09 WC 34077
15IWCC879

STATE OF ILLINOIS) BEFORE THE ILLINOIS WORKERS' COMPENSATION
) SS COMMISSION
COUNTY OF COOK)

Miguel Arroyo,
Petitioner,

vs. NOS. 09 WC 34077
15IWCC879

Elite Staffing,
Respondent.

ORDER OF RECALL UNDER SECTION 19(F)

A Petition to Recall Decision pursuant to Section 19(f) of the Illinois Workers' Compensation Act to correct an error in the Decision and Opinion on Review of the Commission dated November 24, 2015, having been filed by Respondent herein, and the Commission having considered said Petition, the Commission is of the opinion that the Petition should be granted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated November 24, 2015, is hereby recalled pursuant to Section 19(f).

IT IS FURTHER ORDERED BY THE COMMISSION that a Corrected Decision and Opinion on Review shall be issued simultaneously with this Order.

DATED: DEC 2 2 2015

RWW/rm
46

Ruth W. White

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Miguel Arroyo,

Petitioner,

vs.

NO: 09 WC 34077
15 IWCC 879

Elite Staffing,

Respondent.

CORRECTED DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary total disability and permanent disability and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below. On August 17, 2009 Petitioner filed an Application for Adjustment of Claim alleging an injury to his back on June 23, 2009. Evidence was presented at arbitration on October 14, 2014, and the Decision of the Arbitrator was filed on January 22, 2015. We adopt the Arbitrator's findings of fact as contained in the Decision attached hereto and made a part hereof but modify the Arbitrator's conclusions of law and ordered benefits.

Petitioner, a 55-year-old laborer, sustained an undisputed accidental injury to his back on June 23, 2009 attempting to lift a box. The Arbitrator found that Petitioner's current condition of ill-being is causally related to the accident, and that Petitioner is permanently and totally disabled from all employment. The Arbitrator awarded Petitioner temporary total disability benefits for the period June 29, 2009 through February 9, 2011 and weekly permanent total disability benefits commencing February 10, 2011 and continuing for life. The Arbitrator further awarded all medical expenses set forth in Petitioner's Exhibit #1 pursuant to the medical fee schedule, totaling $134,132.19.

After reviewing all of the evidence, the Commission finds that Petitioner reached maximum medical improvement from his June 23, 2009 injury by October 21, 2010. On that date, Petitioner was examined at his own request by Dr. Salehi. We note that Petitioner had been treating with Dr. Malek for

over one year and reported very little symptom improvement despite a series of caudal epidural steroid injections and extensive physical therapy and chiropractic treatments. Dr. Malek opined that surgery would be an appropriate treatment if Petitioner was acquiescent, however Petitioner did not wish to undergo a lumbar fusion. Dr. Salehi's §12 report stated his opinion that he would not recommend a lumbar fusion for Petitioner for several reasons. The report, as summarized by the Arbitrator, reads as follows:

> "[Dr. Salehi] performed a neurologic exam and reviewed: Dr. Bernstein's IME's from 8/31/09 and 3/1/10; Dr. Malek's records from 1/4/10, 1/26/10, 1/28/10, the 9/1/09 lumbar MRI as well as other various records including physical therapy and chiropractic notes. The doctor noted that Petitioner's low back pain complaints were consistent with the mechanism of injury. It was Dr. Salehi's opinion that the Petitioner's condition had become chronic as a result of a permanent exacerbation of pre-existing lumbosacral spondylosis. Dr. Salehi did not recommend surgery opining that a fusion was likely to worsen Petitioner's back condition given the fact that petitioner has multilevel disease as opposed to disease at one or two disc levels." (Arb. Dec., p. 4)

Dr. Salehi's report further recommended that in order to manage Petitioner's chronic pain, he should perform home exercises, refrain from smoking, and take over-the-counter analgesics rather than narcotics and prescription muscle relaxants. Dr. Salehi opined that while Petitioner's work-up and treatment was medically appropriate, he would not recommend any further treatment. Dr. Salehi listed the medical records he reviewed in preparation for his examination, including the records of Concentra Medical Services ("Concentra") and Grandview Health Care ("Grandview") from the initial weeks and months following the accident. We find it significant in weighing the medical opinions in this case that Dr. Malek reviewed no prior medical records other than the lumbar MRI taken on September 1, 2009 several days prior to his initial examination of Petitioner. We find that Dr. Malek's opinion lacks a thorough and complete basis of fact with respect to Petitioner's complaints and response to treatment in the weeks and months following the accident and we find it relevant to briefly review the initial records here.

On June 29, 2009, the first date of treatment post-accident, Petitioner presented to Concentra and was examined by Dr. Bunting. Petitioner described the lifting accident on June 23, 2009 wherein he claimed he twisted his back. Petitioner testified that he continued working the remainder of his shift on June 23, 2009 but that he did no strenuous activity. Petitioner did not claim any temporary total disability benefits between June 23, 2009 and June 29, 2009. Petitioner denied any prior history of back pain or injuries and complained of sharp low back pain, without radiation, that he rated at level "2/10." Petitioner denied any radicular symptoms such as numbness or tingling in his lower extremities and his straight leg raise test was negative for back pain. At the conclusion of the examination, Dr. Bunting diagnosed a lumbar strain and released Petitioner to return to work with restrictions.

On July 1, 2009 Petitioner returned to Concentra and reported some improvement in his symptoms and once again denied any radiation of pain from his low back or radicular symptoms. On that same day, Petitioner was evaluated by a physical therapist at Concentra. On July 8, 2009, Petitioner returned to Dr. Bunting a final time. Petitioner reported further improvement after a few sessions of physical therapy. He rated his pain level at "2/10" in the low back without radiation. On July 13, 2009

the physical therapist noted that Petitioner completed five sessions and showed signs of expected progress; the physical therapist recommended that Petitioner continue to return for further sessions.

However, the following day Petitioner began treating at Grandview and did not return to Concentra. Following his examination by Dr. De Las Casas at Grandview, Petitioner began a course of very frequent physical therapy sessions and chiropractic manipulations. On July 30, 2009, Petitioner reported to Dr. Cummings at Grandview that he experienced 40% improvement since starting care at Grandview and felt less pain in his low back overall. He continued to participate in frequent sessions of physical therapy and chiropractic manipulations and on August 26, 2009 he reported to chiropractor Kristen Kuk that his low back pain was slightly better but he reported a new symptom of coldness and itching in his right foot. Petitioner was subsequently referred for a §12 examination by Dr. Bernstein at the request of Respondent. Dr. Bernstein opined on August 31, 2009 that no further treatment was necessary for Petitioner's lumbar strain.

On September 10, 2009, Petitioner presented to Dr. Malek for a surgical consultation. As stated above, Dr. Malek confirmed at his deposition that he reviewed Petitioner's lumbar MRI but did not have any other prior records for review. Petitioner complained to Dr. Malek of low back radiating into his buttocks and tingling in his lower extremities. Dr. Malek noted that Petitioner had prior physical therapy but according to Petitioner's report "he did not tolerate the regimen he was on." Dr. Malek diagnosed Petitioner with lumbar radiculopathy and back pain with annular tears at L5-S1 and L3-L4. Dr. Malek recommended caudal epidural steroid injections. Petitioner continued physical therapy and chiropractic treatments at Grandview and Dr. Malek performed a series of three caudal epidural steroid injections from January through March of 2010. Petitioner testified at hearing that the injections provided little to no relief of his back pain. On March 1, 2010, Petitioner was reexamined by Dr. Bernstein. Dr. Bernstein reviewed the September 2009 MRI and found no distinct herniation directly causing any nerve root compression. Dr. Bernstein did not change his opinion following the new examination and updated record review; he believed that Petitioner was at maximum medical improvement and could work full duty.

Although Petitioner did not wish to undergo surgery, Dr. Malek continued to order additional surgical workup for Petitioner, including electrodiagnostic studies and a lumbar discogram, in order to "isolate the pain generator." We note that Dr. Salehi reviewed the discogram results and concluded that the positive findings did not change his opinion that it was not medically appropriate to surgically address Petitioner's condition. He believed that Petitioner could return to work under restrictions due to his chronic back pain.

After considering all of the evidence and for the reasons set forth below, we find that Petitioner's treatment following his October 21, 2010 examination by Dr. Salehi was not reasonable, necessary or causally related to the lumbar strain he sustained on July 23, 2009 and that Respondent is not liable for the charges incurred by Petitioner or for temporary total disability benefits after that date. Additionally, we find that Respondent is not liable for "travel" expenses totaling $3,450.00 charged by Grandview Health Care between January 28, 2009 and May 18, 2010 and between December 8, 2009 and December 22, 2009 as there is no evidence establishing the validity or necessity of these charges. Furthermore, in accordance with our findings we vacate the Arbitrator's award of permanent and total disability benefits and we find that as a result of the accidental injury of June 23, 2009 Petitioner sustained a loss of 30% of the person as a whole pursuant to §8(d)2.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $237.67 per week for a period of 68 4/7 weeks, commencing June 29, 2009 through October 21, 2010, 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 $237.67 per week for a period of 150 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 30% loss of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the following charges for reasonable and necessary medical expenses incurred through October 21, 2010 pursuant to §8(a) and §8.2 of the Act, with the exception of "travel" charges totaling $3,450.00 by Grandview Health Care between January 28, 2009 and May 18, 2010 and between December 8, 2009 and December 22, 2009: $15,655.00 to Dr. Malek, $1,087.70 to Prescription Partners, $6,545.00 to Windy City Anesthesia, $50,145.35 to Instant Care, $675.00 to Instant Care Medical Group, $7,941.98 to MedHealth Partners, $180.00 to Preferred Open MRI, $22,873.71 to Grandview Health Partners, $1,700.00 to MRI Lincoln Imaging Center, $1,500.00 to Advantage MRI, $2,352.63 to MNF Supplies, Inc., and $3,989.48 to EQMD, Inc., all subject to the medical fee schedule.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: DEC 2 2 2015
RWW/plv
o-10/28/15
46

Ruth W. White

Joshua D. Laskin

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

15IWCC0879

ARROYO, MIGUEL
Employee/Petitioner

Case# **09WC034077**

ELITE STAFFING
Employer/Respondent

On 1/22/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1067 ANKIN LAW OFFICE LLC
JOSHUA E RUDOLFI
162 W GRAND AVE SUITE 1810
CHICAGO, IL 60654

4866 KNELL O'CONNOR & DANIELEWICZ
THOMAS BOYD
901 W JACKSON BLVD SUITE 301
CHICAGO, IL 60607

15IWCC0879

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 Arroyo
Employee/Petitioner

v.

Elite Staffing
Employer/Respondent

Case # **09** WC **34077**

Consolidated cases:

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

DISPUTED ISSUES

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

FINDINGS

On **6/23/2009**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**13,838.24**; the average weekly wage was $**266.12**.

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

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

ORDER

Medical benefits

- Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $18,965.00 to Dr. Michel Malek, $1,087.70 to Prescription Partners, $6,545.00 to Windy City Anesthesia, $50,145.35 to Instant Care, $675.00 to Instant Care Medical Group, $7,941.98 to Medhealth Partners, $183.60 to Preferred Open MRI, $26,190.16 to Grandview Health Partners, $1,700.00 to MRI Lincoln Imaging, $1,500.00 to Advantage MRI, $2,352.63 to MNF Supplies, Inc., $3,989.48 to EQMD, Inc., $8,624.87 to Fullerton Surgery Center, $2,399.01 to NR Anesthesia, $1,300.00 to Best Practice Physical Therapy, and $532.41 to Injured Workers' Pharmacy, as provided in Sections 8(a) and 8.2 of the Act.

- Respondent shall pay reasonable and necessary medical services of $134,132.19, as provided in Sections 8(a) and 8.2 of the Act.

- Respondent shall be given a credit of $0.00 for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Temporary Total Disability

- Respondent shall pay Petitioner temporary total disability benefits of $237.67/week for 84 5/7 weeks, commencing 6/29/2009 through 2/9/2011, as provided in Section 8(b) of the Act.

- Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 6/29/2009 through 2/9/2011, and shall pay the remainder of the award, if any, in weekly payments.

- Respondent shall be given a credit of $0.00 for temporary total disability benefits that have been paid.

Permanent Total Disability

- Respondent shall pay Petitioner permanent and total disability benefits of $**461.78**/week for life, commencing **2/10/2011**, as provided in Section 8(f) of the Act.

- Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund***, as provided in Section 8(g) of the Act.

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

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

Signature of Arbitrator

1/22/15
Date

JAN 22 2015

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

15IWCC0879

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MIGUEL ARROYO, Petitioner,	)	
vs.	)	Case No.: 09 WC 34077
ELITE STAFFING, Respondent.	)	

ADDENDUM TO ARBITRATION DECISION

Background

On October 14, 2014, this matter proceeded to hearing before Arbitrator Jessica A. Hegarty in the City of Chicago, County of Cook. The issues in dispute between the parties are causal connection, reasonableness and necessity of medical services, medical bills, temporary total disability (TTD) and the nature and extent of Petitioner's injury. (Arb. 1).

The parties stipulated that the body parts/injuries at issue are only for Petitioner's low back/lumbar spine. (Arb. 1).

Findings of Fact

The Petitioner, a 60-year-old Hispanic male, worked for the Respondent as a laborer for approximately 12 years. His job duties included sweeping, packing, and stacking pallets on top of each other.

On June 23, 2009, the Petitioner was involved in an undisputed accident while attempting to lift a box. Petitioner testified that the box weighed approximately 180 pounds. As the Petitioner lifted the box, he felt a "crack" in his middle and lower back. The Petitioner notified Respondent, and continued working with the assistance of three other workers for the remainder of his shift.

On June 29, 2009, the Petitioner sought medical care at Concentra Medical Center where his complaints of pain in his mid to lower back were noted. (Pet. Ex. #2.) Petitioner denied radicular symptoms. The Petitioner was diagnosed with a lumber strain, placed on light duty, and recommended physical therapy. (*Id.*)

On July 8, 2009, the Petitioner followed up at Concentra where his lumbar pain complaints were noted. Petitioner also reported that he was completely off of work because Respondent could not accommodate his light duty restrictions. (*Id.*)

From July 1, 2009, through July 13, 2009, the Petitioner participated in physical therapy at Concentra. (*Id.*)

On July 14, 2009, the Petitioner sought treatment with Dr. Lee de las Casas at Grandview Health Partners ("Grandview"). (Pet. Ex. #3.) Grandview medical records reflect Petitioner's complaints of pain in his thoracic and lumbar spine. (*Id.*) Physical therapy was recommended and the Petitioner was taken off of work. (*Id.*) The Petitioner was also referred for x-rays of his skull to ensure clearance for an MRI. The Petitioner began physical therapy at Grandview on the same date. (*Id.*)

On July 23, 2009, a skull x-ray performed at Preferred Open MRI cleared the Petitioner for an MRI. (*Id.*)

On July 30, 2009, the Petitioner followed up at Grandview where his continued complaints of pain in his lower back were noted. (*Id.*) Physical therapy and no-work restrictions were continued. (*Id.*)

On August 26, 2009, the Petitioner consulted with Dr. Krysten Kuk at Grandview. The doctor recommended an MRI of Petitioner's lower back. No-work restrictions were continued, and Petitioner was referred to neurosurgeon, Dr. Michel Malek. (*Id.*)

On August 31, 3009, the Petitioner was examined by Dr. Avi Bernstein at Respondent's request pursuant to Section 12 of the Act. Dr. Bernstein noted a mechanism of injury consistent with the Petitioner's trial testimony. (Rsp. Ex. #2.) Petitioner complained of pain to his lower back. (*Id.*) Dr. Bernstein opined that the Petitioner sustained a lumbar sprain and recommended physical therapy. (*Id.*)

On September 1, 2009, the Petitioner underwent a lumbar MRI that revealed:

> *At the T12-L1, and L1-2 levels, there are 3 to 4 mm subligamentous posterior disc herniations elevating the posterior longitudinal ligaments and indenting the thecal sac, without significant spinal stenosis or significant neuroforaminal narrowing.*
>
> *At the L3-4 level, there is a 2-3 mm posterior disc herniation with a small annular tear indenting the thecal sac, without spinal stenosis or significant neuroforaminal narrowing.*
>
> *At the L5-S1 level, there is a 3 to 4 mm broad based posterior disc herniation indenting the thecal sac, without significant spinal stenosis or significant neuroforaminal narrowing.* (Pet. Ex. #3 & 4.)

On September 10, 2009, the Petitioner saw Dr. Michel Malek who noted Petitioner's complaints of low back pain radiating into his buttocks with tingling in his legs. (Pet. Ex. #5.)

Dr. Malek diagnosed Petitioner with back pain accompanied by radiculopathy. The doctor recommended a series of epidural steroid injections (ESI's) along with a thoracic spine MRI. (*Id.*) The Petitioner 's off-work status was continued. (*Id.*)

On September 11, 2009, an MRI of the Petitioner's thoracic spine was unremarkable. (Pet. Ex. #4.)

The Petitioner continued physical therapy and work conditioning during this time at Grandview. (Pet. Ex. #3.)

On January 12, 2010, Dr. Malek noted that the Petitioner's exam remained unchanged. The doctor continued to recommended a series of ESI's. (Pet. Ex. #5.)

The Petitioner had ESI's performed on January 14, 2010 and January 28, 2010. (Pet. Ex. #4 and #5.) The Petitioner testified that these injections helped his pain for a brief period of time.

On March 1, 2010, the Petitioner participated in a second Section 12 exam with Dr. Avi Bernstein at the request of the Respondent. (Rsp. Ex. #3.) The Petitioner reported that he had two ESIs with only five to six days of pain relief. (*Id.*) Dr. Bernstein opined that the Petitioner was neurologically intact, was at maximum medical improvement, and could return to work full duty. (*Id.*)

On March 18, 2010, the Petitioner followed up with Dr. Malek who noted a partial response to the two ESIs. (Pet. Ex. #5.) An additional ESI was recommended along with a course of work conditioning and an eventual FCE. (*Id.*) The Petitioner was released with light duty restrictions. (*Id.*) The Petitioner testified that he continued to be off-work as light duty work was not made available to him.

The Petitioner had his third ESI performed on March 24, 2010. (Pet. Ex. #4 and #5.)

On April 8, 2010, Dr. Malek consulted with Petitioner at which time work conditioning was recommended. Petitioner's light duty work restrictions were continued. (Pet. Ex. #5)

The Petitioner underwent a course of work conditioning at Grandview following this appointment. (Pet. Ex. #3)

On April 22, 2010, the Petitioner again saw Dr. Malek. (Pet. Ex. #5) Dr. Malek noted continued low back pain and a positive straight leg test. (*Id.*) Dr. Malek recommended a discogram for the Petitioner's lumbar spine. (*Id.*)

On May 20, 2010, a discogram was performed, revealing the Petitioner's pain generator at L4-L5 with contribution from the L5-S1 level. (Pet. Ex. #4) A post-discogram CT scan was performed the same day showing evidence of abnormal nucleogram at L3-L4, L4-L5, as well as evidence of a grade IV tear at L3-L4 and L4-L5. (*Id.*)

On June 3, 2010, Dr. Malek noted Petitioner's continued complaints of low back pain. The doctor discussed the possibility of surgery with the Petitioner. (Pet. Ex. #5.) Prior to recommending surgery, Dr. Malek recommended an updated MRI and an EMG/NCV of the right lower extremity. (*Id.*) Petitioner was continued on light duty. (*Id.*)

On June 3, 2010, An MRI of the Petitioner's lumbar spine on June 3, revealed:

> *At the L3-L4, L4-L5 and L5-S1 levels 3-4 mm, 2-3 mm, and 3-4 mm disc protrusions/herniations respectively indented the thecal sac without significant spinal stenosis, nor significant neuroforaminal narrowing.* (Pet. Ex. #4.)

The Petitioner was continued on light duty restrictions at his July 22, 2010 appointment with Dr. Malek. (Pet. Ex. #5) An EMG performed on July 22, 2010 was essentially normal. (*Id.*)

On September 2, 2010, the Petitioner followed up with Dr. Malek who noted Petitioner to be stable but still complaining of paraspinal pain. (*Id.*) Dr. Malek recommended an SI joint injection in an effort to alleviate Petitioner's pain. The doctor also ordered an FCE. (*Id.*)

On October 21, 2010, Dr. Malek noted that the FCE and SI joint injections had not been approved. (*Id.*)

On October 21, 2010, the Petitioner consulted with Dr. Sean Salehi of the Neurological Surgery & Spine Center at Petitioner's request, pursuant to Section 12 of the Act. (Pet. Ex. #7.) Dr. Salehi noted Petitioner's complaints of low back pain at a 6/10 and a burning sensation in the bottom of his feet. The Petitioner indicated that sitting and standing make his symptoms worse while bed rest improves his pain complaints. The doctor performed a neurologic exam and reviewed: Dr. Bernstein's IME's from 8/31/09 and 3/1/10; Dr. Malek's records from 1/4/10, 1/26/10, 1/28/10, the 9/1/09 lumbar MRI as well as other various records including physical therapy and chiropractic notes. The doctor noted that Petitioner's low back pain complaints were consistent with the mechanism of injury. (*Id.*) It was Dr. Salehi's opinion that the Petitioner's condition had become chronic as a result of a permanent exacerbation of pre-existing lumbosacral spondylosis. (*Id.*) Dr. Salehi did not recommend surgery opining that a fusion was likely to worsen Petitioner's back condition given the fact that Petitioner has multi level disease as opposed to disease at one or two disc levels. Dr. Salehi recommended an FCE to determine permanent restrictions and released the Petitioner with a lifting restriction of 20 pounds, no repetitive bending or twisting, and alternating standing and sitting every 30 to 45 minutes. (*Id.*)

On November 22, 2010, the Petitioner had an FCE performed at Best Practice Physical Therapy that was deemed to be valid. The FCE determined that the Petitioner is capable of working in the light strength category with a maximum lifting restriction of 20 pounds and a maximum carrying restriction of 10 pounds. (Pet. Ex. #5.)

On January 12, 2011, The Petitioner followed up with Dr. Malek at which time SI injections were again recommended. (*Id.*) The doctor noted that Petitioner's physical exam remained unchanged. The Petitioner was released again with light duty restrictions. (*Id.*)

The Petitioner had SI joint injections performed by Dr. Malek on January 21, 2011, and February 4, 2011. (*Id.*)

On February 9, 2011, Petitioner reported to Dr. Malek that the epidural injections had helped his back while the SI injections had not provided any significant relief. Dr. Malek told Petitioner he had two options: surgery or declare MMI. (*Id.*)

The Petitioner testified that he does not wish to have the surgery. He testified that he is fearful the surgery may produce a negative outcome such that he might not be able to walk again.

The Petitioner was released from Dr. Malek's care with permanent restrictions consistent with his FCE.

The Petitioner testified that he is sixty (60) years old. He completed school through the 6th grade in his native Mexico. He has been in the United States for thirty-five (35) years and has worked in general labor positions the entire time. The Petitioner was approved for Social Security Disability (SSD) benefits in March, 2011 and he continues to receive those benefits as of the date of trial.

Petitioner testified that his back continues to cause him pain, and that he is unable to walk more than 5-6 blocks, or for more than 15 minutes at a time. Petitioner also testified that he has not looked for work or applied to any positions since the date of accident.

The Petitioner has had nurses come to his home from Medicare that have shown him stretches to perform in order to help him cope with his continued back pain. The Petitioner continues to follow up with his primary care doctor, Dr. Monteverde, who prescribes him medication for his back pain. The Petitioner testified that prior to this work injury he never had any problems with his back, nor had he ever sought medical care for a back injury. The Petitioner has not received any TTD benefits from the Respondent and still has outstanding medical bills as of the date of trial.

The Arbitrator had an opportunity to observe the Petitioner during his testimony and thought him to be an open, straightforward and honest person.

The Petitioner called Ms. Kari Stafseth to testify. Ms. Stafseth is a certified vocational counselor who works with Vocamotive. She has a Master of Science in Rehabilitation degree from the University of Illinois at Urbana-Champaign and has been a certified Rehabilitation Counselor since 2009. Ms. Stafseth testified that she met with the Petitioner personally for the purpose of a vocational consultation and that she reviewed the Petitioner's medical records in conjunction with the one-on-one interview with the Petitioner. Ms. Stafseth opined that the Petitioner is permanently and totally disabled. (Pet. Ex. #8.) She based her opinion on the Petitioner's age, education, language, prior work history, transferrable skills and physical capabilities. (*Id.*) According to Ms. Stafseth, a 60 year old Spanish speaking male with a permanent 20 pound lifting restriction, falls into the "unskilled sedentary" work group. Ms. Stafseth further testified that approximately 1% of the jobs in the entire country fall into such category. (*Id.*)

Ms. Stafseth reviewed a Labor Market Survey introduced by the Respondent at trial. (Rsp. Ex. #6.) After reviewing the survey, Ms. Stafseth opined the Labor Market Survey to be invalid because of the failure to consider the Petitioner's physical limitations and permanent restrictions.

Dr. Michel Malek testified by way of evidence deposition. (Pet. Ex. #9.) Dr. Malek testified that the Petitioner had an asymptomatic, pre-existing degenerative condition in his lumbar spine that was aggravated and accelerated beyond its normal progression by the Petitioner's work accident. (*Id.* at 33.) Dr. Malek further opined that the mechanism of injury, the contemporaneous nature of the complaints, onset of symptoms, physical examinations, diagnostic testing and response to treatment were all consistent with Petitioner's work injury. (*Id.* at 33-34.) Dr. Malek disagreed with Dr. Bernstein's diagnosis of Petitioner's back as a muscle sprain. (*Id.* at 35.) Dr. Malek disagreed with Dr. Bernstein's diagnosis of a muscle sprain because he failed to consider Petitioner's radicular pain complaints. Dr. Malek testified that radicular complaints are inconsistent with a muscular sprain. (*Id.* at 36.) Dr. Malek further opined that the Petitioner's 5 to 6 day positive response to ESI's is further evidence of radiculopathy and a disc injury. (*Id.* at 37-38.) In Dr. Malek's opinion all of the Petitioner's medical care has been reasonable, necessary and causally related to his undisputed work accident. (*Id.* at 34.)

Dr. Sean Salehi testified by way of evidence deposition. (Pet. Ex. #10.) Dr. Salehi testified that he reviewed the post discogram CT dated May 20, 2010 showing annular tears at L2-3, L3-4, and L4-5 and Petitioner's June 3, 2010, lumbar MRI film. The doctor testified that the MRI showed multilevel disc degeneration and dehydration. Dr. Salehi diagnosed Petitioner with lumbosacral spondylosis and lumbar strain. In Dr. Salehi's opinion Petitioner's work injury caused a permanent exacerbation of Petitioner's pre-existing lumbar spondylosis. (*Id.* at 15.) He based this opinion on the fact that the Petitioner had no previous history of back problems, had a mechanism of injury consistent with his complaints, and did not improve within 6 months. (*Id.* at 15-16.) Dr. Salehi opined that the Petitioner was capable of work pursuant to his valid FCE. (*Id.* at 17-18.) He further opined that the Petitioner's medical care has been reasonable, necessary and causally related to his work accident. (*Id.* at 17.)

Dr. Avi Bernstein testified by way of evidence deposition. (Rsp. Ex. #8.) Dr. Bernstein testified that it is possible that the Petitioner aggravated his underlying pre-existing condition, but he did not believe that that would account for all of the Petitioner's complaints. (*Id.* at 19.) Dr. Bernstein testified that Petitioner's permanent restrictions are unwarranted as he does not have a distinct injury. (*Id.* at 20.) With respect to SI joint pain, Dr. Bernstein testified pain in the SI joint, 99.99% of the time, is related to low back pain. (*Id.* at 18.) Dr. Bernstein was unaware of any previous injury to the Petitioner's low back. (*Id.* at 23) He opined that a patient who has temporary relief from an ESI would benefit from additional injections, not to exceed three in a six month period. (*Id.* at 26.) He further opined that when a patient has radiating pain in the buttocks or thighs, it is commonly due to a discogenic cause. (*Id.* at 27-28.)

CONCLUSIONS OF LAW

F. Whether the Petitioner's Current Condition of Ill-Being is Causally Related to the Work Accident.

The Arbitrator finds that the Petitioner's current condition of ill-being is causally related to the Petitioner's undisputed June 23, 2009, work injury.

Dr. Michel Malek testified that the Petitioner had a pre-existing degenerative lumbar spine condition that was silent and asymptomatic prior to his work accident. (Pet. Ex. #9 at 33.) Dr. Malek further testified that the Petitioner's work accident caused the Petitioner's pre-existing condition to become "symptomatic by aggravation, precipitation and/or acceleration beyond the natural progression of the disease." (*Id.*)

Dr. Sean Salehi opined as to a causal connection between the Petitioner's current condition and the work injury. (Pet. Ex. #10 at 15.) Dr. Salehi testified that the Petitioner sustained a permanent aggravation of his pre-existing spondylosis. (*Id.*)

Dr. Avi Bernstein opined in his Section 12 reports that the Petitioner sustained a lumbar sprain and could have returned to work as of 2009. (Resp. Ex. #2, #3, and #4.) Dr. Bernstein based this opinion partly upon the MRI reports that he reviewed, however, he did not review the actual films in arriving at his opinion. (Resp. Ex. #8 at 26-27.) Dr. Bernstein arrived at this opinion despite documentation that the Petitioner complained of radiating pain which he testified is typically of a discogenic cause. (*Id.* at 27-28.)

Dr. Malek also testified that a lumbar sprain does not cause radiation. (Pet. Ex. #9 at 38.)

Based on the credible, medical evidence contained in the record, the Arbitrator finds that the Petitioner has sustained his burden with respect to causal connection.

J. Whether the Medical Services were Reasonable and Necessary and Whether Respondent has Paid all Appropriate Charges.

Having previously found causation, the Arbitrator finds that the Petitioner's medical care was causally related to his undisputed work accident. Dr. Malek and Dr. Salehi both testified that the medical treatment provided to the Petitioner was reasonable and necessary. The Petitioner's treatment consisted of diagnostic testing, doctor's visits, pain medication, ESIs, SI injections, physical therapy, work conditioning and a FCE.

With regard to the ESIs, the Arbitrator notes Dr. Bernstein's testimony in which he agreed that up to three ESIs within a 6 month period is reasonable. (Resp. Ex. #8 at 26.) Dr. Bernstein further testified that ESIs can be diagnostic with respect to identifying the location of the pain generator. (*Id.* at 24) The Respondent relies on the UR report of March 26, 2010, in disputing these injections. (Rsp. Ex. #7.) The Arbitrator agrees with Dr. Malek, Dr. Salehi and Dr. Bernstein in finding that these injections were reasonable and necessary.

With regard to the SI injections, Dr. Bernstein testified that 99.9% of the time pain in the SI joint is due to low back pain. (*Id.* at 18.) Dr. Malek testified that the SI injections were performed in a diagnostic capacity. (Pet. Ex. #9 at 54.) Based upon the medical opinions in this case the Arbitrator finds that the SI joint injections were reasonable and necessary and were performed due to the low back pain.

The Respondent introduced UR reports to dispute physical therapy. (Resp. Ex. #7 *generally.*) The Arbitrator finds that due to the Petitioner's significant, consistent pain complaints, a conservative course of physical therapy was reasonable and necessary. The Arbitrator chooses to accept the opinions of Dr. Malek and Dr. Salehi in so finding.

Concerning the discogram performed by Dr. Malek, the Arbitrator finds that it was reasonable and necessary. Dr. Malek testified that a discogram helped to determine exactly where the pain generator was in the Petitioner's spine. (Pet. Ex. #9 at 22-23.) The discogram confirmed the Petitioner's complaints were related to the L4-L5 and L5-S1 levels, which is consistent with other objective medical evidence. (*Id.*) No medical testimony refuting this test was entered into evidence.

Concerning the FCE that was performed, the Arbitrator finds that the FCE was reasonable and necessary in helping to determine the Petitioner's functional abilities. In a case where permanent restrictions are assessed, an FCE is an accepted standard in quantifying those restrictions.

Based on the above findings, the Arbitrator finds that the Petitioner's medical care was reasonable and necessary in aiding the Petitioner in achieving maximum medical improvement.

The Arbitrator further finds that the Respondent has not paid all appropriate charges and awards the Petitioner's medical bills contained in Petitioner's Exhibit #1.

K. Whether the Petitioner is Entitled to TTD, Maintenance, or PTD Benefits.

The Petitioner is entitled to TTD benefits from June 29, 2009, to February 9, 2011, a period of 84 5/7 weeks, payable at the minimum rate of $220.00 per week. The Arbitrator further finds that the Petitioner is entitled to PTD benefits from February 10, 2011 through the date of trial.

With regard to TTD, the Petitioner's initial medical records from Concentra indicate that he was placed on light duty restrictions on June 29, 2009, and that the Respondent was unable to accommodate those restrictions. (Pet. Ex. #2.) Despite having an undisputed work accident, the Respondent did not start TTD benefits at that time. The Respondent has provided no basis for the non-payment of benefits at that time. The Petitioner's medical records from that date forward indicate that the Petitioner was either provided off work notes, or provided light duty restrictions that the Respondent did not accommodate. The Petitioner credibly testified that the Respondent was unable to accommodate light duty, and the Petitioner's medical records support this fact. The Concentra medical note from July 9, 2009 indicates that "[p]atient has not been working because light duty is not available." (Pet. Ex. #2) Accordingly, the Arbitrator finds that

the Petitioner is entitled to TTD benefits from June 29, 2009 through February 9, 2011, the date he was released by Dr. Malek at maximum medical improvement with permanent work restrictions. (Pet. Ex. #5.)

Concerning the Petitioner's right to PTD benefits, please see the analysis in "Nature and Extent." *Infra.*

L. What is the Nature & Extent of the Injury?

The Arbitrator finds that as a result of the Petitioner's undisputed June 23, 2009 work injury the Petitioner is permanently and totally disabled.

The Arbitrator places significant weight on the valid FCE performed on November 22, 2010, in determining the level of permanency caused by the Petitioner's injury. (Id.) The FCE determined that Petitioner is capable of assuming a position in the light strength category with a maximum lifting capacity of 20 lbs., and a maximum carrying capacity of 10 lbs. The FCE determined that in order for Petitioner to successfully return to work in the light strength category the following job restrictions must be met:

- No standing for more than 15 minutes continuously.
- No walking for more than 0.3 mile continuously.
- No pushing more than 80 lbs.
- No crouching.
- No stooping.
- No crawling on hands and feet. (Id.)

The Arbitrator notes that the Petitioner is 60 years of age, does not speak English, has a 6th grade education (from schooling in Mexico) and has worked solely as a laborer during his 35 years in the United States. The Petitioner has been receiving SSD benefits since March 2011.

The Petitioner's vocational expert, Ms. Kari Stafseth testified that the Petitioner is permanently and totally disabled. (Pet. Ex. #8.) She based her opinion on the Petitioner's age, education, language, prior work history, transferrable skills and physical capabilities. (*Id.*) According to Ms. Stafseth, a 60 year old Spanish speaking male with a permanent 20 pound lifting restriction, falls into the "unskilled sedentary" work group. Ms. Stafseth further testified that approximately 1% of the jobs in the entire country fall into such category. (*Id.*)

Ms. Stafseth reviewed a Labor Market Survey introduced by the Respondent at trial. (Rsp. Ex. #6.) After reviewing the Labor Market Survey, Ms. Stafseth opined the Labor Market Survey to be invalid because of the failure to consider the Petitioner's physical limitations and permanent restrictions.

The Arbitrator notes that Respondents labor market survey suggests that Petitioner is capable of obtaining work as:

- a housekeeper
- laundry feeder/ironer
- janitor
- pizza assembler
- dishwasher/steward.

After reviewing the labor market survey, the Arbitrator agrees with Ms. Stafseth that based upon the job leads contained, it does not appear that the Petitioner would in fact qualify for any of the positions in light of his permanent restrictions. As such, the Arbitrator affords little weight to the Respondent's vocational opinion and labor market survey.

Based upon the totality of the Petitioner's current physical condition (age, education, work history, skills, etc.) the Arbitrator finds that the Petitioner has proven by the preponderance of credible evidence that he is permanently and totally disabled. The Arbitrator therefore awards Permanent Total Disability benefits in the amount of $461.78 (50% of State Average Weekly Wage as of the date of accident) per week from February 10, 2011, and ongoing for the rest of Petitioner's life.

State of Illinois)
)ss.
County of Will)

Before the Illinois Workers' Compensation Commission

Gina Catalanello,
Petitioner,

vs.

No. 04 WC 45978
15 IWCC 0058

Horizon House,
Respondent.

ORDER

Pursuant to Respondent's Motion to Correct Clerical Error, the Commission recalls the Decision and Opinion on Review of the Illinois Workers' Compensation Commission dated January 23, 2015 under Section 19(f) of the Act.

The Commission notes that while Respondent's Motion was filed on February 13, 2015, the Commission withheld ruling on the Motion at the request of the parties. It is clear to the Commission that there has been no meeting of the minds in the interim.

The Commission is of the opinion that the Commission's Decision and Opinion on Review dated January 23, 2015 should be recalled due to a clerical error. The Commission, therefore, hereby grants Respondent's Motion to Correct Clerical Error.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated January 23, 2015 is hereby recalled and a Corrected Decision and Opinion on Review issued simultaneously. The parties should return their original decisions to Commissioner Michael J. Brennan.

Dated: DEC 17 2015

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

MJB:ell
052

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Gina Catalanello,

Petitioner,

vs.

NO: 04 WC 45978
15 IWCC 0058

Horizon House of IV, Inc.,

Respondent.

CORRECTED DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary total disability benefits and permanent disability benefits, 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.

So that the record is clear, and there is no mistake as to the intentions or actions of this Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical / legal perspective. We have considered all of the testimony, exhibits, pleadings and arguments submitted by the Petitioner and the Respondent and find that Petitioner suffered an intervening incident on March 20, 2007, which terminates Respondent's liability and requirement to pay compensation after that date.

The Commission notes that Petitioner was attacked by her boyfriend on March 20, 2007. (T.47-48) Petitioner testified that she was beaten by her boyfriend and explained that he beat her with his fists about the head, arm and back. (T.47-48) Petitioner's testimony is consistent with the history taken at the emergency room. (PX3) The nurse noted that Petitioner was assaulted by her boyfriend and that he "beat" her. (PX3) The emergency room nurse further noted that noted that the beating took place while Petitioner and her boyfriend were "in [a] car at stop sign." The nurse's note explains that Petitioner was dragged out of the car by her boyfriend and into his

aunt's home, where he continued to beat her. The emergency room medical report noted that Petitioner had "[b]ruising to [right] arm, [left] forearm, [left] [illegible], [left upper] back. Large area of swelling to [left upper] back. [left] eye bruised and swollen." (RX5)

Petitioner returned to the emergency room complaining of severe head and neck pain on April 2, 2007. (T.48,RX6) She was diagnosed with a subdural hematoma and underwent a right frontal temporoparietal craniotomy for evacuation of hematoma. (RX6)

In a letter dated August 21, 2009, and addressed To Whom It May Concern, Dr. Perales indicated that the March 20, 2007 attack caused Petitioner "multiple injuries, including: subdural hemorrhaging of the brain, chronic pain syndrome, loss of balance, memory loss, and chronic headaches." (PX3) Dr. Perales explained that since undergoing a right frontal temporoparietal craniotomy for evacuation of a hematoma on April 7, 2007, Petitioner "has had memory loss and loss of balance. After the attack she suffered from severe anxiety disorder. I am treating her chronic pain with narcotics: Roxycodone and Oxycontin. Her anxiety disorder is being treated with Xanax. [Petitioner] is totally disabled." (PX3)

The Commission notes that while Petitioner was still suffering from back pain and sciatica prior to the March 20, 2007 accident, Petitioner did not require any surgical intervention for her lumbar problems until after the March 20, 2007 attack. The medical records from Dr. Perales show that Petitioner's lumbar problems worsened following the March 20, 2007 attack. Finally, the Commission notes that in his August 21, 2009 letter, Dr. Perales attributes Petitioner's ongoing issues to the March 20, 2007 attack and finds that Petitioner is totally disabled following the March 20, 2007 attack. Nowhere does he ascribe Petitioner's inability to work to her work accident.

Therefore, based upon the totality of the evidence, the Commission finds that the March 20, 2007 attack constitutes an intervening act, breaking the causal connection between Petitioner's current conditions of ill-being and the March 4, 2004 work accident. As such, the Arbitrator's award of partial temporary disability benefits commencing on April 12, 2010 is hereby vacated. Furthermore, the Commission modifies the award of medical expenses by the Arbitrator and awards all medical expenses through March 19, 2007, the day before the intervening act.

The Commission further notes that Petitioner underwent a considerable amount of conservative treatment following the March 4, 2004 work accident and up to the March 20, 2007 intervening attack. Petitioner was still suffering from lumbar back problems as a result of the March 4, 2004 attack which were worsened by the March 20, 2007 attack. Therefore, based on the totality of the evidence, the Commission finds that Petitioner has suffered a 10% loss use of the person as a whole as a result of the March 4, 2004 attack.

One should not and cannot presume that we have failed to review any of the record made below. Though our view of the record may or may not be different than the arbitrator's, it should not be presumed that we have failed to consider any evidence taken below. Our review of this material is statutorily mandated and we assert that this has been completed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision is modified as stated above, and is otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $200.83 per week for a period of 4-2/7 weeks, that being the period of temporary total incapacity for work under Section 8(b) of the Act. Respondent shall be given credit for all sums previously paid hereunder.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner $36,813.28 in medical expenses, the amount incurred in medical expenses through March 19, 2007, as provided under Sections 8(a) and 8.2 of the Act. Respondent shall be given credit for medical benefits that have been paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner permanent partial disability benefits of $382.40 per week for a further period of 50 weeks, as provided in Section 8(d)2 of the Act, because the injury sustained caused a 10% loss of use of the person as a whole.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $36,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 17 2015
MJB/ell
o-12/02/14
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Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

CATALANELLO, GINA
Employee/Petitioner

Case# **04WC045978**

HORIZON HOUSE OF IV INC
Employer/Respondent

15IWCC0058

On 1/30/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0400 LOUIS E OLIVERO & ASSOC
DAVID W OLIVERO
1615 FOURTH ST
PERU, IL 61354

0445 RODDY LEAHY GUILL & ZIMA LTD
ROBERT J DOHERTY JR ESQ
303 W MADISON ST SUITE 1500
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF LASALLE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

GINA CATALANELLO,
Employee/Petitioner

v.

HORIZON HOUSE OF IV, INC.,
Employer/Respondent

Case # 04 WC 45978

Consolidated cases: ____

15IWCC0058

An *Application for Adjustment 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 **New Lenox on 10/10/12 and** , on **07/23/13**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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 **Choice of physicians**

FINDINGS

On **03/04/04**, 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*** sustain an accident that arose out of and in the course of employment.

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

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

In the year preceding the injury, Petitioner earned $**15,664.68**; the average weekly wage was $**301.24**.

On the date of accident, Petitioner was **39** 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 $**631.18** for TTD, $ 0 for TPD, $ 0 for maintenance, and $ 0 for other benefits, for a total credit of $**631.18**.

Respondent is entitled to a credit of $2,200.03 under Section 8(j) of the Act.

CORRECTED ORDER

Respondent shall pay petitioner temporary total disability benefits of $200.83/week for **4&2/7 wks**, commencing 03/05/04 through 03/18/04 and 07/22/04 through 08/06/04, as provided in Section 8(b) of the Act. Respondent to receive credit for all sums previously paid hereunder.

Respondent shall pay reasonable and necessary medical services of $96,691.98, as provided in Section 8(a) of the Act and pursuant to the medical fee schedule. Respondent to receive credit for all sums previously paid hereunder.

Respondent shall pay petitioner permanent totally disability benefits of $382.40/ week for life, commencing 04/12/10, as provided in Section 8(f) of the Act.

Commending on the second July 15th after the entry of this award, petitioner may become eligible for cost-of-living adjustments paid the ***Rate Adjustment Fund***, as provided in Section 8(g) of the Act.

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

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

/s/ George S. Andros

CORRECTED AWARD –ARB ANDROS

Signature of Arbitrator

JAN. 28, 2014

Date

JAN 30 2014

PRELUDE & CASE OVERVIEW 04 WC 45978

This case is determined by the preponderance of the medical opinions of many doctors, all of whom practice in central Illinois in their well defined practice areas. The hub of the referrals of treatment was Dr. Constantino Perales. He referred the Petitioner to the Associated University Neurosurgeons at the medical complex in Peoria. Both Dr. William Olivero and his colleague, Dr. Dinh evaluated the patient. That evaluation included consult with Dr. Lisa Snyder and return to Dr. Dinh Dr. Snyder discussed management of her chronic pain. Dr. Dinh relied upon in part the discogram from St. Francis Medical Center in Peoria plus MRI. That discogram demonstrated a grade 4 tear pattern at L4-L5 level. Later discogram and differing opinions between Dr. George De Phillips and section 12 examiner Dr. Steven Delheimer were manifested in the evidence. The Arbitrator finds that despite the defense' tenacious efforts to underscore this worker's domestic physical abuse and likely over medicating at times as breaking the chain of causation, the Arbitrator in a close call by a preponderance of the evidence adopts the opinions and direction of the case and medical conclusions over the years espoused by Drs.Perales, Oliverio, Dinh and , in this specific case, Dr. George De Phillips. This person became downtrodden and even hopeless over the years and at times relying heavily on her only available form of treatment namely medication - given surgical and or invasive remediation were not granted under workers compensation benefits via primarily Dr. Delheimer.

STATEMENT OF FACTS 04 WC 45978

At Arbitration, employee, GINA CATALANELLO, testified that she began working for employer, HORIZON HOUSE OF IV, INC., in September 1999, teaching disabled adults basic day-to-day skills. Employee CATALANELLO worked for employer, HORIZON HOUSE OF IV, INC., continuously until November 2006 when she was involuntarily let go. Employee CATALANELLO also testified that she never had any injury to her low back before working for employer, HORIZON HOUSE OF IV, INC., nor had she ever received any medical treatment to her low back.

On March 4, 2004, employee CATALANELLO was leaning over a bathtub to assist a disabled adult, when she was unexpectedly physically assaulted by another resident who came up from behind and began punching and kicking her in the low back area. Following the attack, employee CATALANELLO had to seek immediate medical attention since she could not straighten up her back and had numbness in her right buttock area.

ILLINOIS VALLEY COMMUNITY HOSPITAL - EMERGENCY ROOM

On March 4, 2004, at 9:00 p.m., employee CATALANELLO arrived at the emergency room of Illinois Valley Community Hospital complaining of having low back pain and right hip pain from being punched and kicked in that area. The emergency room records verify that she was experiencing significant low back pain and was unable to straighten all the way. An emergency room physician examined her and ordered pelvic x-rays, which did not reveal any fracture.

He diagnosed employee CATALANELLO with trauma to the right lower back and iliac crest and instructed her to rest, use an ice pack on her low back, take Vicodin for pain and follow up the next day for further treatment in the Occupational Health Department at Illinois Valley Community Hospital.

ILLINOIS VALLEY COMMUNITY HOSPITAL - OCCUPATIONAL HEALTH DEPT.

On March 5, 2004, employee CATALANELLO went to the Occupational Health Department and informed the therapist that she was still experiencing low back pain, especially when bending. The therapist noted in the chart that employee CATALANELLO was slow getting up from a chair and that her gait was guarded. The therapist found on examination, tenderness in employee CATALANELLO's back, which she treated with ice and heat and range of motion exercises. After one physical therapy session, the Occupational Health Department discharged employee CATALANELLO back to regular duty.

On March 10, 2004, employee CATALANELLO returned to Occupational Health Department because she could not work due to the pain in her low back area. Dr. Fesco, the Occupational Health physician, drew a diagram in his chart showing the location of her low back pain, muscle spasm, a hematoma and the radiation of the pain. Dr. Fesco's diagnosis was that employee CATALANELLO had an acute lumbo-sacral muscle spasm and ecchymosis. He recommended further physical therapy, Flexeril for her muscle spasm and restricted her from all work.

On March 15, 2004, employee CATALANELLO returned to Dr. Fesco and reported that she was feeling much better and was not experiencing pain in the thigh or night time pain. Dr. Fesco's impression was that her lumbo-sacral sprain was resolving and that she could return to work with a 15 pound restriction. Since her employer could not accommodate these restrictions, she stayed off work.

On March 17, 2004, employee CATALANELLO received physical therapy for her low back and the therapist's chart note reflected that employee CATALANELLO still rated her pain as a 5 out of 10, which after the therapy session reduced to a 3 out of 10.

On March 18, 2004, Dr. Fesco examined employee CATALANELLO and did not find any muscle spasms or leg pain, so he then released her to return to full-duty work.

Employee CATALANELLO testified that following her return to work, she still experienced quite a bit of lower back pain and stiffness in her back and could not fully perform her job. Employer, HORIZON HOUSE OF IV, INC., accommodated her limitations by assigning her to a van driver's position. Over the course of the next two months while on light duty, employee CATALANELLO was still having problems with her low back.

DR. CONSTANTINO PERALES

On July 1, 2004, employee CATALANELLO sought further medical attention for her low back pain from Dr. Constantino Perales, a physician she had never seen before but one who had treated her son. Employee CATALANELLO gave Dr. Perales a history of having injured her back at work in March and was still having cramps in the low back with leg pain, right worse than left, and stiffness. Dr. Perales examined her back and found tenderness, a positive straight leg raising and positive deep tendon reflexes. Dr. Perales diagnosed her with low back pain, prescribed a lumbar support for her to use at work and ordered a lumbar MRI. On July 8, 2004, employee CATALANELLO had a lumbar MRI at Illinois Valley Community Hospital, which the radiologist interpreted as showing a broad-based L4-5 disc protrusion with annular tear.

On July 22, 2004, employee CATALANELLO had a follow-up with Dr. Perales because she was still having back pain and stiffness, along with leg pain. Dr. Perales reviewed the MRI results with employee CATALANELLO and on examination found that she had a positive straight leg raising test and a positive deep tendon reflex test as well as restrictions in range of motion of the lumbar spine. Dr. Perales' diagnosis then became a lumbar syndrome with an annular tear at L4-5, degenerative joint disease and right sciatica. He prescribed employee CATALANELLO a Medro Dose Pack, Darvocet, Celebrex and also restricted her from work.

On August 8, 2004, employee CATALANELLO presented to the emergency room at Illinois Valley Community Hospital because she was having swelling under her tongue after taking the prescription Celebrex for several days. She was instructed to discontinue taking the Celebrex since she had a reaction to it and to follow-up with Dr. Perales.

On August 9, 2004, Dr. Perales returned employee CATALANELLO to work with a 5 pound weight limit and no climbing, bending or stooping.

On August 17, 2004, employee CATALANELLO began receiving physical therapy for her complaint of low back pain, cramping and numbness in the toes, which were the same complaints she had immediately after her work injury. Employee CATALANELLO received approximately six weeks of therapy at Illinois Valley Community Hospital that ended on September 15, 2004.

On August 31, 2004, employee CATALANELLO saw Dr. Perales for a follow-up from the emergency room visit for her allergic reaction to Celebrex.

On October 27, 2004, Dr. Perales referred employee CATALANELLO back to physical therapy and employee CATALANELLO gave the therapist the following history:

> "The patient states that she hurt her back March 2004 when she was attacked at work. She states that she started having pain in her lower back area, which she describes as cramping which goes down to the buttock area. She states that she was taken to the emergency room and x-ray was found to be negative for any fractures or dislocation. The patient states she has had physical therapy, which helped in relieving some of the pain in her lower back area. She states that she was released back to work in March and worked for about two months on a light duty, but she started having some problems in her back again so she consulted with Dr. Perales and she was ordered to have MRI and x-ray. She states that last on July 8, 2004, she had another MRI and she was told to take off work and started physical therapy again which she had done from July to September and made some improvements again. She states that ever since she stopped therapy in September she started having some cramping in her lower back area again so she went back to see the doctor and she was ordered to have physical therapy again. She is now referred physical therapy for continuation of treatment."

Employee CATALANELLO received physical therapy until November 18, 2004.

DR. GREGG DAVIS - INDEPENDENT MEDICAL EVALUATION

On December 8, 2004, employee CATALANELLO chose to be evaluated by Dr. Gregg Davis, a physician board certified in family practice. Employee CATALANELLO informed Dr. Davis that she was still experiencing low back complaints that were identical to those she had experienced at the time of her work injury. Employee CATALANELLO denied having any prior or subsequent injuries. Dr. Davis testified at his evidence deposition that employee CATALANELLO had degenerative disk disease of her lumbar spine, a herniated nucleus pulposus at L4-5 with an associated annular tear and right lower extremity radiculopathy. Dr. Davis believed that these conditions were related to employee CATALANELLO's work injury and he further believed she would need future medical care for control of her pain and would benefit also from permanent work restrictions.

DR. CONSTANTINO PERALES

On June 7, 2005, employee CATALANELLO returned to see Dr. Perales and complained of low back pain, more on the right side, cramping to thighs and having numbness to feet and toes. Dr. Perales testified at his evidence deposition that employee CATALANELLO was experiencing symptoms of a herniated disc or significant nerve impingement. Dr. Perales then referred her to a neurological specialist and his records indicate that he referred employee CATALANELLO to Dr. William Olivero.

DR. WILLIAM OLIVERO - ASSOCIATED UNIVERSITY NEUROSURGEONS

On August 3, 2005, employee CATALANELLO saw Dr. William Olivero and gave a history of being hurt at work over a year ago and since that time was having low back pain, cramping at the legs and numbness in the feet. Dr. Olivero performed an examination on her back which revealed decreased range of motion. He then ordered a repeat lumbar MRI, which he later interpreted as being unchanged from the previous MRI. Dr. Olivero recommended further physical therapy and epidural steroid injections.

On September 21, 2005, employee CATALANELLO returned to see Dr. Olivero after having had two epidural steroid injections in her low back. She reported experiencing some relief, so Dr. Olivero ordered her to have further injections. Dr. Olivero also prescribed physical therapy for another 4 weeks.

On November 9, 2005, employee CATALANELLO saw Dr. Olivero and reported that she was slightly better after the most recent epidural steroid injection. Dr. Olivero advised her that the next option would be either a fusion surgery or artificial disc replacement, so he referred employee CATALANELLO to his partner, Dr. Dzung Dinh, for evaluating the possibility of surgery.

DR. DZUNG DINH - ASSOCIATED UNIVERSITY NEUROSURGEONS

On November 28, 2005, employee CATALANELLO saw Dr. Dinh, who after reviewing the MRI's and examining employee CATALANELLO, was not sure if her pain was coming from the right sacroiliac joint or discogenic or a combination. Dr. Dinh believed that if her pain persisted after treatment to the sacroiliac region, then a discogram would be needed before any surgery. Dr. Dinh referred employee CATALANELLO to Dr. Lisa Snyder for further treatment for the low back and sacroiliac joint.

DR. LISA SNYDER - INSTITUTE OF PHYSICAL MEDICINE & REHABILITATION

On December 22, 2005, employee CATALANELLO saw Dr. Lisa Snyder with the chief complaint of low back pain. On examination, Dr. Snyder found mildly limited range of motion in her lumbar and tenderness along her lumbo-sacral para vertebrals. Dr. Snyder recommended that employee CATALANELLO have a different approach to physical therapy and continued to monitor her progress. On June 1, 2006 she saw Dr. Snyder and informed her that she managed her chronic low back pain by using a TENS unit eight to ten hours a day and by taking prescription medicine. Dr. Snyder referred employee CATALANELLO back to Dr. Dinh for further care.

DR. DZUNG DINH - ASSOCIATED UNIVERSITY NEUROSURGEONS

On March 7, 2007, employee CATALANELLO returned to see Dr. Dinh and complained of having sharp shooting pain into the left buttock. Dr. Dinh reviewed the most recent MRI done on January 16, 2007, which showed a dark disc at L4-5 and an annular tear. Dr. Dinh ordered water therapy and also ordered a discogram at L4-5 level.

On August 2, 2007, employee CATALANELLO underwent a lumbar discogram at St. Francis Medical Center, which demonstrated a grade IV tear pattern at the L4-5 level.

DR. GEORGE DEPHILLIPS

On February 13, 2009, employee CATALANELLO was referred by Dr. Perales to Dr. George DePhillips for another neurosurgical consultation and she gave Dr. DePhillips a history of being attacked by a resident and suffering low back pain immediately and over the past several years suffering with pain radiating into right buttock and thigh as well as calf to ankle with numbness and tingling in right foot. Dr. DePhillips reviewed the lumbar MRI which revealed dehydration and degeneration at L4-5 with a tear in the annulus. Dr. DePhillips explained to her that her low back pain is most likely due to the tear of the annulus. Dr. DePhillips requested records of the lumbar discogram before discussing any surgical options with employee CATALANELLO.

On June 22, 2009, when employee CATALANELLO saw Dr. DePhillips to review the discogram results, he had some concern over the validity of the discogram and recommended a follow-up discogram be done and another MRI scan.

On April 12, 2010, employee CATALANELLO returned to see Dr. DePhillips following her follow-up discogram done on March 11, 2010, by Dr. Patel. The discogram provoked concordant pain at L4-5 with contrast leakage consistent with disc protrusion. Dr. DePhillips explained to employee CATALANELLO that a fusion surgery was a reasonable option for her to consider. Dr. DePhillips stated in his records that the work injury most likely aggravated her pre-existing degenerative disc disease which the source of her low back pain.

DR. GEORGE DEPHILLIPS - EVIDENCE DEPOSITION (08/18/10)

On August 18, 2010, Dr. George DePhillips testified at his evidence deposition that at the time he first saw employee CATALANELLO in February 2009, he was provided with the treating physician's records and various radiology studies. The initial history employee CATALANELLO gave him was that on March 4, 2004, she was attacked in the bathroom and developed low back pain with pain radiating into the right buttock and posterolateral thigh and calf to the ankle with numbness and tingling in the right foot. She further indicated that conservative care only gave her temporary relief. She did not provide any history of trauma either before or after the work injury.

Dr. DePhillips review the lumbar MRI scan from 2007, which he interpreted as showing at the L4-5 level, dehydration and disk degeneration with a tear in the annulus. Dr. DePhillips testified that the significance of an annular tear is that it can cause inflammation which irritate the nerve endings and that the symptoms employee CATALANELLO complained of were consistent with the tear of the annulus at L4-5.

Dr. DePhillips further testified that his primary diagnosis was discogenic low back pain with L5 lower extremity radiculitis with a secondary diagnosis of sacroiliac dysfunction. Dr. DePhillips testified that trauma can cause tears of the annulus. Dr. DePhillips discussed with employee CATALANELLO, the possible courses of treatment consisting of living with the pain and continuing pain management through medication or surgery.

On June 22, 2009, employee CATALANELLO had a follow-up appointment with Dr. DePhillips and they reviewed the discogram performed in 2007. The discogram was reported as showing concordant pain at both the L4-5 level and L5-S1 level. Dr. DePhillips recommended a follow-up discogram since he question the test validity.

On April 12, 2010, employee CATALANELLO returned after undergoing the follow-up discogram and MRI. The recent discogram provoked a concordant pain at L4-5 level and the dye in the annulus indicated an annular tear. The MRI scan revealed disc degeneration at L4-5 level with disc bulging. Dr. DePhillips recommended a one-level fusion surgery if employee CATALANELLO wished to proceed with surgery. Dr. DePhillips believed employee CATALANELLO was unemployable and disabled. Dr. DePhillips was of the opinion that the surgery was causally related to the work injury on March 4, 2004.

On cross-examination, Dr. DePhillips stated that was unaware of any trauma that employee CATALANELLO suffered before or after the work injury. Dr. DePhillips was questioned whether he aware that on June 21, 2006, employee CATALANELLO fell over a railing and sustained a chest wall contusion and also whether he was aware that on March 20, 2007, employee CATALANELLO was a victim of domestic abuse. Dr. DePhillips testified that his opinions would not change in light of these incidents because employee CATALANELLO was already symptomatic in terms of back pain, bilateral leg pain and discogenic pain before these subsequent events. Dr. DePhillips stated that the subsequent traumatic events may have aggravated her condition, but the initial onset of her condition was causally related to the work injury.

On cross-examination, Dr. DePhillips further stated that he was unaware that employee CATALANELLO was released to return to work from Occupational Health Department two weeks after her injury. Dr. DePhillips testified that it is not uncommon for patients who have been injured to experience improvement in the muscle sprain, strain ligamentous strain and then within eight weeks, show symptoms of discogenic pain.

Dr. DePhillips testified that the symptoms a patient would have indicating an annular tear would be worsening low back pain, radiculitis, spasms in paraspinal muscles, numbness and tingling. Initially, the patient starts to experience low back pain which progressively worsens.

On redirect examination, Dr. DePhillips reviewed the lumbar MRI reports for July 8, 2004 and August 2005, and they showed an annular tear. These MRI's were done long before any subsequent trauma. The lumbar MRI's for 2007 and 2010 also show the same annular tear, indicating that any subsequent trauma did not aggravate the annular tear. Dr. DePhillips concluded his testimony by stating that there was no indication that any of these subsequent events to employee Catalanello affected her low back condition.

DR. CONSTANTINO PERALES - EVIDENCE DEPOSITION (02/11/11)

On February 11, 2011, Dr. Constantino Perales testified that his medical practice consists of treating a significant number of patients who have been injured at work or in motor vehicle accidents.

On July 1, 2004, Dr. Perales first saw employee CATALANELLO, who gave a history of sustaining a back injury in March 2004 and complained of back pain and cramping in her buttocks and right flank area. On examination, Dr. Perales found mild tenderness of the lumbar spine and positive straight leg raising. His diagnosis was back pain, lumbar syndrome and he ordered a lumbar MRI.

On July 8, 2004, the MRI report indicated that employee CATALANELLO had a small broad-based L4-5 disc protrusion with annular tear. Dr. Perales further testified that in his opinion, there was a correlation between employee CATALANELLO's physical complaints and the findings made by the radiologist of a protruding disc with an annular tear. Dr. Perales diagnosed employee CATALANELLO with having a lumbar syndrome with annular tear, degenerative arthritis or degenerative joint disease and right sciatica. He then ordered physical therapy, a steroid pack and Celebrex.

On August 31, 2004, employee CATALANELLO had a follow-up appointment with Dr. Perales concerning her allergic reaction to Celebrex. Dr. Perales agreed that the emergency room treatment employee CATALANELLO received was related to an allergic reaction she had to the Celebrex.

On October 7, 2004, employee CATALANELLO reported to Dr. Perales that her low back pain was slightly improved, but that she was still getting cramps in her lumbar spine. Dr. Perales found on examination, that she had slight tender spasm of the lumbar spine and some positive findings of nerve impingement. Dr. Perales sent her back for further physical therapy and refilled her prescription medicine.

On December 15, 2004, Dr. Perales provided a narrative report indicating that employee CATALANELLO gave a history of being assaulted by a resident who pushed and kicked her in the lower back area. Based upon his examination and MRI findings, Dr. Perales diagnosed her with lumbar syndrome with a disc protrusion and annular tear at L4-5 and right sciatica. Dr. Perales further stated in his report, that employee CATALANELLO's current back problem was causally related to her work injury and that she may need to be evaluated by a neurosurgeon.

Dr. Perales testified that he continued to treat employee CATALANELLO over the next six years and his opinions regarding accident and causal connection to the injury have not changed. Dr. Perales further indicated that employee CATALANELLO's condition has progressed to the point where surgery is an open option for her.

On June 7, 2005, employee CATALANELLO reported to Dr. Perales that there was an exacerbation in her lower back pain, as well as cramping and numbness to both feet and toes. A physical examination revealed tenderness of the lumbar spine and the straight leg test worsened the symptoms. Dr. Perales recommended referral to a neurosurgeon because she had clear symptoms of a herniated disc or significant nerve impingement.

On December 1, 2005, Dr. Perales examined employee CATALANELLO, who had no significant improvement in her low back. He refilled her prescription of Vicodin and continued her on physical therapy.

On June 20, 2006, employee CATALANELLO saw Dr. Perales and complained of persistent low back pain and difficulty walking. Dr. Perales continued on with his same management.

On June 28, 2006, employee CATALANELLO presented to Dr. Perales with an unrelated condition where she suffered a contusion to her left ribs. She made no complaints that her low back condition worsened as a result of this incident. On subsequent visits for treatment of her left rib condition, she did not make any complaints that the trauma to the ribs worsened her low back pain.

On January 9, 2007, employee CATALANELLO saw Dr. Perales and complained that her low back pain was worse over the past month and that she also noticed some lumps on the lower right of her back side that were causing her pain. Dr. Perales ordered a MRI of the lumbar area, which showed a broad-based disc bulge and annular tear at the L4-5 level. Dr. Perales believed that the MRI findings were similar to the MRI findings in 2004, with the possible evidence of some healing. On April 12, 2007, employee CATALANELLO saw Dr. Perales for injuries she sustained to her head as a result of domestic violence. Employee CATALANELLO did not make any complaints that her low back condition had changed at all following the domestic violence.

On January 8, 2008, employee CATALANELLO saw Dr. Perales and indicated that her low back pain was essentially unchanged. Dr. Perales referred her to Dr. DePhillips, a neurosurgeon, for a second opinion. On June 12, 2008, employee CATALANELLO complained to Dr. Perales that her low back pain seemed to be a little worse and examination of the lumbo-sacral spine revealed some impingement of the nerves.

On June 26, 2008, employee CATALANELLO stated to Dr. Perales that she was still having low back pain everyday and that the pain was constant.

On November 18, 2008, employee CATALANELLO told Dr. Perales that she had morning stiffness and cramping in her legs. His diagnosis was chronic low back pain and parasthesias of the lower extremities. On January 20, 2009, employee CATALANELLO had a follow-up visit with Dr. Perales and stated that her low back pain was unchanged and that it was radiating down her right leg. Dr. Perales received a copy of Dr. DePhillips' consultation report on employee CATALANELLO and his assessment of her low back condition was essentially the same as Dr. Perales' assessment.For the remainder of 2009, Dr. Perales recommended that employee CATALANELLO follow-up with Dr. DePhillips.

On January 27, 2010, employee CATALANELLO complained to Dr. Perales that she had increase in back pain and severe right buttock pain for the past two weeks. Dr. Perales' physical exam indicated that she had more nerve impingement in the lumbar spine. On April 2, 2010, employee CATALANELLO had a lumbar MRI with findings that were consistent with the previous lumbar MRI's. On July 13, 2010, employee CATALANELLO discussed with Dr. Perales that she did not want surgery at the present time. Dr. Perales recommended home exercises as well as using the YMCA for guidance. For the remainder of 2010, Dr. Perales maintained employee CATALANELLO on her prescription medications and home exercises. His diagnosis was chronic pain syndrome, chronic lumbar syndrome, parasthesias of the legs, weakness of the legs and right sciatica.

On February 9, 2011, Dr. Perales saw employee CATALANELLO for her low back pain and he continued her on the same treatment regimen. Dr. Perales testified at his deposition that employee CATALANELLO continued to be disabled and he didn't see her returning to any kind of gainful activity since her ongoing back problem appeared to be progressing. Dr. Perales further stated that his treatment to her low back condition and the pain medication he prescribed was causally related to her back injury. Dr. Perales also testified that employee CATALANELLO's conditions of ill-being could be permanent in nature.

On cross-examination, Dr. Perales testified that he is not board certified in any specialty and his practice is a combination of internal medicine and occupational medicine. Dr. Perales testified that he referred employee CATALANELLO to neurosurgeons for consultation. He further testified that as a primary care physician, he monitors the patient and takes care of the prescription needs of the patient.

Dr. Perales testified that from 2004 through the time of his deposition, he has treated employee CATALANELLO's low back injury and has prescribed pain medications. Initially he prescribed Darvocet, which was later taken off the market. He then switched her to Vicodin, which is a synthetic codeine. He then tried her on a prescription for Percocet, which is a slightly different type of codeine. On July 17, 2006, he switched her over to Roxicodone, which is also known as oxycodone. Dr. Perales testified that unless the patient has pain issues, he would not normally keep a patient on oxycodone for three or four years. Dr. Perales did not believe that employee CATALANELLO had any type of problem with addictive medication.

Dr. Perales was questioned regarding employee CATALANELLO's incident where she slipped and fell carrying groceries and her right ribs hit the railing and he testified that he did not notice any increase in her low back symptoms. Dr. Perales stated that he did not have any evidence that the injury to the rib exacerbated any of her back symptoms. Dr. Perales also testified that the domestic violence incident did not change her low back symptoms.

DR. STEVEN DELHEIMER – SECTION 12 REPORT (08/24/04)

On August 24, 2004, at her employer's request, employee CATALANELLO was evaluated by Dr. Steven Delheimer at which time and she stated the following physical complaints:

> "At this time she complains of pain involving her back, which radiated into both legs (right > left). The pain is aggravated by prolonged standing. The leg pain, when present, is much worse than the back pain. She describes the pain as a
> charley horse - burning type sensation associated with muscle spasm. The pain, however, is now infrequent and occurs about once a month. She indicates that the pain is definitely to a lesser degree than at the time of the initial injury."

In his report, Dr. Delheimer lists various records he reviewed, but he failed to mention the March 17, 2004, physical therapy note from Illinois Valley Community Hospital, which indicated:

> "Pain Rating (0-10): Start 05/10 End 3/10 Location:
> ROM: (+) TTP of L pubic (+) spring test on R more than L."

Dr. Delheimer stated in his report that :

> "I would like to emphasize, however, that Ms. Catalanello's pain has significantly improved since then and her radicular symptoms have resolve."

Dr. Delheimer stated in his recommendation section of his report that:

> "In the absence of any radicular pain, I believe Ms. Catalanello is capable of returning to work light duty with no lifting greater than 20 pounds and no excessive flexion / extension. These restrictions should remain in effect for a period of two weeks after which I anticipate Ms. Catalanello will be capable of returning to work without restriction.

> I do not believe she needs any further diagnostic studies or treatment relative to the March 4, 2004 incident, and consider her to be at or approaching maximal medical treatment effective today, August 24, 2004."

On September 9, 2004, Dr. Delheimer received a phone call from Ms. Tara Burkett of Cambridge Integrated Services Group, and he immediately changed his opinions concerning MMI. Dr. Delheimer claimed that he was originally "unaware" that Ms. CATALANELLO did not have medical treatment from March 18, 2004 to July 1, 2004, even though Dr. Delheimer had the medical records.

Dr. Delheimer changed his opinion and claimed that Ms. CATALANELLO reached MMI toward the end of March 2004 and that none of Dr. Perales' treatment was causally related to the work incident of March 4, 2004.

DR. STEVEN DELHEIMER – SECTION 12 REPORT (01/23/07)

On January 23, 2007, employee CATALANELLO was re-evaluated by Dr. Steven Delheimer and she stated the following physical complaints:

> "At this time, Ms. Catalanello complains of pain involving her low back. The pain is worse on the right side than on the left. She is uncomfortable if she sits or stands for too long. She complains of some cramping of the inner thighs but is nonradicular."

Since the time that Dr. Delheimer initially evaluated employee CATALANELLO on August 24, 2004, she received treatment for her back condition from Dr. William Olivero, Dr. Dzung Dinh, Dr. Lisa Snyder and Dr. Ronald Kloc. Employee CATALANELLO underwent two lumbar MRI's epidural steroid injections, facet blocks, trigger point injections, physical therapy and discogram. Dr. Delheimer performed a physical examination on employee CATALANELLO and found the examination to be normal. Dr. Delheimer expressed the opinion that following employee CATALANELLO's work injury on March 4, 2004, she reached maximum medical improvement on March 18, 2004 and could work full duty. Dr. Delheimer did not believe any of the treatment employee CATALANELLO received from Dr. Olivero, Dr. Dinh, Dr. Snyder and Dr. Kloc, was related to her work injury.

DR. STEVEN DELHEIMER - DEPOSITION (05/19/09)

Dr. Delheimer testified that in the past, he has conducted medical examinations for Cambridge Integrated Services Group and that in general, 80% of his evaluations are for employers. Dr. Delheimer admitted that after he wrote his August 24, 2004 report, the insurance adjuster called him and pointed out that there was a gap in treatment from March 18, 2004 to July 1, 2004.

Dr. Delheimer changed his opinion from finding employee CATALANELLO at maximum medical improvement on August 24, 2004, to finding her at maximum medical improvement on March 18, 2004.

Dr. Delheimer reviewed the July 8, 2004 lumbar MRI and made no mention of the annular tear noted by the radiologist. He stated that he did not believe an annular tear was significant since nobody has ever proven that it causes pain. Later in his deposition, Dr. Delheimer admitted that there are other neurosurgeons who believe that there is a chemical change when there is an annular tear that the chemical can irritate the nerve roots.

Dr. Delheimer admitted that he was not provided with employee CATALANELLO's January 16, 2007 lumbar MRI at the time of his re-evaluation on January 23, 2007 or at the time of his deposition on May 19, 2009.Dr. Delheimer stated that he was never provided with medical records to suggest that employee CATALANELLO ever had back pain in the past and did not have any subsequent injury to her low back.

Dr. Delheimer, effectively Respondent's expert witness throughout the case was not provided with any of Dr. Perales' medical records after July 1, 2004.

Dr. Delheimer stated that from a clinical standpoint, employee CATALANELLO's March 10, 2004 complaints were consistent with the complaints she made to him on August 24, 2004 and consistent with the January 23, 2007 examination. Dr. Delheimer admitted that he did not find any symptom magnification. (emphasis added)

Dr. Delheimer was also unaware that Dr. Dinh had a discogram performed on August 7, 2007 that showed concordant pain at L4-5. Even though Dr. Delheimer does not rely on a discogram, he admitted that there are other neurosurgeons who do use it to determine necessity for surgery.

DR. STEVEN DELHEIMER - IME REPORT (11/04/09)

On November 4, 2009, employee CATALANELLO was re-evaluated by Dr. Steven Delheimer and she stated to him the following physical complaints:

> "At the time of this evaluation, she complains of low back pain, which is lumbar in location. In addition, she complains of some buttock pain that will vary from side to side and is described as a burning sensation. She also experiences charley horses involving her calves, which is bilateral; neither side is worse than the other."

Dr. Delheimer reviewed the lumbar MRI dated January 16, 2007 and concluded that it only showed degenerative disc disease at L4-5 level. Dr. Delheimer stated that employee CATALANELLO suffered a soft tissue injury and had long since reached maximum medical improvement.

DR. STEVEN DELHEIMER - DEPOSITION (06/22/11)

On June 22, 2011, Dr. Steven Delheimer testified that he re-evaluated employee CATALANELLO on November 4, 2009. He reviewed the lumbar MRI dated January 16, 2007 and did not notice any significant changes in the L4-5 level from the prior studies.

Dr. Delheimer was of the opinion that employee CATALANELLO was not a surgical candidate and did not need a discogram.Dr. Delheimer testified that when he examined employee CATALANELLO on November 4, 2009, he did not note any Waddell signs indicating symptom magnification.

Dr. Delheimer admitted that there could be some minor bulging of the L4-5 disc. He further testified that he did not appreciate any tears of the disc, although the radiologist did make the finding. Dr.. Delheimer agreed that other reasonable neurosurgeons do use the results from discograms to treat their patients with disc problems. He also acknowledged that both Dr. Dinh and Dr. DePhillips ordered discograms.

Dr. Delheimer further stated that there are nerves that innervate the annulus and that would be where the pain is generated. Dr. Delheimer testified that he reviewed the MRI of the lumbar spine of July 8, 2004 and did not see an annular tear. Dr. Delheimer testified than an annular tear can heal in months. However, the MRI's and discograms consistently demonstrate an annular tear at L4-5 level.

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

Employee CATALANELLO testified that she was in her usual state of good health and never had any injury to her low back before working for employer, Horizon House of IV, Inc. All the medical records and deposition testimony entered into evidence as well as the medical reports from all the physicians, substantiate that employee CATALANELLO never had any prior medical treatment for her back.

Employee CATALANELLO also testified that on March 4, 2004, she was assaulted by a resident who came up from behind her and punched and kicked her in the low back. She immediately experienced pain in her low back and right hip and sought medical care at the emergency room of Illinois Valley Community Hospital. The emergency room physician initially diagnosed her with trauma to the right lower back and iliac crest and on March 10, 2004, the Occupational Health Department physician diagnosed her with low back pain, muscles spasms, hematoma and radiating pain.

On July 1, 2004, employee CATALANELLO came under the care of Dr. Constantino Perales, who diagnosed her with low back pain and ordered a lumbar MRI, which showed a broad-based L4-5 disc protrusion with annular tear. Follow-up lumbar MRI's and discograms consistently showed an annular tear at L4-5 level.

On December 8, 2004, Dr. Gregg Davis performed a medical evaluation on employee CATALANELLO and diagnosed her as having a herniated disc at L4-5 with an associated annular tear and right lower extremity radiculopathy. Dr. Davis testified at his evidence deposition that there was a causal connection between employee CATALANELLO's medical conditions and her work injury on March 4, 2004.

On December 15, 2004, Dr. Constantino Perales indicated in his report, that employee CATALANELLO had contusions to her lumbar spine, had a lumbar syndrome with annular tear of L4-5, disc protrusions at L4-5 level and sciatica. Dr. Perales found that these conditions were causally related to her injury at work.

On February 11, 2011, Dr. C. Perales testified at his evidence deposition that he continually treated employee CATALANELLO for her low back conditions from July 1, 2004, up until the time of his deposition, and it was his medical opinion that her low back condition is related to her injury at work.

On August 18, 2010, Dr. DePhillips testified at his evidence deposition that employee CATALANELLO's low back condition was causally related to her work injury.

Employer, HORIZON HOUSE OF IV, INC., requested that Dr. Steven Delheimer examined employee CATALANELLO on three separate occasions and opined that she sustained a soft tissue injury to her low back and reached maximum medical improvement on March 18, 2004.

The Arbitrator adopts the opinions of employee CATALANELLO's treating physicians, Dr. Perales and Dr. DePhillips, which are supported by the Peoria doctors. The Arbitrator finds as a matter of law and fact Petitioner's current condition of ill-being is causally related to the work injury she sustained on March 4, 2004 in the case at bar. No facts or co-morbidities break the chain of causation.

J. WERE 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 following exhibits regarding employee CATALANELLO's medical expenses and reimbursement claims, were admitted into evidence:

(PX. 14)	Hospital Radiology Service	$ 343.43
(PX. 15)	Illinois Valley Community Hospital	$ 4,745.72
(PX. 16)	Dr. Ruben Santos	$ 16.60
(PX. 17)	Central Illinois Radiological	$ 2,379.00
(PX. 18)	Peru Anesthesia	$ 484.62
(PX. 19)	Institute of Physical & Rehabilitation	$ 1,127.00
(PX. 20)	EMPI	$ 2, 128.60
(PX. 21)	St. Margaret's Hospital	$ 3,073.61

(PX. 22)	Joliet Radiological Service Corp.	$ 198.00
(PX. 23)	RS Medical	$ 690.64
(PX. 24)	Central Illinois Pathology	$ 300.00
(PX. 25)	Heating pad	$ 17.99
(PX. 26)	Associated University Neurosurgeons	$ 90.00
(PX. 27)	Dr. George DePhillips	$ 450.00
(PX. 28)	Ameritox	$ 686.78
(PX. 29)	Dr. Constantino Perales	$ 4,663.00
(PX. 30)	Prescriptions (Osco / CVS/ Walgreens/ K-Mart)	$ 4,368.25
(PX. 31)	Prescriptions (Family Pharmacy)	$ 70,928.74
	TOTAL	$ 96,691.98

At hearing, employer, HORIZON HOUSE OF IV, INC., objected only to liability for petitioner's exhibits #14 - #31; Since it has been found as a matter of law the Petitioner sustained an accidental injury on March 4, 2004 and that her current condition is causally related to this accident, the Arbitrator further finds respondent liable for the medical expenses shown in petitioner's exhibits #14 though #31. The Arbitrator, therefore, orders respondent to pay to the Petitioner and her attorney Mr. Olivero the outstanding medical bills in accordance with Section 8(a) of the Act, subject to Section 8.2 Medical Fee Schedule& regulations.. Respondent is entitled to credit for all medical expenses actually paid before date of close of proofs on July 23, 2013.

K. WHAT TEMPORARY BENEFITS ARE IN DISPUTE? ?

On March 4, 2004, while employee CATALANELLO was leaning over a bathtub assisting a resident, she was physically assaulted by another resident who came up from behind and began punching and kicking employee CATALANELLO in the low back. Following the attack, employee CATALANELLO had to seek immediate medical attention because she could not straighten up her back and she was experiencing numbness in her right buttock area.

Employee CATALANELLO was treated in the emergency room at Illinois Valley Community Hospital on March 4, 2004, and followed up with the Occupational Health Department where she received physical therapy treatment. On March 18, 2004, employee CATALANELLO was released to return to work. Employer, HORIZON HOUSE OF IV, INC., paid TTD benefits from March 5, 2004 through March 18, 2004.

Employee CATALANELLO testified that she returned to work, but was unable to perform her full duties so her employer assigned her to a light-duty position as a van driver. She further testified that her back injury continued to cause her problems so she sought further medical attention from Dr. Constantino Perales.

On July 1, 2004, Dr. Perales examined employee CATALANELLO and ordered a lumbar MRI. ON July 22, 2004, Dr. Perales reviewed the lumbar MRI findings with employee CATALANELLO, which showed a broad-based L4-5 disc protrusion with annular tear. Dr. Perales took employee CATALANELLO off-work from July 22, 2004 to August 6, 2004. The medical records from employee CATALANELLO's treating physicians after August 6, 2004, did not address employee CATALANELLO's temporary disability status.

The Arbitrator finds that employee CATALANELLO is entitled to receive TTD payments in the amount of $229.52 per week from March 5, 2004 through March 10, 2004 and July 22, 2004 through August 6, 2004, representing 5 weeks.

L. WHAT IS THE NATURE AND EXTENT OF THE INJURY?

On March 4, 2004, employee CATALANELLO was assaulted by a resident and injured her back. She received conservative medical treatment consisting of physical therapy, back brace, TENS unit, prescription medication and epidural steroid injections. She received only temporary relief from her low back pain, but only a temporary basis.

The first lumbar MRI on July 8, 2004, showed a broad-based L4-5 disc protrusion with an annular tear. A repeat lumbar MRI on August 12, 2005, showed no change in the condition of L4-5 disc. On January 16, 2007, another lumbar MRI showed a dark disc and an annular tear. On August 2, 2007, a post-discogram CT demonstrated a grade IV tear pattern at L4-5 level. On March 11, 2010, a repeat discogram provoked pain at L4-5 with contrast leakage consistent with a disc protrusion.

Employee CATALANELLO testified that she has not made a determination whether to proceed with back surgery, "but would like to have surgery as an option in the future." She testified that she takes medication to control her back pain. Without the medication, her back feels very stiff, hurts and is uncomfortable. Employee CATALANELLO testified that her daily routine consists of her getting up and just trying to do as much as she can. She cleans a little bit, then has to sit down and rest. She does not believe that she could return to work as a training assistant for disabled adults.

Employee CATALANELLO testified that she still experiences low back pain that severely limits her every day activities. Dr. George DePhillips testified that on April 12, 2010, employee CATALANELLO became totally disabled. Dr. Perales testified at his deposition on February 11, 2011, that employee CATALANELLO was totally disabled.

The Arbitrator finds based upon the totality of the medical evidence that the Petitioner in the case at bar is medically totally and permanently disabled under the Act.. Respondent shall pay to petitioner and her attorney the sum of $382.40 per week for life, commencing April 12, 2010, as provided in Section 8(f) of the Act.

O. OTHER - CHOICE OF PHYSICIANS

On March 4, 2004, employee CATALANELLO was injured at work and had to be treated immediately for her injuries at the emergency room of Illinois Valley Community Hospital. The discharge instructions from the emergency room physician were:

": Follow-up with Occupational Health on 3-5-04 — 1 pm"

On March 5, 2004, employee CATALANELLO complied and followed up with the Occupational Health Department of Illinois Valley Community Hospital, where she received physical therapy and was taken off-work until March 8, 2004. On March 10, 2004, employee CATALANELLO returned to Occupational Health Department because she was unable to work due to the pain in her low back, right leg, thigh and pelvis.

On March 18, 2004, Occupational Health Department released employee CATALANELLO to return to work. Employee CATALANELLO testified that she returned to work, but could not perform her full duties due to her low back pain and stiffness. Employer, HORIZON HOUSE OF IV, INC., accommodated by assigning her to a light-duty job as a driver of a transportation van. On July 1, 2004, employee CATALANELLO had to seek further medical care from Dr. Constantino Perales because she continued to have low back pain. On June 7, 2005, employee CATALANELLO saw Dr. Perales again and complained of lower back pain along with numbness to both toes and feet. Dr. Perales' chart note indicates that he referred employee CATALANELLO for a neurosurgical consult.

Dr. Perales testified at his evidence deposition that on June 30, 2005, he had a referral sheet for employee CATALANELLO to see Dr. Olivero, a neurosurgeon at OSF St. Francis, Peoria, Illinois. On August 3, 2005, employee CATALANELLO began treating with Dr. Olivero for her low back conditions and he ordered a repeat lumbar MRI, re-started physical therapy for employee CATALANELLO and ordered epidural steroid injections at the local hospital.

Employee CATALANELLO then saw Dr. Ronald Kloc, a pain management specialist at Illinois Valley Community Hospital for three epidural steroid injections ordered by Dr. Olivero. Dr. Olivero also referred employee CATALANELLO to his partner, Dr. Dzung Dinh, for possible back surgery.

On November 9, 2005, employee CATALANELLO saw Dr. Dzung Dinh, who referred her to Dr. Lisa Snyder for conservative treatment for her low back pain and sacral iliac dysfunction treatment. Dr. Dinh also considered the possibility of ordering a discogram prior to back surgery.On December 22, 2005, employee CATALANELLO saw Dr. Snyder for her low back pain and Dr. Snyder re-started physical therapy, prescribed a TENS unit and gave her trigger point injections. On June 1, 2006, Dr. Snyder referred employee CATALANELLO back to her primary care physician, Dr. Perales, for further follow-up care.

On August 2, 2007, Dr. Lawrence Wang performed a discogram on employee CATALANELLO that had been ordered by Dr. Dzung Dinh.

On January 27, 2010, employee CATALANELLO saw Dr. Perales complaining of pain in her low back with severe right buttock pain. Dr. Perales then referred her to Dr. George DePhillips, neurosurgeon, for possible nerve impingement in the lumbar spine.

On February 13, 2009, employee CATALANELLO saw Dr. George DePhillips and he requested to be provided with the lumbar discogram to review. On June 22, 2009, Dr. DePhillips reviewed the lumbar discogram and determined that he needed a repeat discogram in order to validate the results.

On March 11, 2010, employee CATALANELLO underwent a repeat discogram by Dr. Patel as ordered by Dr. DePhillips.

The Arbitrator finds as a matter of law that all of employee CATALANELLO's medical providers were either within her two choice of medical providers or within the covered chain of referrals.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PATRICIA MADISON,

Petitioner,

vs.

NO: 09 WC 11776

15IWCC0059

WalMart Associates,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission finds that the medical expenses awarded by the Arbitrator should have been payable by Respondent to the Petitioner directly, not to the actual medical providers. While it is common for employers to pay providers directly prior to a hearing on an undisputed case, Section 8(a) of the Act dictates that medical compensation "shall be paid to the employee". As such, the Arbitrator's award should have stated that any remaining outstanding medical expenses should be paid by Respondent to Petitioner, not the medical providers.

The amount the Petitioner is entitled to as awarded medical expenses is limited to a) only those medical expenses which are related to her right hip condition, b) only those medical expenses which remain outstanding and unpaid, and c) the fee schedule amounts related to such causally related unpaid medical expenses.

As correctly noted by the Arbitrator, several of the bills submitted into evidence are for services involving preexisting conditions such as cardiac care, and unrelated to Petitioner's right

14 IWCC 1027
12 WC 04945

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JUAN CARLOS AVILA,
Petitioner,

vs.

NO: 14 IWCC 1027
12 WC 040945

COUNTRY CLUB HILLS POLICE DEPARTMENT,
Respondent.

ORDER OF RECALL UNDER SECTION 19(f)

Petitioner filed a Motion to Recall/Reconsideration of Decision and Opinion on Review premised on the belief the Commission relied on the February 4, 2014, Arbitration Decision rather than the Corrected Arbitration Decision issued on March 26, 2014. Petitioner, in his motion, noted a copy of the February 4, 2014, Arbitration Decision was attached to its Decision and Opinion on Review. The Commission, after reviewing the matter, concludes the February 4, 2014, Arbitration Decision was attached to its Decision and Opinion on Review rather than the Corrected Arbitration Decision dated March 26, 2014. Consequently, the Commission recalls its November 25, 2014, to correct this but finds it unnecessary to reconsider its decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated November 25, 2014 is hereby vacated and recalled pursuant to Section 19(f) for clerical errors contained therein.

IT IS FURTHER ORDERED BY THE COMMISSION that a Corrected Decision and Opinion on Review shall be issued simultaneously with this Order.

The party commencing 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: JAN 6 - 2016
KWL/mav
42

Kevin W. Lamborn

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

JUAN CARLOS ALVIA,

Petitioner,

vs. NO: 14 IWCC 1028
12 WC 040945

COUNTRY CLUB HILLS POLICE DEPARTMENT,

Respondent.

CORRECTED DECISION AND OPINION ON REVIEW

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

Petitioner, a police officer, injured his right ankle on March 31, 2012, after jumping to avoid an on-coming vehicle. There was no dispute that this incident is compensable under the Act, and there is no dispute that Respondent properly compensated Petitioner during his period of temporary total disability and paid all related medical bills. The only contested issue was as to the nature and extent of Petitioner's permanent total disability, and the arbitration hearing on this issue was heard on January 7, 2014, by Arbitrator David Kane.

Arbitrator Kane, after taking into consideration the enumerated factors as listed in Section 8.1(b) of the Act, found Petitioner sustained a 7.5% loss of use of the right foot as a result of the March 31, 2012, accident. Petitioner appealed Arbitrator Kane's arbitration decision, arguing his injury merited a larger permanency award. The Commission agrees.

After reviewing the arbitration decision against the evidence, the Commission finds

Arbitrator Kane erred when he found Petitioner had no complaints after returning to work concerning his right foot. Petitioner credibly testified he now wears boots to maintain stability in his right ankle as well as experiencing swelling in his ankle on more strenuous days, stiffness in his ankle when it is kept in the same position for a prolonged period of time, such as when he drive a patrol car. Also credibly testified to was Petitioner's need to medicate with Ibuprofen several times a week as well as his having to change certain aspects as to how he performs his duties as a police officer due to the residual effects of the March 31, 2012, accident. In recognition of Petitioner's lingering pain and functional deficits, the Commission finds Petitioner has experienced a 12½% loss of the use of his right foot.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $695.78 per week for a period of 15.865 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 12½% loss of the use of the right foot; Respondent is credited for the permanent partial disability benefits of 3% loss of use of the right foot was awarded pursuant to the February 4, 2014, arbitration decision (11 WC 29092).

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: JAN 6 - 2016
KWL/mav
O: 09/30/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

14IWCC1028

AVILA, JUAN CARLOS
Employee/Petitioner

Case# **12WC040945**
11WC029092

COUNTRY CLUB HILLS POLICE DEPT
Employer/Respondent

On 3/26/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1836 RAYMOND M SIMARD PC
MARC TREVINO
221 N LASALLE ST SUITE 1410
CHICAGO, IL 60601

2965 KEEFE CAMPBELL BIERY & ASSOC LLC
DANIEL J BODDICKER
118 N CLINTON ST SUITE 300
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)
☒ None of the above

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

14IWCC1028

JUAN CARLOS AVILA
Employee/Petitioner

v.

COUNTRY CLUB HILLS POLICE DEPARTMENT
Employer/Respondent

Case # 12 WC 40945

Consolidated cases: **11 WC 29092**

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 Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **January 7, 2014**. By stipulation, the parties agree:

On the date of accident, **March 31, 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 $**82,990.00**, and the average weekly wage was $**1,596.00**.

At the time of injury, Petitioner was **33** years of age, ***married*** with **2** dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.
The parties stipulated that Respondent paid Petitioner his full salary during the period of temporary total disability.

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 $**695.78**/week for a further period of **7.515** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **the permanent partial loss of use of the right foot of Petitioner to the extent of 7.5%, after application of a credit for 3% loss of use of the right foot, as awarded in 11 WC 29092 for a net award of 4.5% loss of use of the right foot.**

Respondent shall pay Petitioner compensation that has accrued from **07/30/12** through **01/7/14**, 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.

David A. Kane
Signature of Arbitrator

March 26, 2014
Date

MAR 26 2014

14IWCC1028

STATEMENT OF FACTS

JUAN CARLOS AVILA V. COUNTRY CLUB HILLS POLICE DEPARTMENT

12WC 40945

This case comes before the Arbitrator on undisputed facts with regard to the incident in question. Petitioner testified to his employment with Respondent, the City of Country Club Hills Police Department, as a patrol officer on and around the date of loss of March 31, 2012. Petitioner was 33 year old on the date of loss.

Petitioner testified that on March 31, 2012 he injured his right ankle when he jumped out of the way of a vehicle to avoid getting hit. Petitioner testified he was taken to emergency room at St. James Hospital.

Petitioner followed up at St. James Occupational Health Center where x-rays of Petitioner's right ankle were taken on April 2, 2012. (Res. Ex. 11). The x-rays were compared to x-rays of Petitioner's right ankle taken on April 22, 2011. The findings were no fracture, the ankle mortise and talar dome are intact, the osseous structures appear intact and unremarkable. There was no bony destruction to suggest osteomyelitis. The impression was negative right ankle radiographs. Petitioner testified he was advised to continue wearing his brace and to elevate his leg when sitting.

Petitioner testified he started physical therapy on April 11, 2012. Petitioner testified Dr. Clifton Ward prescribed an MRI of the right ankle. On April 25, 2012, Dr. Clifton Ward discharged Petitioner to see Dr. David Mehl. (Res. Ex. 12). Dr. Clifton Ward's work status report dated April 30 noted Petitioner indicated he was walking a little better but it still hurt around his heel and when he turned it inwards. (Res. Ex. 13).

On July 27, 2012 Petitioner had an FCE performed at METT Physical Therapy. (Res. Ex. 15). It demonstrated that Petitioner could perform 97.5% of the physical demands of his job as a Police Officer. The FCE report stated that Petitioner's deficiencies occurred during squat and power lifts with goal weights of 100 lbs. each. Further, that Petitioner stated it would be an infrequent occurrence that he would actually be expected to left loads of that weight at his job. The report stated Petitioner had made excellent progress and that although he experience very mild ankle pain, 1 on a scale of 10, and very mild swelling he feels he is ready to resume his usual job duties as a police officer and discharge from the program was recommended.

On July 30, 2012, Dr. David Mehl found Petitioner to be at maximum medical improvement and capable of full duty. Dr. David Mehl released Petitioner to work full duty on July 30, 2012.

Petitioner testified he was off work on duty disability from April 11, 2012 until August 2, 2012.

Petitioner saw Simon Lee, M.D. on September 19, 2013 for an independent medical examination, (Res. Ex. 16) and for an impairment rating. (Res. Ex. 17). In his independent medical examination report Dr. Lee notes Petitioner denied any instability episodes or repeat injuries since it originally occurred. Dr. Lee noted that on examination Petitioner had some mild increased laxity of his right ankle and no mechanical symptoms. Dr. Lee diagnosed status post right ankle chronic sprain with mild laxity. Dr. Lee noted Petitioner only requires over the counter ibuprofen. Dr. Lee noted he believed there to be a mild amount of symptom magnification. Dr. Lee opined no work restrictions are necessary. Dr. Lin opined no further treatment is necessary other than what Petitioner is currently using, i.e.

occasional bracing or use of high-top shoes or boots as required. Dr. Lee opined Petitioner reached MMI in 2012 and should be able to continue full work duty and employment.

Dr. Lee gave his opinions on impairment in his report dated September 19, 2013. (Res. Ex. 17) Dr. Lee opined that Petitioner has a 5% lower extremity impairment under the AMA guides.

Petitioner testified he still works as a patrol officer. Petitioner testified he still chases suspects when necessary and his ankle does not prevent him from chasing suspects. Petitioner testified since he returned to full duty work after the March 31, 2012 injury he has not reported to any of his supervisors that he has problems with his ankle to the extent he cannot perform his duties. Petitioner testified he can physically perform his job as a police officer.

Respondent's witness Lieutenant William Garrison testified he is patrol lieutenant with the Country Club Hills Police Department. He is responsible for supervision of the operations of the Patrol Division, scheduling and training. Lt. Garrison testified that Petitioner came back to full duty work after each of his ankle injuries. Lt. Garrison testified that since Petitioner came back to full duty work he has not complained that the condition of his ankle prevented him from doing his job as a patrol officer. Lt. Garrison testified he is not aware of any incident where Petitioner could not perform some duties of his as patrol officer because of his ankle when he was working full duty.

CONCLUSIONS OF LAW

Nature & Extent of the Injury

3

The Arbitrator finds that Petitioner sustained a 7.5% loss of use of the right foot as the result of the accident of March 31, 2012. The Arbitrator notes that Respondent shall receive credit for the award of the right foot awarded for the April 21, 2011 date of loss (11WC 29092). The application of this 3% credit results in a net award of 4.5% for the accident herein.

1. The reported level of impairment pursuant to the Section 8.1(b),
2. The occupation of the employee,
3. The age of the employee at the time of injury,
4. The employee's future earning capacity,
5. Evidence of disability corroborated by the treating medical records.

Of note, no single enumerating factor shall be the sole determining factor for disability.

Per Section 8.1(b) of the Act, the Arbitrator has considered the following:

(i) the reported level of impairment per the AMA Guide is 5% of the right foot;

(ii) The occupation of Petitioner is police officer. Petitioner continues to work full duty as a Patrol Officer and makes no complaints;

(iii) Petitioner was 33 years old at the time of the accident. Petitioner continues to work full duty as a Patrol Officer and makes no complaints;

4

(iv) Dr. Mehl released Petitioner to full duty work and Dr. Lee stated that Petitioner should be able to continue full work duty and employment;

(v) The medical records are consistent with the past subjective complaints of Petitioner. The Arbitrator notes Petitioner testified he can do his job as a Police Officer and has made no complaints since returning to full duty work.

5

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Aaron Conway,
Petitioner,

vs. NO: 10 WC 2879
15 IWCC 0810

City of Chicago
Respondent.

ORDER OF RECALL UNDER SECTION 19(f)

A Petition under Section 19(f) of the Illinois Workers' Compensation Act to Correct Clerical Error in the Decision of the Commission dated November 2, 2015 having been filed by Respondent herein. Upon consideration of said Petition, the Commission is of the Opinion that it should be granted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated November 2, 2015 is hereby vacated and recalled pursuant to Section 19(f) for clerical errors contained therein.

IT IS FURTHER ORDERED BY THE COMMISSION that a Corrected Decision and Opinion on Review shall be issued simultaneously with this Order.

The party commencing 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: JAN 19 2016
KWL:vf
42

Kevin W. Lamborn

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

AARON CONWAY,

Petitioner,

vs.

NO: 10 WC 02879
15 IWCC 0810

CITY OF CHICAGO,

Respondent.

CORRECTED DECISION AND OPINION ON REVIEW WITH SPECIAL FINDINGS

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 average weekly wage, benefit rate, medical expenses, nature and extent, and special findings, 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 order to qualify for a wage-differential award under section 8(d)(1) of the Act, a claimant must prove (1) a partial incapacity which prevents him from pursuing his "usual and customary line of employment" and (2) an impairment in earnings. 820 ILCS 305/8(d)(1) (West 1998); Gallianetti v. Industrial Commission, 315 Ill. App. 3d 721, 730 (2000). The purpose of Section 8(d)1 is to compensate an injured claimant for his reduced earning capacity, and if the injury does not reduce his earning capacity, he is not entitled to such compensation. Smith v. Industrial Commission, 308 Ill. App. 3d 260, 266 (1999). A claimant must prove his actual earnings for a substantial period before his accident and after he returns to work, or in the event that he is unable to return to work, he must prove what he is able to earn in some suitable employment. Smith, 308 Ill. App. 3d at 266.

Petitioner underwent a right knee arthrotomy and quadriceps tendon repair on February 16, 2010 (PX2). The Med Voc Rehabilitation reports reflect that Petitioner underwent a

functional capacity evaluation with NovaCare on December 15, 2010, placing him at the light to medium physical demand level, capable of standing, walking, and kneeling on an occasional basis. Petitioner testified that on January 24, 2011, Dr. Bach subsequently provided him with permanent work restrictions of no climbing, no ladders, no squatting or kneeling, and minimal walking, coinciding with his release from medical care. Petitioner testified that he was never offered a job within his work restrictions, that he continued to receive weekly benefits from Respondent, that he attempted to find work, and that he retired from Respondent on February 24, 2014.

While Petitioner met the first requirement for a wage differential, that he could no longer meet the physical demands of his usual and customary line of employment as a motor truck driver based upon his permanent work restrictions, the Commission finds Petitioner failed to prove an impairment in earnings. Instead the evidence reflects that Petitioner purposefully sabotaged Respondent's attempts to return him to gainful employment within his restrictions with Respondent, and then subsequently sabotaged MedVoc efforts to return him to gainful employment. Furthermore, as the Arbitrator noted, Petitioner tendered no documentary evidence of his job search efforts following his January 24, 2011 release to return to work with restrictions, nor did he offer any testimony from which the Commission could conclude he conducted a job search, being unable to identify any prospective employer that he had contacted.

With regard to Respondent's efforts to return Petitioner to gainful employment with Respondent, the Commission finds significant that Petitioner completed an August 26, 2011 Willingness & Ability Questionnaire for a Watchman position with Respondent and therein noted that he was unable to: 1) work in all types of weather conditions; 2) wear a security uniform including black work shoes/boots, safety vests, rain gear and hard hats; 3) maintain a clean and safe working area during his shift; 4) monitor security cameras, report incidents, check doors, check property perimeter, check vehicle gates, make sure exterior lighting is working, check perimeter of construction site, and complete security incident report; and 5) be assigned to various work locations around the city. (RX1) On cross-examination, Petitioner admitted that he had no restrictions with regard to those activities, that the questionnaire was an opportunity for him to return to work as a watchman for Respondent, that he answered "no" to several questions, which may have taken him out of the running, that he was not offered that job because in his own opinion he was not able to do that job, and that it is possible none of Dr. Bach's January 2011 work restrictions were included in any of the questions on the questionnaire. (T32-36, 50-55). As noted by the Arbitrator, Petitioner purposely and falsely answered the questions on the questionnaire to ensure that he would not be hired, stating on the form that he was physically unable to do things that no physician had restricted him from doing.

Petitioner's initial consultation with MedVoc Rehabilitation was on May 20, 2013, at which time Petitioner reported he was not sure he wanted to obtain employment as he was hoping to retire. (RX2, 06/06/13). Petitioner admitted on cross examination that he had no intention of searching for employment when he was contacted by MedVoc, as he intended to retire. (T41-44). Petitioner himself admitted that while MedVoc was attempting to secure him employment within his work restrictions, that he was not responsive or cooperative to those efforts, that he was sent job leads and asked to apply for jobs but did not do so. He admitted that between June 6, 2013 through March 21, 2014, he was non-compliant with the vocational efforts

as he intended to retire. (T57-59).

The Commission finds that Petitioner failed to prove he is entitled to an award of a wage differential under Section 8(d)1, relying on the Arbitrator's significant finding that Petitioner did everything within his power to purposely thwart Respondent's efforts at returning him to gainful employment with Respondent and with vocational placement, that Petitioner's conduct demonstrated a clear and convincing lack of good faith, that Petitioner's job search efforts were completely absent, and that he had no intention of going back to work upon his treating physician's release for him to return to work with restrictions.

The evidence in the record, therefore, does not support a finding that the claimant was entitled to a wage differential award, *i.e.*, that he suffered a partial incapacity which prevents him from pursuing his usual and customary line of employment and that he has an impairment in earnings. The Commission, in considering a wage differential award under Section 8(d)(1), finds Petitioner failed to prove entitlement to same. Instead, the Commission awards PPD benefits under Section 8(d)(2), in the amount of 40% loss of use of the man as a whole. Accordingly, the Commission vacates the Arbitrator's 8(d)1 award of $361.24 per week, and finds that Petitioner sustained permanent partial disability to the extent of 40% of the man as a whole under §8(d)2 of the Act.

With regard to the issue of temporary total disability benefits, the Commission finds Petitioner is entitled to temporary total disability benefits of $ 842.81per week for 54-4/7 weeks, from December 22, 2009 through January 28, 2011, that being the period of temporary total incapacity for work under §8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner. In so finding, the Commission relies upon the parties stipulation contained within the request for hearing (ARB EX1), the off work slips issued by MercyWorks (PX4), and the January 24, 2011 office note of Petitioner's treating physician, Dr. Bach, placing Petitioner at maximum medical improvement with a permanent restriction of no climbing, no ladders, no squatting or kneeling, and minimal walking (PX3).

With regard to the issue of maintenance benefits, the Commission finds Petitioner's entitlement to same was terminated as of May 20, 2013, as the overwhelming evidence indicates that following that date, Petitioner was not engaged in directed or self-directed active job search, and Petitioner in fact was refusing to comply with the vocational assistance being offered to him. As noted above, Petitioner's initial consultation with MedVoc Rehabilitation was on May 20, 2013, at which time he reported he was unsure if he wanted to obtain employment as he was hoping to retire soon. (RX2, 6/6/13). On cross-examination, Petitioner testified he was unsure if he completed any job search logs following his May 20, 2013 meeting with MedVoc. He further admitted that he intended to retire, that he had no intention of searching for employment when he was contacted by MedVoc, that he failed to apply for job leads, and that he was non-cooperative and non-compliant with vocational efforts based upon his intention to retire. (T41-44, 57-59). On re-direct, Petitioner reiterated that he was non-cooperative with vocational efforts because he was planning on retiring, and that he had advised MedVoc he was not interested in looking for a job as he was retiring. (T48). Accordingly, the Commission finds that Petitioner is entitled to maintenance benefits of $842.81 per week for 120-3/7 weeks, from January 29, 2011 through May 20, 2013.

We now address Petitioner's "Request for Special Findings." Prior to oral arguments before the Commission, Petitioner filed a timely "Request for Special Findings" pursuant to Commission Rule 7040.40(c). The Commission responds to each interrogator as stated below.

"Interrogatory 1: Did the Respondent, City of Chicago, make Petitioner a firm offer to work as a night watchman in its Water Department? The Commission finds no job offer was tendered.

"Interrogatory 2: Did Respondent, City of Chicago, make Petitioner a firm offer to work at any time from the date of Petitioner's restricted release to return to work to the date of Arbitration?" The Commission finds no job offer was tendered.

"Interrogatory 3: "That there is no evidentiary basis from the record to conclude that Respondent, City of Chicago, offered Petitioner a watchman position at its Water Department for $33.85 per hour for 40 hours per week." The Commission will not reply to Petitioner's statement as no question was presented.

Finally the Commission addresses a clerical error. On page two, sentence one, of the Arbitrator's findings, the Commission corrects the date of accident from "December 12, 2009" to "December 21, 2009."

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on October 15, 2014 is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $842.81 per week for a period of 54-4/7 weeks, from December 22, 2009 through January 28, 2011, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $842.81per week for a period of 120-3/7 weeks, from January 29, 2011 through May 20, 2013, that being the period of maintenance un
der § 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's finding that Petitioner is entitled to a wage differential award of $361.24 per week under §8(d)1 of the Act is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $664.72 per week, the maximum permanent partial disability rate for Petitioner's date of injury, for a period of 200 weeks, as provided in §8(d)2 of the Act, for the reason that the

injuries sustained caused the permanent partial disability to the extent of 40% loss of use of the man as a whole.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, including $48,512.07 for temporary total disability, and $136,535.22 for maintenance, for total credit of $185,047.29, to or on behalf of Petitioner on account of said accidental injury.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit in the amount of $4,363.50 under §8(j) of the Act; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

As this matter involves the City of Chicago, pursuant to Section 19(f)(2), no bond for the removal of this cause to the Circuit Court by Respondent is required. The party commencing 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: JAN 19 2016
KWL/kmt
O-09/01/15
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

15IWCC0810

CONWAY, AARON
Employee/Petitioner

Case# 10WC002879

CITY OF CHICAGO
Employer/Respondent

On 10/15/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

2399 SILVERMAN, CLIFFORD A
18400 MAPLE CREEK DR
SUITE 700
TINLEY PARK, IL 60477

0010 CITY OF CHICAGO
MICHELLE S BRYANT
30 N LASALLE ST - 8TH FL
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 15IWCC0810

Aaron Conway
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **10** WC **02879**

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 **Ketki Steffen**, Arbitrator of the Commission, in the city of **Chicago**, on **August 4, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **December 12, 2009**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**65,739.26**; the average weekly wage was $**1,264.22**.

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 $**48,512.07** for TTD, $**0** for TPD, $**136,535.22** for maintenance, and $**0** for other benefits, for a total credit of $**185,047.29**.

Respondent is entitled to a credit of $**4,363.50** under Section 8(j) of the Act.

ORDER

The Arbitrator finds that the medical bills are reasonable and related to the December 21, 2009 accident and awards the bills pursuant to section **8a** and section **8.2** (medical fee schedule) except for the medical bill from West Suburban Hospital for $4,363.50. The Arbitrator does not award said bill. As to the awarded bills, the respondent shall hold the petitioner harmless from any claims made by Blue Cross Blue Shield.

The Arbitrator awards a wage differential based on the hourly wage of the **watchman position**. Said differential is based on the stipulated that the hourly wage for a motor truck driver in the department of streets and sanitation ($ $33.85) and the hourly salary for a watchman ($20.31 or AWW of $812.40). The difference between $1,354.00 and $812.40 is $541.60 x .667= $361.24.

~~The Arbitrator awards a wage differential of $361.24.~~

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

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

Ketki Steffen
Signature of Arbitrator

10/15/14
Date

OCT 15 2014

PROCEDURAL HISTORY

This matter was presented for a hearing on the merits before Arbitrator Ketki Steffen on August 4, 2014. Both parties were represented by counsel and have entered into several stipulations that are contained as Arbitrator's Exhibit No. 1 ("AX1") for the trial record. The case relates to an accident date of December 21, 2009; a date which predates the September, 2011 AMA guidelines amendment to the Act.

FACTUAL HISTORY

The Petitioner, Aaron Conway, was an employee of the respondent, City of Chicago, Department of Streets and Sanitation for 21 years. Over the course of those 21 years the petitioner testified that he worked in various departments and various positions. On December 21, 2009, the petitioner worked as a motor truck driver collecting refuge for the respondent.

He testified that he was getting out of his truck to use the restroom, when he slipped and fell on ice. He testified that he did the splits, when his left leg came down first and his right leg followed but his foot landed on ice and he fell on the ground. He was unable to get up and could not move. He testified that when he fell, he fell to his side and he fell into a fence. At the time of his fall he weight 290 lbs and was 6 feet 2 inches tall. Petitioner was 62 years old at the time of the accident and had no dependents.

The petitioner was taken by ambulance to Resurrection hospital where x-rays were taken and he was subsequently discharged from care. On December 22, 2009, the petitioner followed up with Mercyworks and was diagnosed with a right knee contusion and right thigh contusion. He was released to return to work and to continue with therapy prescribed by the hospital.

He continued to treat with Mercyworks and on December 31, 2009 an MRI of the right knee was ordered. On January 7, 2010 an MRI was performed and revealed a high grade quadriceps tendon tear. The petitioner eventually came under the care of Dr. Bach. Dr. Bach recommended surgery to repair a tendon rupture.

On February 16, 2010, Dr. Bach performed a right knee arthrotomy and quadriceps tendon repair. Petitioner underwent post-operative physical therapy and on December 15, 2010 the petitioner underwent an FCE. The FCE was deemed valid and recommended the petitioner participate in a 4-6 week aggressive work hardening program.

The petitioner underwent the work hardening program and on October 25, 2010, Dr. Bach released the petitioner to return to work sedentary work.

On January 24, 2011, Dr. Bach placed the petitioner at maximum medical improvement with permanent restriction of no climbing, no ladders, no squatting, no kneeling, and minimal walking.

The petitioner testified that Dr. Bach prescribed a cane for walking, but on cross examination recanted his statement that Dr. Bach prescribed the cane, but noted that it was Dr.Bach's assistant that prescribed the cane. The medical records do not support the prescription of the cane.

The petitioner testified that he asked the respondent to help him find a job, but was unable to recall who he spoke with. The petitioner entered into evidence a letter provided by the respondent requiring him to look for jobs online and in person and to keep job logs and submit them to the respondent (Px #1). The petitioner testified that he looked for work but did not bring his job logs into court. The petitioner was also unable to provide the name of any prospective employee that he had contacted over the course of his job search. He testified that he knew he was coming into court to testify about his attempts to look for work, but that he did not feel he needed to bring the job logs into court. The Petitioner was offered an opportunity to bring the job logs back to court, but declined.

The petitioner testified that the respondent never offered him a job within his restrictions and that he was never notified by any from the respondent, until vocational rehabilitation services were offered on June 6, 2013.

During cross-examination the petitioner acknowledged that he had been contacted by the respondent on several occasions regarding jobs. The petitioner stated that he was first contacted by the respondent for a watchman's position within the respondent's water department. The petitioner testified that he received a

willingness and ability questionnaire for the watchman position. He acknowledged his signature on the questionnaire and acknowledged that he had in fact completed the questionnaire.

The petitioner testified that there were several questions on the questionnaire that he stated he was unable to do things, but had not been restricted from doing. The petitioner was asked whether he was able to maintain a clean and safe working area, he responded that he was not able to. He also said that he was unable to work in all types of weather conditions or wear security uniforms.

The petitioner testified that based on his answers to the questionnaire it was fair to say that he was unable to perform the job duties of a watchman and that is why he did not get the position as a watchman. The petitioner also acknowledged that none of his actual restrictions provided by Dr. Bach said he was unable to do any of the activities he claimed.

The petitioner testified that he is a high school graduate and that he attended one year of junior college. He testified that his prior work experience included factory work, shipping and receiving and driving forklifts. He testified that he retired on February 24, 2014 and is currently receiving retirement pension benefits and not disability benefits.

Petitioner testified that he was also contacted by the respondent for a traffic technician position. He testified that he went downtown and tested for the position, but never heard anything further.

He testified that when he retired, it was not his intention to never work again and that he would look for work at a later time. However, when the petitioner was contacted by a vocational counselor at MedVoc he was non-compliant with the counselor's efforts to help him find work within his restrictions, but not with the respondent.

The petitioner testified that from June 6, 2013 through March 21, 2014, he was not compliant because it was his intention to retire, so he did not want to look for work. The respondent entered a group exhibit containing various letters sent to the petitioner, from MedVoc Rehabilitation, Ltd. concerning his non-compliance. Specifically, letters dated February 4, 2014 and March 21, 2014.

He testified that he still has pain in his right knee and that he "can't" keep his leg in one position without it hurting. He testified that he does not do a lot of walking up and down stairs. He also testified that he experiences buckling in his knee after walking about ¼ of a block.

He testified that he is not currently taking any pain medication or over the counter pain pills. He testified that he saw his primary care physician for pain in his leg, but that he did not bring his medical records or any medical evidence to support additional care and treatment.

The parties stipulated that the current pay for a motor truck driver is $33.85 per hour. The petitioner admitted into evidence a labor market survey dated March 20, 2014, indicated that the petitioner could make up to $14.25 per hour in a light assembly position. However, the petitioner failed to contact any of the prospective employers listed. The labor market survey indicated that the average wage range for the targeted position is $10.25 per hour to $12.25 per hour, but the median wage was $11.25.

In regards to the issue of causal connection, the Arbitrator finds:

Claimant has the burden of proof that his employment was a causative factor with respect to his disability. *Steiner vs. Industrial Commission*, 101 Ill. 2d. 257 (1984). Proof of the state of heath of the employee prior to and down to the time of injury and the change immediately following the injury and continuing thereafter is competent as tending to establish that impaired condition was due to the injury. *Plano Foundry Co. v. Industrial Commission*, 356 Ill. 186 (1934). Petitioner testified he had no prior problem with his right leg or knee and had been driving a refuse truck for the City some 15-16 years before December 12, 2009. Petitioner testified that he slipped on ice in the alley and fell to the ground when he was getting out of the garbage truck. He described his fall as doing "the splits" and stated that he felt a warm wet sensation in his leg. Based on the surgical repair to the torn quadriceps found by Dr. Bach, (Pet. Ex. No. 2) a review of the medical records and opinions and the permanent restrictions of no climbing, no ladders, no squatting, no kneeling and minimal walking, the Arbitrator finds that the Petitioner has met his burden of proof to show that his present condition of ill-being is related to the accident of December 12, 2009.

In regards to (J), "Has Respondent paid all appropriate charges for all reasonable and necessary medical services?" the Arbitrator finds:

Petitioner alleges $4,363.50 bills due and owing for services rendered at West Suburban Hospital on December 21, 2009. The petitioner used his group insurance to pay for services rendered, but the petitioner's testimony was that he received emergency treatment from Resurrection Hospital not West Suburban Hospital. Even more, the petitioner failed to offer any medical records into evidence supporting the care and treatment provided by said provider.

The Arbitrator finds that the medical bills are not reasonable or related to the December 21, 2009 accident.

In regards to (L), "What is the nature and extent of the injury?" the Arbitrator finds:

The Arbitrator finds that Petitioner was permanently and partially disabled as a result of his work accident and has proven that he suffered a loss of earning capacity as a result of his injuries. The evidence shows that the Petitioner had the option of working as a watchman for the Respondent and that this position fit within his medical limitations and qualifications. The Petitioner, for his own private/personal reasons choose not to accept or pursue this employment. The watchmen position would have paid Petitioner $33.85 per hour or $1,354.00 per week. The parties stipulated that at the time of the hearing a garbage truck driver working for the Respondent would earn $33.85 per hour or $1,354.00 per week. (Pet. Ex. No. 5). The Petitioner has proven that he suffered a diminished earning capacity as a result of his work accident. The Arbitrator finds that the Petitioner is entitled to a wage differential benefit of $361.24.

The Arbitrator finds a wage differential award is more appropriate then a MAW award. The Arbitrator declines to find that the Petitioner should receive a MAW award because the Petitioner has demonstrated that he has been partially incapacitated and cannot return to his former vocation and this in turn has caused him to suffer diminished earning capacity. Our Supreme Court in *General Electric Company v. The Industrial Commission*, 89 Ill.2d 432, 433 N.E.2d. 671, 674 has found such earning loss calculation to be a sound basis in

the worker's compensation system. *Gallianette v. Industrial Commission of Illinois*, 315 Ill.App.3d 721, 734 N.E.2d 482 (2000). (Wage-differential awards are preferred) A claimant's voluntary decision to remove himself from the work force does not preclude a wage differential award. *Wood Dale Electric v. The Illinois Worker's Compensation Commission*, 2013 ILAP (1st) 113394 WC (2013); *Copperweld Tubing Products, Co. v. Illinois Workers' Compensation Commission*, 402 Ill.App.3d 630; 931 N.E.2d 762 (2010) and claimant need not be working at the time of trial *Copperweld, ibid.*

Section 8(d)1 of the Act provides provides that guidelines for the wage differential calculation.

"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 compensation under the 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 2/3% 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." (Emphasis added.) 820 ILCS 305/8(d)1 (West 1992).

To qualify for a wage differential award, a claimant must prove: (1) a partial incapacity that prevents him from pursuing his usual and customary line of employment and (2) an impairment of earnings. 820 ILCS 305 Ill. App. 3d 488, 494, 867 N.E.2d 1063 (2007). Whether a claimant has satisfied each element is a question of fact to be resolved by the Commission, whose determination in this regard will not be disturbed on appeal unless it is against the manifest weight of the evidence. Morton's of Chicago v. Industrial Comm'n, 366 Ill.App.3d 1056, 1061, 853 N.E.2d 40, (2006). For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. Durand v. Industrial Comm'n, 224 Ill. 2d 53, 64, 862 N.E.2d 918 (2006)

The facts in evidence show Petitioner's present physical condition preclude him from returning as a garbage truck driver for the City of Chicago. He suffered a complete quadriceps tendon tear and has permanent restrictions of no climbing, no ladders, no squatting or kneeling and minimal walking. (Pet. Ex. No. 2). Additionally, Mercy Works, Respondent's clinic, released Petitioner for sedentary duty only. (Pet. Ex. No. 4). Thereby, Petitioner has met his burden of proof, by a preponderance of the evidence, that he cannot pursue his usual and customary employment.

Petitioner has also carried his burden of proof, by a preponderance of the evidence that he suffered impairment in his earnings capacity as a result of his injury. The parties stipulated that at the time of the hearing a garbage truck driver working for the Respondent would earn $33.85 per hour or $1,354.00 per week. (Pet. Ex. No. 5). The Petitioner has proven that he suffered a diminished earning capacity as a result of his work accident.

The heart of the issues in this case rests upon a determination of how diminished the Petitioner's earning capacity was, following his accident and his restricted duty release. The Petitioner urges the court that said earning capacity be determined by the Labor Survey prepared by MedVoc Rehabilitation, Ltd. that finds that the mean wage for the positions targeted was $11.25 per hour or $450.00 per week. Respondent has proposed in the alternative that the wage differential be calculated based on a watchmen salary, a position which was ready and available and fit within the Petitioner's medical restrictions.

The Arbitrator finds that the evidence overwhelmingly shows that Petitioner was capable of working at the watchmen position where he could have earned $33.85 per hour or $1,354.00 per week. The Arbitrator finds that the evidence produced at trial shows that the watchmen job was within Petitioner's restrictions and that Respondent was willing and able to afford him the opportunity to take this job within his restrictions. Petitioner did everything within his power to purposely thwart Respondent's effort and his conduct demonstrates a clear and convincing lack of good faith. The evidence shows that Petitioner's job search efforts were completely absent and that, in fact, he had no intention of going back to work. Petitioner openly admitted as much in court through his testimony and conduct that it was his intention to not return back to employment as

he was just waiting to retire and receive his pension. The Arbitrator notes the following facts in support of this conclusion:

1. The petitioner job search records are completely absent. Petitioner has produced no proof of a job search nor could he provide even a minor detail of any job search. Petitioner testified that he asked the respondent to help him find a job, but was unable to recall who he spoke with. The petitioner entered into evidence a letter provided by the respondent requiring him to look for jobs online and in person and to keep job logs and submit them to the respondent (Px #1). The petitioner testified that he looked for work, but did not bring his job logs into court. The petitioner was also unable to provide the name of any prospective employee that he had contacted over the course of his job search. He testified that he knew he was coming into court to testify about his attempts to look for work, but that he did not feel he needed to bring the job logs into court. The Arbitrator offered the petitioner an opportunity to bring the job logs back to court, but he declined.

2. The petitioner was thoroughly impeached regarding his testimony that the respondent never offered him a job within his restriction and that he was never notified by anyone from the respondent, until vocational rehabilitation services were offered on June 6, 2013. After denying Respondent's efforts during direct exam, the the petitioner reluctantly acknowledged that he had been contacted by the respondent on several occasions regarding jobs.

3. The evidence shows that Petitioner purposely thwarted efforts by Respondent to place him in a suitable position. Petitioner was contacted by the respondent for a watchman's position within the respondent's water department. The petitioner received a willingness and ability questionnaire for the watchman position which he signed. Petitioner then purposely and falsely answered the questions on this form that would ensure that he would not be hired. He stated on this signed form that he was physically unable to do things that no physician had restricted him from doing. Additionally, Petitioner stated that he was unable to maintain a clean and safe working area. He also

said that he was unable to work in all types of weather conditions or wear security uniforms. On cross examination the petitioner also acknowledged that none of his actual restrictions provided by Dr. Bach said he was unable to do any of the activities he claimed.

4. Petitioner also testified in court that when the Vocational counselor tried to help him find employment he simply informed them that he planned on retiring.
5. In court petitioner testified that he was also contacted by the respondent for a traffic technician position. He testified that he went downtown and tested for the position, but never heard anything further.
6. He testified that when he retired, it was not his intention to never work again and that he would look for work at a later time. He also testified that from June 6, 2013 through March 21, 2014, he was not compliant because it was his intention to retire, so he did not want to look for work.
7. Petitioner was wholly non-compliant with vocational counselor at MedVoc as they attempted to place him in suitable employment. Specifically, letters dated February 4, 2014 and March 21, 2014 document these efforts.

Based on this clear evidence the Arbitrator is convinced that the watchmen position (not the labor market survey) is an appropriate gauge of Petitioner's earning capacity. The Arbitrator specifically finds that the Petitioner purposely dismissed the watchmen job opportunity before an offer could be made so that he would not have to return back to employment. The Petitioner also actively thwarted all of Respondent's other efforts to find appropriate employment within the Petitioner's restrictions. Nevertheless, the Arbitrator finds that the Petitioner is entitled to a wage differential award to the extent of the wage difference between his previous job as a motor truck driver ($33.85/hour, AWW $1,354.00) and a job as a watchman ($20.31/hour, AWW $812.40). The wage differential award between $1,354.00/week and $812.40/week is $541.60 x .667= $361.24.

Kelli Steffen
Signature of Arbitrator

10/15/14
Date