission heard arguments and made several findings in its Decision and Order dated July 23, 2018 focusing primarily on the law of the case that Convention All was Petitioner's employer and that Petitioner did not timely file an amended application naming any other respondent. First, the Commission found that Petitioner had not properly perfected the review given that the transcript had not been timely authenticated. Second, the Commission found that amended application filed by Petitioner in 2011 adding/substituting Employco n/k/a Work Place solutions as a respondent was not timely filed and, moreover, the issue of employment had been previously decided to be between Petitioner and Convention All, not Employco n/k/a Work Place Solutions. The Commission noted that this was the law of the case. Third, the Commission found that Petitioner failed to file an Amended Application for Adjustment of Claim naming Employco n/k/a Work Place Solutions until 2011, long after the 2007 hearing determining that Convention All was Petitioner's employer, and such filing was beyond the statute of limitations. Fourth, the Commission found that the employer-employee relationship had been determined in a final decision that could not be re-litigated and the Arbitrator did not err in dismissing the case against Employco n/k/a Work Place Solutions, the sole respondent per Petitioner's 2011 amended application.

Finally, the Commission addressed the Circuit Court's order and found that the IWBF could not be pursued as a respondent. In so concluding, the Commission again noted that Employco n/k/a Work Place Solutions was not a named party at the time of the initial arbitration hearing as the employer-employee relationship had already been determined. The Commission also noted that Convention All was not insured and that the IWBF was not a named party at the time of the initial arbitration hearing. The Commission found that the Illinois Workers' Compensation Act ("Act") did not provide for the IWBF to be brought in retroactively as a respondent.

D. Second Appeal to the Circuit Court and Second Remand to the Commission

Thereafter, Petitioner filed an appeal on August 8, 2018 to the Circuit Court regarding the Commission's July 23, 2018 Decision and Order on Remand from the Circuit Court.

The Circuit Court, in its February 14, 2019 Opinion and Order, noted Petitioner's request that the Court "overturn the decision of the Commission and apply Section 4(d) of the Illinois Workers' Compensation Act, which created the Illinois Workers' Benefit Fund, retroactively, thereby allowing recovery against the fund for an injury that predates the creation of the fund. 820 ILC 305/4(d)."

After consideration of the parties' arguments and extensive analysis of the retroactive application of the Act to the IWBF, "[t]he [Circuit Court held] that because the amendment that created the IWBF was substantive, it does apply retroactively under Section 4 of the Statute on Statutes." 820 ILC 305/4(d). The Court also considered Petitioner's eligibility to recover against the IWBF regardless of retroactive application of the Act. The Court "agree[d] with the IWBF that it is not, and never was, a proper party to this case."

The Court then considered whether the law of the case doctrine was incorrectly applied with respect to the employer-employee relationship; specifically, whether Employco could or should be considered as Petitioner's employer. In consideration of the parties' arguments, conduct between the parties and knowledge of the parties before and after the initial arbitration hearing, and further analysis relating to Employco's assumption of liability for Convention All, the Circuit Court found in pertinent part:

> ... the manifest weight of the evidence suggests that Employco assumed Convention All's liability to Petitioner, and that Employco is a properly named in this action.
>
> In reaching this conclusion, most of the Law of the Case is left undisturbed. The existence of an employer-employee relationship between Petitioner and Convention All at the time of injury is beyond examination at this point. That said, the Commission's decision affirming Arbitrator Huebsch's decision that the application was not timely filed must be reversed. The January 2011 correspondence, to which Petitioner moved in detrimental reliance, taken with Employco's handling of the claim through Convention All's bankruptcy and the continued correspondence for Employco by its attorneys demonstrates that Employco either voluntarily or through some contractual means, assumed Convention All's liability.
>
> By the same token, Employco's involvement in the case from its inception reduces the risk of prejudice that exists for other prospective parties, most notably the IBWF. ...
>
> If [Petitioner] should be left with no recourse because she filed an Amended Application at the behest of Employco, the Act's purpose of ensuring that employees who become injured or disabled in the course of their employment receive just compensation would be undermined. While it is understandable that Employco would move to limit its own liability, it cannot if it has assumed Convention All's liability. Employco assumed liability for Petitioner's claim either at the outset of this case or in 2011 when it prompted Petitioner to move in detrimental reliance to its correspondence. It must bear that liability. The decision of the Commission dismissing Employco from the case is reversed. ...

When Employco assumed the liabilities of Convention All, Employco also assumed the legal position of Employer in this case. The employee and her attorneys followed all the rules[1] of the Commission while Employco employed unscrupulous and manipulative methods to try and distance themselves of the liabilities they assumed either voluntarily or as required of them.

Melody v. Employco, et al., No. 18-L-50480 at 13-15 (Cir. Ct. Cook County, February 14, 2019).

In essence, while Convention All may have been uninsured the Court was compelled by evidence that Employco seemed to provide full service to Convention All with regard to its defense of workers' compensation claims; at least sustaining indemnity to Convention All as reflected in its payments of certain benefits to Petitioner. The Court noted that "[i]f Convention All was technically uninsured, it was almost definitely paying for Employco's services in lieu of insurance." *Id.* at 3.

Ultimately, the Circuit Court ordered as follows:

A. The Decision of the Illinois Workers' Compensation Commission barring Petitioner from recovery against the Illinois Workers' Benefit Fund, issued on July 23, 2018 on docket no. 18 IWCC 0459 is **CONFIRMED.**

B. The Decision of the Illinois Workers' Compensation Commission granting dismissal of Respondent Employco, issued on July 23, 2018 on docket no. 18 IWCC 0459 is **REVERSED.**

C. This matter is **REMANDED** to the Commission for further proceedings consistent with Employco as the Employer of the Plaintiff.

Id. at 16.

[1] The Commission does not concur that Petitioner followed all of its Rules in prosecuting her case as it relates to the inclusion of any and all necessary respondents at the time that she filed any amended application. As the Commission's Rules existed prior to 2016, Section 9020.20 Application for Adjustment of Claim subsection (e) provided that "Applications for Adjustment of Claim may be amended prior to a hearing on the merits by filing an Amended Application for Adjustment of Claim under the letter and number given the original Application for Adjustment of Claim. The Amended Application for Adjustment of Claim must be clearly labeled "Amended" and must have attached to it proof that filing party has served a copy of the Amended Application for Adjustment of Claim on the opposing party in the manner set forth in Section 9020.70." Section 9020.20. However, this section of the Commission's Rules was amended on October 19, 2016 at which time the Commission voted unanimously to adopt certain changes. Germane to the Court's analysis in this case, and in line with its view in 2019 that it would be unfair, in some circumstances, to disallow amendment of an application for adjustment of claim, the Commission adopted an amendment to Section 9020.20(e) further providing that "[i]t shall be within the discretion of the Commission whether to allow any amendments to the Application after the commencement of a hearing on the merits." *Mora v. Industrial Comm'n*, 312 Ill. App. 3d 266 (1st Dist. 2000).

II. CONCLUSIONS OF LAW

19IWCC0537

The Commission takes note of the Circuit Court's extensive consideration of the issues before it, as well as that which it found most compelling in issuing the February 14, 2019 order. ~~In essence, the Court was compelled by the lack of prejudice or infringement of rights to~~ Employco n/k/a Work Place Solutions should it be held as a properly named respondent given its involvement in defending the instant workers' compensation claim from inception, albeit not at the forefront. The Court noted this prejudice did exist for other prospective respondents, such as the IWBF. The Court reiterated its view that either Employco assumed liability for this claim at the onset, or in 2011 when they prompted Petitioner to rely on correspondence from the same Respondent's counsel that represented Convention All to amend her application for adjustment of claim. The Court was compelled, based on its review of the facts and law to require Employco to bear the liability it had assumed and prevent the unjust outcome leaving Petitioner without recourse.

Thus, in accordance with the Circuit Court's order, the Commission affirms the dismissal of the Injured Workers' Benefit Fund as a Respondent and reverses the dismissal of Employco n/k/a Work Place Solutions as a Respondent. The matter is hereby remanded to the Arbitrator for further proceedings consistent with the decision of the Circuit Court of Cook County.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 19, 2016 is hereby affirmed and adopted as to the barring of recovery from the IWBF.

IT IS FURTHER ORDERED BY THE COMMISSION that the decision granting dismissal of Employco as a Respondent is reversed to reinstate Employco n/k/a Work Place Solutions as a proper party respondent in this matter.

IT IS FURTHER ORDERED BY THE COMMISSION that this matter is remanded to the Arbitrator for further proceedings consistent the order with Employco n/k/a Workplace Solutions as the employer of Petitioner.

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.

19IWCC0537

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: SEP 3 0 2019
d-9/12/19
BNF/jsf
045

Barbara N. Flores

Marc Parker

Deborah L. Simpson

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 Accident	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANTHONY BRIDGES,

Petitioner,

vs. NO: 17 WC 17575

CHICAGO TRANSIT AUTHORITY,

Respondent.

19IWCC0538

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b. having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causation, temporary total disability, medical expenses, prospective medical treatment penalties, and the admissibility of certain evidence, and being advised of the facts and law, reverses 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 Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

I. FINDINGS OF FACT

On May 24, 2017, Petitioner was working as a bus operator for Respondent on the 53 Pulaski route when he arrived at the 31st and Komensky turnaround terminal. There were other CTA employees and supervisors on site at the time. Petitioner was told by a supervisor, James Moss, ("Supervisor Moss"), that the police had previously been called to remove a man he described as a threat. Petitioner and Supervisor Moss testified extensively at the arbitration hearing about "the man" who was at the station when Petitioner docked his bus.

Petitioner testified that he was responsible for the welfare and safety of CTA passengers, employees, and property, regardless of a supervisor's orders to protect the bus. When Petitioner arrived at the station, Supervisor Moss came to his driver's side window and instructed him not to let

the man on the bus. Petitioner locked the front door of the bus. He explained that he is a big guy and gets off the bus by stepping backwards. As Petitioner was exiting the bus through the rear door, Supervisor Moss again knocked on the window and told Petitioner that the man was trying to get on his bus, to hold the doors, and not let the man on the bus. While exiting the bus and holding the doors closed with both hands, Petitioner testified that the man hit him in the head, jumped on his back, and grabbed him in a headlock. Petitioner explained that the man threatened and fought with him, and they fell backwards.

Supervisor Moss testified that the man had caused a disturbance, threatened him, and was a risk to drivers prior to Petitioner arriving at the station. He corroborated Petitioner's testimony that he noticed the man trying to board the bus as well as his instructions not to let the man do so and to hold the bus door closed. Supervisor Moss also corroborated Petitioner's testimony that, as Petitioner was exiting the bus through the rear door, the man was there. When Supervisor Moss came around to the rear entrance of the bus, Petitioner and the man were struggling or fighting.

The decision of the Arbitrator delineates the facts relating to Petitioner's medical treatment in detail. As relevant to the issues on review, the Commission notes that Petitioner testified that he felt pain in his lower back, buttocks, and left shoulder on the scene. He requested an ambulance and was transported to Norwegian American Hospital. While there, physicians examined Petitioner's back and left shoulder. He was discharged with an off-work slip and followed up the next day with Dr. Chunduri from Illinois Orthopedic Network. Petitioner underwent MRIs of the lumbar spine, cervical spine and left upper extremity and Petitioner was kept off work. The left shoulder MRI showed a full thickness rotator cuff tear and surgery was recommended. The lumbar and cervical spine MRIs showed multiple disc protrusions. Petitioner was prescribed physical therapy and epidural steroid injections. Petitioner underwent physical therapy for his lower back, neck and left shoulder between May 30, 2017 through at least August 18, 2017.

Regarding his current condition of ill-being, Petitioner testified that he had never sustained any prior injuries to his left shoulder, back, or neck. He has not sustained any new injuries to his left shoulder or neck since his accident at work on May 24, 2017. Petitioner testified that he continues to experience pain in his right hip, lower back, neck and left shoulder. Further, his hip and left shoulder pain are constant. Petitioner testified that he wishes to undergo the recommended prospective medical treatment in the form of left shoulder surgery and epidural steroid injections to his lower back.

II. CONCLUSIONS OF LAW

A. Evidence

A threshold issue in this case is whether the Arbitrator erred in admitting surveillance video offered by Respondent in its Exhibit No. 2. At the arbitration hearing, Petitioner's counsel objected to the exhibit on the bases of lack of foundation, failure to authenticate, altered form, and inconsistent speed. The Commission finds that the video was admitted in error, sustains Petitioner's counsel's objections, and reverses the Arbitrator's admission of the exhibit.

A video recording may be admitted in evidence only if it is properly authenticated and relevant to the issues in controversy. *People ex rel. Sherman v. Cryns*, 203 Ill.2d 264, 283 (2003). First, a foundation must be laid by someone having personal knowledge of the filmed object

that is capable of testifying that the video is an accurate portrayal of what it purports to show. *Id.* at 283-84 (citing *Cisarik v. Palos Community Hospital*, 144 Ill.2d 339, 342 (1991)). Next, "[v]erification may be furnished by the testimony of any competent witness who has sufficient knowledge to testify that the videotape fully represents what it purports to portray." Id. at 284 (quoting *Missouri Portland Cement Co. v. United Cement, Lime, Gypsum & Allied Workers International Union, Division of Boilermakers, AFL-CIO, Local No. 438*, 145 Ill. App. 3d 1023, 1027 (1986)).

Here, the record does not contain the required foundation to admit Respondent's Exhibit No. 2 into evidence. While Petitioner identified himself in the video, his testimony does not establish that the video is an accurate, full representation of what Respondent purports it to show. When the exhibit was offered into evidence by Respondent, Petitioner's counsel objected noting its altered form and inconsistent speed of the video. Respondent's counsel acknowledged technical issues related to the video software and the Arbitrator noted difficulty controlling the playback speed of the video. While the proffered exhibit is relevant to whether Petitioner sustained a compensable accident at work, it was not properly authenticated and the accuracy of the video – that is, whether it fully and accurately represents what it purports to portray – is brought into question. Thus, the Commission sustains Petitioner's counsel's objections, reverses the Arbitrator's decision to admit Respondent's Exhibit No. 2, and does not consider its contents in reaching its conclusions related to the issues on review.

B. Accident

Next, the Commission considers the issue of accident, finds that Petitioner met his burden of proof, and reverses the decision of the Arbitrator. In so concluding, the Commission notes that the parties' dispute centers on whether Petitioner was an aggressor in the altercation with the man at the station.

Identifying the aggressor in a workplace altercation is a question of fact for the Commission. *Franklin v. Industrial Comm'n*, 211 Ill.2d 272, 282 (2004). The principle known as the "aggressor defense" provides that, even if a fight is work related, an injury to the aggressor is not compensable. *Id.* at 279-80. The rationale is that the claimant's "'own rashness'" negates a causal connection between the employment and the injury so that the work is neither the proximate nor a contributing cause of the injury. *Id.* (quoting *Triangle Auto Painting & Trimming Co. v. Industrial Comm'n*, 346 Ill. 609, 618 (1931)). In making this determination, the fact that one party made the first contact is not decisive. *Ford Motor Co. v. Industrial Comm'n*, 78 Ill.2d 260, 263 (1980). Instead, the parties' conduct must be examined in light of the totality of the circumstances. *Id.* These circumstances include the conduct of the other participant or participants in the altercation. *Franklin*, 211 Ill.2d at 282.

The facts in this case support the conclusion that Petitioner was not the aggressor in the altercation that took place on May 24, 2017. Prior to Petitioner arriving at the turnaround terminal, Supervisor Moss had been threatened by the same man who had caused a disturbance. When Petitioner arrived at the station, the man attempted to board Petitioner's bus without authorization. Supervisor Moss instructed Petitioner to prevent the man from boarding his bus more than once. Petitioner followed those instructions and protected the bus by holding the doors closed when the man threatened Petitioner and took physical action against him. While Respondent asserts that Petitioner made the first contact with the man, there is no evidence establishing as much, and it is

nonetheless not dispositive on the issue of compensability. Petitioner was threatened and physically engaged by a man attempting to trespass onto Respondent's property. There is no evidence that Petitioner was the aggressor given the totality of the circumstances and, thus, the Commission finds that Petitioner has established that he sustained a compensable accident at work as claimed.

C. Causal Connection

The Commission also finds that the Petitioner's current condition of ill-being is causally related to the work accident of May 24, 2017. Immediately after the incident at work, Petitioner underwent emergency medical treatment. He then set on a course of treatment for the left shoulder and back with Drs. Giannoulias and Chunduri. Dr. Giannoulias reviewed Petitioner's left shoulder MRI and concluded that Petitioner's full thickness left rotator cuff tear resulted from an acute injury. The objective findings in the MRI, and Petitioner's lack of prior left shoulder symptomatology, support Dr. Giannoulias' conclusion. Petitioner also underwent treatment for his low back with Dr. Chunduri. He concluded that Petitioner suffered from sacroiliac joint dysfunction and recommended a right SI joint steroid injection. There is no evidence that Petitioner was symptomatic in the low back prior to the injury and the medical records corroborate Petitioner's uncontroverted testimony regarding his condition and the mechanism of injury. Thus, the Commission finds that Petitioner has established that his continued condition of ill-being is causally related to the accident at work.

D. Medical Bills

As explained more fully above, the Commission finds that Petitioner's current condition of ill-being is causally related to his accident at work. The Commission also finds that the medical bills submitted into evidence are for reasonable and necessary medical treatment rendered to Petitioner to address his work-related injuries. Thus, the Commission awards payment of Petitioner's bills from Norwegian American Hospital, Illinois Orthopedic Network, Premium Healthcare, and Premier Therapy totaling $24,572.67 pursuant to Sections 8(a) and 8.2 of the Act.

E. Temporary Total Disability

The Commission further finds that Petitioner has established entitlement to temporary total disability benefits beginning May 25, 2017 through August 30, 2017. Petitioner was restricted from working full duty by his physician during this period as reflected in the medical records. Thus, the Commission awards temporary total disability benefits as claimed.

F. Prospective Medical Treatment

The Commission finds that the record supports a continued causal connection between Petitioner's current condition of ill-being and accident at work requiring further medical care. Dr. Chunduri recommended an epidural steroid injection to address Petitioner's ongoing complaints in the lumbar spine. Dr. Giannoulias recommended rotator cuff repair surgery to address Petitioner's ongoing complaints in the left shoulder. Based on the totality of the record, the Commission finds that additional medical treatment is necessary to alleviate Petitioner from the effects of his occupational injuries. Thus, the Commission awards the left rotator cuff repair surgery as ordered by Dr. Giannoulias and right SI joint steroid injections as ordered by Dr. Chunduri.

G. Penalties

19IWCC0538

The Commission finds that Respondent had a reasonable dispute as to the compensability of Petitioner's claim and was reasonable in its denial of benefits. Respondent's conduct was not unreasonable, vexatious and/or in bad faith. Thus, the Commission affirms the Arbitrator's denial of penalties and fees as claimed by Petitioner.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $859.69 per week for a period of 14 weeks, that being the period of temporary total disability under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $24,572.67 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 ordered to approve and pay for the left rotator cuff repair surgery as ordered by Dr. Giannoulias and right SI joint steroid injections as ordered by Dr. Chunduri 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.

The party commencing 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: SEP 30 2019

Barbara N. Flores

Deborah L. Simpson

Marc Parker

BNF/dmm
O: 081519
49

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

BRIDGES, ANTHONY Case# **17WC017575**
Employee/Petitioner

CHICAGO TRANSIT AUTHORITY
Employer/Respondent

19IWCC0538

On 1/12/2018, 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:

2559 BOWMAN & CORDAY LTD
LANE ALLAN CORDAY
134 N LASALLE ST SUITE 1440
CHICAGO, IL 60602

0515 CHICAGO TRANSIT AUTHORITY
JEANNINE D SIMS
567 W LAKE ST 6TH FL
CHICAGO, IL 60661

STATE OF ILLINOIS)
)SS.
COUNTY OF **COOK**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Anthony Bridges
Employee/Petitioner

v.

Chicago Transit Authority
Employer/Respondent

Case # **17** WC **17575**

Consolidated cases: ______

19IWCC0538

An *Application for Adjustment 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 **August 30, 2017**. After reviewing all the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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

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

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

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

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

G. [ ] What were Petitioner's earnings?

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

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

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

K. [x] Is Petitioner entitled to any prospective medical care?

L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD

M. [x] Should penalties or fees be imposed upon Respondent?

N. [x] Is Respondent due any credit?

O. [ ] Other ______

FINDINGS 19IWCC0538

On the date of accident, **May 24, 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 not*** sustain an accident that arose out of and in the course of his employment by Respondent

ORDER

As the Arbitrator has found that Petitioner did not sustain an accident that arose out of and in the course of his employment by Respondent, he denies compensation. All other disputed issues have been rendered moot.

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

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

Signature of Arbitrator

1-11-2018
Date

ICArbDec19(b)

JAN 12 2018

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ATTACHMENT TO 19(b) DECISION OF ARBITRATOR

Anthony Bridges v. Chicago Transit Authority

Case No. 17 WC 17575

FINDINGS OF FACTS

Petitioner, Anthony Bridges, is a bus operator with the Chicago Transit Authority. Petitioner testified that he has been a bus operator with Respondent since 2008. Petitioner testified that he is responsible for the safety of the passengers on his bus and drives along a designated bus route. He does not personally collect any fares.

On the date of accident, Petitioner testified that he was driving the 53 Pulaski route. He pulled into the bus turnaround at 31st and Komensky and was supposed to have an 18-minute break. Petitioner testified that there is a bathroom at the turnaround. Petitioner testified that usually when he arrives at the turnaround, he stretches, cleans and checks the bus, walks around and goes to the restroom or gets something to drink. He testified that he is responsible for the safety of the bus.

Petitioner testified that when he pulled into the turnaround, Mr. Moss came to his window and told him not to let an unidentified male (hereinafter referred to as "the man") board the bus due to the man's behavior prior to Petitioner's arrival. Petitioner testified that when he parked the bus, he left the rear door unlocked so he could exit out of that door and no one would be able to board at the front of the bus. He initially testified that he was already backing out of the rear door when he heard Mr. Moss tell him to not let the man on the bus. Petitioner testified that he then tried to hold the rear door closed and the man hit him in the head and put Petitioner in a headlock. Petitioner testified that he began to defend himself once that happened. Petitioner testified that the man continued to approach and antagonize Petitioner and another CTA employee even after this physical altercation was ended. The police eventually arrived and arrested the man.

Petitioner testified that once the police left the scene, Mr. Moss directed him to return the bus to the garage. Once at the garage, he completed an accident report and then requested an ambulance as his back, shoulder, and lower buttocks were hurting. Petitioner testified that he injured his right hip, low back, neck, and ~~left shoulder during the altercation—specifically, when the men fell to the ground.~~

James Moss appeared on behalf of Petitioner. He testified that he is a bus service management supervisor and was present on the date of accident. He testified that he has worked for Respondent since 1990 and has been a supervisor since 2004. Mr. Moss testified that as part of his job duties, he appears on the scene when there is a disturbance or injury on a bus. Mr. Moss testified that prior to Petitioner even pulling into the turnaround, the man caused a disturbance on another CTA bus. The police were called; however, the police refused to arrest the man. Mr. Moss testified that he told the man to leave but the man refused. He further testified that he told Petitioner not to let the man on the bus. Mr. Moss testified that he did not observe the beginning of the physical altercation between Petitioner and the man because he had walked around to the driver's window and was trying to engage the switch to lock the doors. Mr. Moss testified that he saw neither how the altercation began nor who initiated the altercation. On cross-examination, Mr. Moss testified that he never told Petitioner to physically touch the unidentified male in any way. He further testified that it is against CTA's rules and procedures for any employee to touch another person without his or her consent. He testified that fighting in any form is expressly prohibited by CTA.

Video Footage

Respondent submitted a video of the incident into evidence. (RX 2). This video shows four individual camera angles during roughly the same time period. Camera 5 is interior and faces the rear door. Beginning at 20:55:00, we see Petitioner kicking at debris that is on the bus. He opens the rear door and kicks an aluminum can off the bus. The doors close again and Petitioner continues to look down and around shuffling debris. At approximately 20:56:05, the man approaches the rear door. It is clear that Petitioner does not see him as Petitioner is not facing the door and is looking down at debris on the floor. Petitioner then turns toward the front

of the bus and appears to be listening to something Mr. Moss is saying. At 20:56:10, the man opens the rear door. Petitioner turns to face him. The man is not on the bus and is standing outside the now open door. As the man moves further through the doors (but not yet onto the bus), Petitioner strides towards the male. At 20:56:12, Petitioner steps forward and uses his body and right arm to try to push the man away from the door. There appears to be the beginnings of a shoving match and at 20:56:16, Petitioner clearly uses his right arm to push against the man's head. At approximately 20:56:20, Petitioner continues to push the man away from the door and steps completely off the bus. He then faces the door and tries to hold it closed. The camera then shows the men in shadows.

Camera 7 is an exterior front camera that faces the rear of the bus on the right side of the bus. At 20:55:54, the Arbitrator notes the rear door opens and a can is seen rolling out of the bus and then the door closes. At approximately 20:56:04, the man approaches the rear door. He is carrying a bag and also has a rolling suitcase. He reaches to open the door at 20:56:07 and works the door open at 20:56:10. At 20:56:12, he steps forward and the Petitioner comes into view. Petitioner clearly is seen shoving the man with his right arm and is using his body to further block the man from entering the bus. At 20:56:13, a mutual shoving match begins during which the much smaller man (the man) is trying to push back against Petitioner and Petitioner continues to use his body and his right arm and hand to shove against the man. Petitioner pushes against the man enough so that Petitioner is able to exit the bus. The men continue to engage in shoving.

At 20:56:30, Petitioner is holding the doors closed while still using his right arm to push against the man. The man is also still engaged in the fight. The man then jumps up and attempts to wrap his left arm around the back of Petitioner's neck. Petitioner tries to break free as the men still fight and both men fall to the ground at 20:56:38. Petitioner lands on top of the man and is able to use his weight to subdue the man. Initially the man tries to push Petitioner off him, and then at 20:56:45 Petitioner rises on his knees and begins to punch the man. The man clearly tries to protect his head by placing his arms around his head. Although the man is no longer fighting, Petitioner continues to punch the man in the back of his head numerous times. He continues even after

two CTA employees, one of whom is Mr. Moss, approach and try to break up the fight. At 20:57:02, Petitioner then stands up, while still shoving the man's head into the ground, and then begins to kick the unidentified male in his head and stomp on the man's head. The Arbitrator notes that the man is still trying to protect his head from harm and is clearly not fighting back. Both Petitioner and the unidentified man appear ready to continue the fight once the man finally stands up. At 20:57:38, everyone finally walks out of view of the camera. Petitioner later returns to view and is seen picking something up.

Camera 6 is an interior camera that shows the view out of the bus windshield. At 20:56:08, we see Mr. Moss come into view and then walk off screen. At 20:56:31 Mr. Moss walks across the front of the bus and walks off screen toward the driver's side of the bus. We also see another CTA employee walk towards the rear right side of the bus where the altercation has already started. Mr. Moss then walks back across the front of the bus towards the right side of the bus. At 20:58:06, Petitioner appears on camera as well as the man and the other CTA employee. At this point, it appears that the man has become the aggressor and is trying to incite another fight. Everyone then moves off screen again and they continue to move on and off screen as it is apparent that the man, Petitioner, as well as possibly other people, continue to say things to each other. The man remains on CTA property until the police arrive at 21:06:07. The police eventually arrest the man.

Camera 1 is an interior camera that faces the front door of the bus. Although no relevant parts of the physical altercation are shown from this camera view, the Arbitrator notes that the camera does show some of the ongoing back and forth between Petitioner, the man, and another CTA employee following the initial fight and the arrival of the police. Although it is not seen clearly in any camera view, Petitioner testified that although the man did not hit him following the fight, the man did hit another CTA employee. That employee was not present to testify.

Medical Treatment

Petitioner received treatment at Norwegian Hospital's ER on the date of accident. (PX 4). The records show that Petitioner complained of low back pain and left shoulder pain. Petitioner told the medical personnel

that a passenger grabbed him by his neck and he fell to the ground and landed on his tailbone. The doctor diagnosed low back pain and left shoulder pain.

Petitioner began treatment with Dr. Chunduri the next day. (PX 5). Petitioner complained of neck pain radiating into his left arm and low back pain radiating into his right leg with some right elbow pain. *Id.* Petitioner told Dr. Chunduri that he was exiting the bus when he was attacked by a male passenger who put him in a head lock. Petitioner further stated that they both fell backwards and "he had to continue fighting the patient after the fall." *Id.* Dr. Chunduri diagnosed cervicalgia, low back pain, right leg pain, and left arm pain. He ordered cervical and lumbar MRIs as well as PT. Petitioner began PT on May 30, 2017. (PX 6).

On June 21, 2017, Petitioner underwent MRIs of the left shoulder, neck, and low back. *Id.* The MRI of the left shoulder revealed a full thickness rotator cuff tear. *Id.* The cervical MRI was fairly unremarkable other than straightening of the normal cervical lordosis. *Id.* The lumbar MRI revealed a L3-4 2-mm. diffuse disk protrusion as well as a 3-mm. diffuse disk protrusion at L5-S1 over the effacement of the thecal sac. It also revealed disk material with hypertrophy caused by neural foraminal stenosis encroaching the left and right exiting nerve root, more so on the right.

In late June, Petitioner returned to Dr. Chunduri who noted Petitioner had experienced a 50% improvement in his condition. Petitioner was to continue in PT for the neck and back. Dr. Giannoulias examined Petitioner's left shoulder that same day. For the first time, Petitioner stated that his injury occurred when he was assaulted by a passenger who put him in a headlock and Petitioner felt a pop in his left arm when he fell backwards. *Id.* Dr. Giannoulias diagnosed an acute left rotator cuff tear and recommended surgical repair. *Id.* Petitioner underwent an EMG/NCS of the lower extremities on July 18, 2017. The test was normal. In early August, Dr. Chunduri recommended a right SI joint steroid injection. Dr. Giannoulias continues to recommend left shoulder surgery.

Medical Bills and TTD

Petitioner submitted bills with outstanding balances allegedly owed for medical services rendered relating to this alleged work accident. (PX 8, 10, 12, and 13). Respondent presented no evidence that it has paid any medical bills to date. Petitioner alleges he is entitled to TTD benefits from May 25, 2017 through the date of hearing. Respondent disputes this claim as Respondent disputes whether a compensable accident occurred on the date of accident. Petitioner testified that his doctors have kept him off work since the date of accident. Petitioner testified that he has not received TTD benefits other than a four-week advance Respondent paid in early August 2017 and has not received short-term disability benefits.

Current Complaints

Petitioner testified that he continues to treat for his low back, neck, and left shoulder. He testified that he never had any prior injuries to those body parts and has sustained no injuries to the affected body parts since the date of the alleged accident. Petitioner testified that his right hip, low back, neck, and left shoulder still bother him. He testified that he rarely gets headaches.

CONCLUSIONS OF LAW 19IWCC0538

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

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

To obtain compensation under the Act, claimant has the burden of proving, by a preponderance of the evidence, all the elements of his claim. *O'Dette v. Indus. Comm'n*, 79 Ill.2d 249, 253 (1980)

The words "arising out of" and in the course of" are used conjunctively, and therefore both elements must be present at the time of the accidental injury in order to justify compensation. *Mazursky v. Indus. Comm'n.*, 364 Ill. 445, 448 (1936). In order for an injury to arise out of the employment, the risk of injury must be a risk particular to the work or a risk to which the employee is exposed to a greater degree than the general public by reason of his employment. See *Orsini v. Indus. Comm'n.*, 117 Ill.2d 39 (1987). An injury "arises out of" petitioner's employment when there is a causal connection between the employment and the injury; the origin or cause of the injury must be some risk connected with, or incidental to, the employment. *Brady v. Louis Ruffolo & Sons Construction Co.*, 143 Ill. 2d 542, 578 N.E. 2d 921, 161 Ill. Dec. 275 (1991). Injuries sustained on an employer's premises, or at a place where the employee might reasonably have been performing his duties, and while the employee is at work, are generally deemed to have been received in the course of the employment. *Caterpillar Tractor Co. v. Industrial Comm'n,* 129 Ill. 2d 52, 57, 133 Ill. Dec. 454, 541 N.E.2d 665 (1989). An injury is not compensable if it resulted from a risk personal to the employee rather than incidental to the employment. *Id.*

"For an injury to arise out of the employment its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d 52 at 58, 133 Ill.Dec. 454 (1989). There are three types of risks which an employee might be exposed to, namely: 1) risks distinctly associated with the employment; 2) risks which are personal to the employee; and 3) "neutral risks which have no particular employment or personal characteristics." *Illinois Institute of Technology Research Institute v. Industrial*

Comm'n, 314 Ill.App.3d 149, 162, 247 Ill.Dec. 22, (2000). Typically, an injury "arises out of" one's employment if, at the time of the occurrence, the employee was performing acts the employer instructed him to perform, acts which he might reasonably be expected to perform incidental to his assigned duties, or acts which he had a common law or statutory duty to perform. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58, 541 N.E. 2d 665, 133 Ill. Dec. 454 (1989). The phrase "in the course of" refers to the time, place and circumstances under which the accident occurred. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 509 N.E. 2d 1005, 109 Ill. Dec. 166 (1987). An injury is received "in the course of" one's employment when it occurs within the period of employment, at a place the employee may be reasonably in the performance of his duties, and while he is fulfilling those duties or engaged in something incidental thereto. *Scheffler Greenhouses, Inc. v. Industrial Comm'n,* 66 Ill. 2d 361, 362 N.E. 2d 325, 5 Ill. Dec. 854 (1977).

Here, there is no question that Petitioner was acting in the course of his employment when he pulled the bus into the terminal. It is also clear that Petitioner remained in the course of his employment as he began clearing the bus of debris in preparation for him to take his restroom break. However, despite Petitioner's attempt to argue otherwise, the Arbitrator finds that he began acting outside the course of his employment the moment he initiated physical contact with the man.

Petitioner argues that he was instructed not to allow the man to board the bus, and that by following this directive and by protecting the property of the CTA, he was fulfilling his duties as an employee.

Petitioner may have had a duty to protect CTA property, but the Arbitrator finds that it is not credible that this duty includes initiating a physical altercation with an individual. Mr. Moss' testimony makes it clear that the man was no longer welcome on CTA property; however, a careful review of the video demonstrates that while the man did open the rear doors of the bus and began to attempt to board, Petitioner initiated the entire physical encounter when he decided to use his body to forcefully push the

man away from the bus. The video even shows that Petitioner deliberately uses his right arm to hit the man in the head as Petitioner is shoving the man.

Prior to that moment, the man did not make contact or even attempt to make physical contact with Petitioner. Both Petitioner and Mr. Moss testified that Mr. Moss did not tell Petitioner to physically engage the man. Although Petitioner incredulously testified that despite his numerous years as a bus operator for Respondent he had never heard that fighting is an offense that may be punishable by termination. Mr. Moss clearly testified that it is against CTA's established rules and procedures for an employee to engage in a physical altercation with any person. Mr. Moss testified that it is against CTA rules for any employee to touch another person in any way without that person's express consent. Mr. Moss testified that an employee who does engage in fighting or any other type of physical altercation can be subject to disciplinary proceedings. Everything that transpired after Petitioner took it upon himself to physically try to prevent the unidentified male from boarding the bus was a personal risk to Petitioner. Consequently, any alleged injuries sustained during the resulting physical altercation are not the result of a compensable work accident.

The Arbitrator finds that "aggressor defense," as outlined by the Illinois Supreme Court, is applicable here. Generally, fights that arise out of disputes about the employer's work are risks incidental to the employment and the resulting injuries are thus compensable. *See, Franklin v. Indus. Comm'n*, 211 Ill.2d 272 (2004). However, injuries suffered by the aggressor in such a fight are not compensable. *Id.* at 280. The aggression negates any causal connection between the employment and the injury. *Id.* The rationale for the "aggressor defense" is that the claimant's "own rashness" negates the causal connection between employment and the injury so that the work is neither the proximate nor a contributing cause of the injury. *Bassgar v. Indus. Comm'n,* 394 Ill. App. 3d 1079, 917 N.E.2d 579, 334 Ill. Dec. 753 (3rd Dist., 2009). Who made the first physical contact, while important in identifying the aggressor, is not decisive.

Rather, the parties' conduct must be examined in light of the totality of circumstances. *Ford Motor Co. v. Indus. Comm'n,* 78 Ill 2d. 260, 399 N.E. 2d 1280, 35 Ill. Dec. 752 (1980).

In *Bassgar,* the Appellate Court found that there were two separate acts of aggression when it examined the parties' conduct in light of the totality of circumstances. The first act of aggression was when claimant's supervisor tackled the claimant, forcing him against a table, where his left arm wedged between the table and his body resulting in a fracture to the arm. After that occurred, claimant's supervisor walked away, decided to retreat from the physical contact/withdraw from the fight, thus any danger to the claimant passed. Yet rather than leave the supervisor alone, claimant decided to follow him and more mayhem ensued. The Court deemed a second act of aggression began when claimant pursued his supervisor after the latter had retreated.

The Arbitrator notes that Petitioner did not testify credibly regarding the manner in which this physical altercation occurred. Petitioner initially testified that when the man tried to board the bus, Petitioner was already trying to exit the bus by backing his way out of the bus. He testified that due to his large size, he is only able to exit by backing out of the bus and when he backed out of the bus, he tried to hold the rear doors closed. Petitioner later attempted to explain away his initiation of the fight by insisting that he was only trying to exit the bus so he could use the restroom, and given his large body mass, he could not help but brush against the man. However, the video discredits Petitioner's testimony. Beginning at 20:56:08 on camera 5, we clearly see that Petitioner was not attempting to exit the bus when the man approached and opened the rear door. In fact, he was not even facing the rear door at that point. When the door opened and Petitioner saw the man attempting to board the bus, Petitioner strides purposefully toward the rear door and begins to forcefully use his body and his right arm to try to shove the man away.

It is clear from the relevant camera angles that the man did not initiate contact with Petitioner. The Arbitrator shall not speculate as to the actions the man may have taken if Petitioner had not begun the physical altercation. Petitioner clearly was not acting in self-defense as the video footage shows that prior to Petitioner

initiating and engaging in the physical altercation, the man had not physically threatened or attacked Petitioner in any way.

Petitioner would like the Arbitrator to focus only on the events that began once both men are outside the bus and the man reaches up and grabs Petitioner by the neck. However, the Arbitrator must consider the totality of the circumstances surrounding that moment. After all, the man's actions - - wrapping his arm around Petitioner's neck - - did not take place in a vacuum. Instead, that moment occurred after the shoving match, which Petitioner clearly initiated. The shoving match evolved into a full-blown fight. The two men were mutual combatants. As a result of Petitioner trying to break free from the man's hold, both men fell to the ground. However, even at this point in the altercation, Petitioner decided to escalate the situation. When the men fell to the ground, Petitioner landed on top of the man. At this point, it is clear that Petitioner's sheer size has subdued the man. When Petitioner stands, the man is lying on the ground in a defensive position. Once again, Petitioner decides to physically engage the man by punching and kicking him numerous times in his head. It is clear that Petitioner wanted to continue to fight with the man even when the man was not posing any threat to Petitioner. The video shows that Petitioner's co-workers, including Mr. Moss, had to intervene to prevent the altercation from continuing to escalate at that point.

Despite Petitioner's testimony that he was either trying to exit the bus and happened to brush up against the man due to Petitioner's size, or that he was only defending himself, the video evidence makes clear that Petitioner acted as the aggressor in this matter. But for Petitioner initiating the altercation by forcefully shoving the man, Petitioner would not have sustained the alleged accidental injury as a result of the subsequent, full-blown physical altercation.

For the foregoing reasons, the Arbitrator denies compensation. All other disputed issues have been rendered moot.

Brian T. Cronin
Arbitrator

1-11-2018
Date